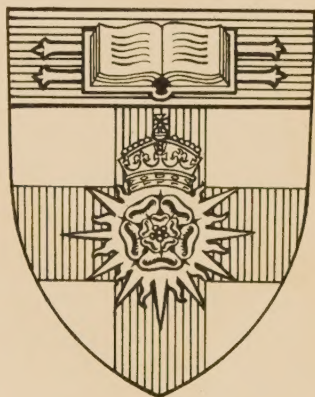


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The reference 2 HALSBURY'S LAWS (3rd Edn.) 20, para. 48, refers to paragraph 48 on page 20 of Volume 2 of the third edition of Halsbury's Laws of England, of which Viscount Simonds is Editor-in-Chief.

HALSBURY'S LAWS OF ENGLAND, HAILSHAM EDITION

The reference 34 HALSBURY'S LAWS (2nd Edn.) 30, para. 26, refers to paragraph 26 on page 30 of Volume 34 of the second edition of Halsbury's Laws of England, of which Viscount Hailsham was Editor-in-Chief.

HALSBURY'S STATUTES OF ENGLAND, SECOND EDITION

The reference 26 HALSBURY'S STATUTES (2nd Edn.) 138, refers to page 138 of Volume 26 of the second edition of Halsbury's Statutes.

ENGLISH AND EMPIRE DIGEST

The reference 24 DIGEST 602, 6028, refers to case No. 6028 on page 602 of Volume 24 of the Digest.

There are three cumulative supplements to the Digest, described as Digest Supp., 2nd Digest Supp. and 3rd Digest Supp.; of these the first two include cases up to December 31, 1939, and December 31, 1951, respectively.

The reference 31 DIGEST (Repl.) 244, 3794, refers to case No. 3794 on page 244 of Digest Replacement Volume 31.

HALSBURY'S STATUTORY INSTRUMENTS

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The reference 15 ENCY. FORMS. & PRECEDENTS (3rd Edn.) 938, Form 231, refers to Form 231 on page 938 of Volume 15 of the third edition of the Encyclopaedia of Forms and Precedents.



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CORRIGENDA

[1956] 3 All E.R.

- p. 940. *VINE v. NATIONAL DOCK LABOUR BOARD*. Case referred to No. 6: read "*Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395; [1948] L.J.R. 155; 177 L.T. 455; 111 J.P. 508; 2nd Digest Supp." instead of as printed. Page 950, lines D. 5 and 6: for "*Coplans v. King* (6) ([1947] 2 All E.R. 393)" read "*Johnson & Co. (Builders), Ltd. v. Minister of Health* (6) ([1947] 2 All E.R. 395)."

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- p. 553. Re *MARSHALL (decd.)*. Line D. 1: for the terms of s. 12 of R.S. 1936 c. 6 substitute "The word 'child' or 'issue', or its equivalent in a will, grant, or settlement shall include a child adopted by the testator, grantor, or settlor, unless the contrary plainly appears by the terms of the instrument". The enactment printed at p. 553, letter D, is s. 12 as amended by the Adoption Act Amendment Act, 1948, c. 1, and incorporated in the Revised Statutes of British Columbia, 1948.
- p. 896. *A.-G. v. P.Y.A. QUARRIES, LTD.* Counsel for the defendants: for "*H. H. Maddocks*" read "*Ronald J. Maddocks*".

THE ALL ENGLAND LAW REPORTS

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D METLISS v. NATIONAL BANK OF GREECE AND ATHENS, S.A.

[COURT OF APPEAL (Denning, Romer and Parker, L.J.J.), February 12, 13, 14, March 18, 1957.]

Conflict of Laws—Succession—Universal succession by foreign law of one foreign company to another—Whether recognised by English courts—Creditor's action against successor to foreign guarantor company—Whether successor company protected by moratorium imposed by foreign law.

Company—Foreign company—Amalgamation—Universal succession of new amalgamated company by law of domicile—Whether recognised by English courts—Creditor's action against successor to foreign guarantor company—Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 208.

F In 1927 the M. Bank, a Greek bank, issued sterling mortgage bonds repayable on Jan. 1, 1957, in London, payment of principal and interest being guaranteed by the N. Bank, another Greek bank incorporated under Greek law. The proper law of these contracts was English. No interest had been paid on the bonds since 1941, and neither bank had any assets in England. In 1949 a Greek law suspended all obligations on the bonds and imposed a moratorium thereon. The suspension and moratorium were still in force. In 1953 by a Greek law the N. Bank was amalgamated with another Greek bank, the A. Bank, which had assets (and possibly liabilities) in England, to form a new amalgamated company, the G. Bank. The Greek Act governing the amalgamation of banking companies provided that a new company absorbing another company by amalgamation should become the "universal successor" to the rights and obligations in general of the amalgamated companies without any further formality or act. In an action by a bondholder against the G. Bank for arrears of interest,

H **Held:** the court would recognise the universal succession of one foreign corporate body (viz., the G. Bank) to another (viz., the N. Bank) under the law of the country of their incorporation; but the G. Bank was not protected against the debt due under the N. Bank's guarantee, since the proper law of that contract was English and English law did not recognise the Greek government's moratorium in relation to an English debt, and therefore the bondholder was entitled to recover six years' arrears of interest against the G. Bank.

Beavan v. Lord Hastings ((1856), 2 K. & J. 724) considered.

Per ROMER, L.J.: the recognition which we accord to foreign legislative or administrative acts is subject to one important qualification, namely,

that municipal laws will not be given an extra-territorial effect if they are prejudicial to the rights of other nations or to those of their subjects (see per SELWYN, L.J., in *The Halley* (1868), L.R. 2 P.C. at p. 203). (See p. 9, letter F, post).

Per PARKER, L.J.: the application of the foreign law as to status does not involve applying the foreign law as to obligation (see p. 13, letter D, post).

Observations by DENNING, L.J., on the protection of groups of English creditors of foreign amalgamated corporations from injustice on the enforcement of liabilities by one group of creditors against the foreign amalgamated corporation (see p. 7, letters A to D, post).

Appeal dismissed.

[**Editorial Note.** The court recognised the law of the domicile of a corporation domiciled abroad, so far as that law affected the status of the corporation, and rejected the foreign law so far as it purported to exclude or prejudice contractual obligations governed by English law. Analogously the recent decision of the Court of Appeal in *Wood v. Wood* (p. 14, post) illustrates the acceptance by the English court of a foreign decree of divorce made by the court of the husband's domicile, in so far as the decree ended the status of marriage, and the rejection of that decree as automatically ending personal obligations of the husband in this country under summary maintenance orders in favour of his wife and children. In both these cases the courts turned to consider also the views of the American courts and both decisions illustrate, it is suggested, different applications of a common principle such as that concisely summarised by PARKER, L.J., in the passage from his judgment quoted at the end of the headnote in the present case; compare also, per DENNING, L.J., at p. 8, letter B, post.

As to the recognition of the dissolution of foreign corporations, see 7 HALSBURY'S LAWS (3rd Edn.) 13, para. 22; and as to the withholding of recognition because of the nature of a foreign law, see *ibid.*, p. 8, para. 10.]

Cases referred to:

- (1) *Kleinwort, Sons & Co. v. Ungarische Baumwolle Industrie Akt. & Hungarian General Creditbank*, [1939] 3 All E.R. 38; [1939] 2 K.B. 678; 160 L.T. 615; Digest Supp.
- (2) *Lazard Bros. & Co. v. Midland Bank, Ltd.*, [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; 10 Digest (Repl.) 1299, 9161.
- (3) *Re Lee-on-Solent Ry. Co. & Southern Ry. Co.*, [1923] 2 K.B. 771; 92 L.J.K.B. 950; 129 L.T. 729; 38 Digest 339, 501.
- (4) *Russian & English Bank & Florance Montefiore Guedalla v. Baring Bros. & Co., Ltd.*, [1936] 1 All E.R. 505; [1936] A.C. 405; 105 L.J.Ch. 174; 154 L.T. 602; 10 Digest (Repl.) 1298, 9154.
- (5) *Clark v. Williard*, (1933), 292 U.S. 112; on application for certiorari (1934), 294 U.S. 211.
- (6) *The Halley*, (1868), L.R. 2 P.C. 193; 37 L.J.Adm. 33; 18 L.T. 879; 11 Digest (Repl.) 431, 773.
- (7) *Dulaney v. Merry & Sons*, [1901] 1 K.B. 536; 70 L.J.K.B. 377; 84 L.T. 156; 5 Digest 1073, 8779.
- (8) *Beavan v. Hastings (Lord)*, (1856), 2 K. & J. 724; 27 L.T.O.S. 282; 69 E.R. 973; 11 Digest (Repl.) 398, 550.
- (9) *Wenlock (Baroness) v. River Dee Co.*, (1883), 36 Ch.D. 675, note at p. 685; 57 L.T. 402, n.; *affd.* H.L. (1885), 10 App. Cas. 354; 10 Digest (Repl.) 749, 4876.
- (10) *Re Martin, Loustalan v. Loustalan*, [1900] P. 211; 69 L.J.P. 75; 82 L.T. 806; 11 Digest (Repl.) 348, 170.
- (11) *Bergerem v. Marsh*, [1921] B. & C.R. 195; 91 L.J.K.B. 80; 125 L.T. 630; 11 Digest (Repl.) 510, 1252.

A Appeal.

The defendants, a new amalgamated Greek company which by Greek law was the universal successor both to a Greek company which had no English assets but had guaranteed the interest (which was in arrear) on Greek bonds payable in England and subjected by Greek law to a moratorium, and to another Greek company which had English assets, appealed against a judgment of SELLERS, J., dated July 12, 1956, holding them liable to pay arrears of interest on the bonds to the plaintiff, a bondholder. The facts appear in the judgment of DENNING, L.J.

N. H. Lever and J. H. R. Newey for the new amalgamated company, the defendants.

C J. G. Foster, Q.C., and M. Littman for the bondholder, the plaintiff.

Cur. adv. vult.

Mar. 18. The following judgments were read.

D DENNING, L.J.: On Dec. 1, 1927, the National Mortgage Bank of Greece (a company incorporated under Greek law) issued £2,000,000 seven per cent. sterling mortgage bonds. In each of the bonds the National Mortgage Bank of Greece promised to pay the bearer the principal moneys on Dec. 1, 1957, and meanwhile interest half-yearly at seven per cent. Payment was to be made in sterling at the offices of Hambros Bank Ltd. or Erlangers in London, and at the option of the holder at the National Bank of Greece in Athens by cheque on London. In case of any question arising, it was to be settled by arbitration in London in accordance with the laws of England. The bonds were guaranteed by E the National Bank of Greece (a company incorporated under Greek law) in these words:

F "The National Bank of Greece hereby unconditionally guarantees the due payment of the principal moneys and interest and the due performance of all the conditions of this bond."

On Dec. 1, 1935, the provisions of the bonds were modified so as to reduce the rate of interest from seven per cent. to four and three quarters per cent. Bondholders resident in Greece were to be paid only in drachmae. Bondholders permanently resident outside Greece were to be paid in sterling. This modification G was stamped on the bonds by an over-stamp. The National Bank of Greece agreed to this modification and their guarantee was continued in full force notwithstanding the modifications.

On Apr. 27, 1941, the Germans captured Athens and occupied Greece: and in the result the National Mortgage Bank of Greece was left with nothing with which to pay the bonds. No further payments have been made on the bonds, H either during the occupation or since.

In November, 1949, the Government of Greece passed a law which suspended all obligations on the bonds. It set up a moratorium. The substantive rights of the bearers of the bonds were suspended. The remedies by action or otherwise were suspended. It was illegal for the debtors to pay either principal or interest. This moratorium continued at first until June 30, 1952, but it has been renewed I from time to time and is still in being.

Notwithstanding that moratorium, if an English bondholder had brought an action in the English courts for the interest due to him, either against the principal debtor, the National Mortgage Bank of Greece, or against the guarantors, the National Bank of Greece, or against both, the English courts would without doubt have given judgment for the interest due. The English courts would not have recognised the moratorium. The proper law of the contract was English law and no enactment of the Greek government could affect the matter: see *Kleinwort, Sons & Co. v. Ungarische Baumwolle etc.* (1) ([1939]

3 All E.R. 38). A judgment of the English courts against those Greek companies would, however, have been of little use to an English bondholder because it was not enforceable in Greece, as the moratorium law forbade its enforcement there: and it would have been of little use in England because, so far as we know, neither the National Mortgage Bank of Greece nor the National Bank of Greece had any assets in England on which a creditor could levy execution. No English bondholder thought it worth while to seek to obtain a judgment in the English courts against those companies for the interest due to him. A B

Then, in 1953, came the event which lies at the root of the present proceedings. The Greek government passed a law amalgamating the National Bank of Greece (the guarantor of the bonds) with the Bank of Athens (a bank hitherto unconnected with the bonds). Those two banks are now amalgamated into one new banking company called the National Bank of Greece and Athens. Let me pause a moment to state the importance of this amalgamation in these proceedings. C Mr. Metliss, the holder of some of the bonds, now seeks to recover the interest on the bonds from this new company: and he brings this action in the English courts for the purpose. The reason is not far to seek. The Bank of Athens had, before the amalgamation, carried on business in this country for many years. It presumably had assets here. If the new amalgamated company has taken over those D assets, they may be available to satisfy any judgment which the bondholder may obtain in the English courts.

Before I discuss the amalgamation, however, I must complete the history. The new amalgamated company was of course protected in Greece by the moratorium law just as its predecessors had been: and it seems to have assumed that it was protected in England, too. It did not anticipate an action by a bondholder E in England like Mr. Metliss. On this assumption, the principal debtor, the National Mortgage Bank of Greece, on Oct. 27, 1955, made an offer to the English bondholders to pay them in sterling on these terms: the principal debt was to be reduced by one-half; all interest from June 1, 1941, to Nov. 30, 1954, was to be waived: and the interest on the bonds from Dec. 1, 1954, onwards was to be two and a half per cent. only. The new amalgamated company (the F National Bank of Greece and Athens) guaranteed the performance of those terms by the principal debtors. If the offer was not accepted, the bondholder remained subject to the moratorium law. That offer was advertised in the "Financial Times": and Hambros and Erlangers were authorised by the Bank of England to say that permission had been given under the Exchange G Control Act, 1947, for bondholders to accept the offer if they so desired. Some English bondholders may have accepted that offer but Mr. Metliss (the bondholder) did not. On Dec. 6, 1955, he brought this action in the English courts against the new amalgamated company. He is the holder of bearer bonds to a total of £21,900, and he claimed interest at four and three quarter per cent. on £21,900 for fourteen and a half years from June 1, 1941, to June 1, 1955, inclusive. That interest amounted to £15,083 12s. 6d. The judge has not given him interest H for fourteen and a half years but only for six years before writ, and has entered judgment against the new amalgamated company for £6,241 5s. 1d. The new amalgamated company appeals to this court.

There was a great contest in the court below as to whether the proper law of the contract contained in the bonds is English law or Greek law. The judge decided that it is English law, and there is no appeal from his decision on that I point.

The two points raised in the appeal are these. First, the new amalgamated company says that it is not liable to be sued in the English courts on the bonds because it was not a party thereto; secondly, it says that if it can be sued, it can pray in aid the moratorium law of Greece to avoid the liability.

The first point raises a question of great importance in private international law. The bondholder says that by Greek law the new amalgamated company is

A the universal successor of the old National Bank of Greece, and that the English courts will recognise that succession so that he can sue the new amalgamated company without more ado. The bondholder does not allege any novation by way of contract with the new company. His statement of claim recites the bonds and the guarantee by the National Bank of Greece, and the only paragraph which brings in the new amalgamated company is this:

B "The defendants are a corporation constituted under the laws of Greece and carrying on business inter alia at 6, Old Jewry, E.C.2, in the County of London. By a Greek decree dated Feb. 26, 1953, the entire assets of the National Bank of Greece (including their liability under the said guarantee) were assigned and transferred to the defendants."

C In the reply the bondholder sought to rely on an estoppel, but it was not pursued before us. The bondholder rests his case solely on the Greek law relating to the amalgamation. I will therefore state what it is:

By an Act No. 2292 made on Feb. 18, 1953, the amalgamation or merger of banking companies was authorised, and it was enacted that

D "The company which absorbs another company by merger, or the new company formed by the amalgamation, becomes the universal successor to the rights and obligations in general of the amalgamated companies, without any further formality or act whatsoever."

By a royal decree dated Feb. 27, 1953, made in pursuance of that Act it was enacted that

E "as from the publication of the present decree, the National Bank of Greece Ltd. and the National Bank of Athens Ltd. cease to exist and the entire property of each of them in its whole (assets and liabilities) on the day of publication is considered as being automatically contributed to the new limited liability banking company (the National Bank of Greece and Athens Company) constituted by virtue of these presents, which is substituted, ipso jure and without any other formality in all rights and obligations of the said amalgamated banks, as their universal successor."

F The English courts will recognise the Greek law as effective to dissolve the two former banking companies. They were Greek companies. It is only by Greek law that they gained any existence at all. If we recognise their existence by Greek law, we must also recognise their dissolution by the same law: see *Lazard Bros. & Co. v. Midland Bank, Ltd.* (2) ([1933] A.C. 289 at p. 297, per LORD WRIGHT). We also recognise the existence of the new amalgamated company just as we recognise the existence of any other foreign company. The question is, do we recognise the new amalgamated company as the universal successor of the former companies, so that it can sue and be sued for their debts without more ado?

H The Greek lawyers in their evidence made it plain that their concept of a universal successor is derived from the Roman law, and particularly from succession of an heir on the death of his testator. On looking again into the books of Roman law, I find that the maxim of classical Roman law was that "hereditas est successio in universum jus quod defunctus habuit". The heir stepped into the shoes of the deceased so far as the property rights were concerned. The debts due to or by the deceased were regarded as due to or by the heir personally. The testator and the heir were regarded by law as one person. The heir was liable for the debts of the deceased even though the estate was insufficient to meet them: but JUSTINIAN introduced* a way of escape by allowing an heir to take the beneficium inventarii, by which, if he made an inventory of the estate within ninety days, he was not liable beyond the assets. If he did not take with benefit of inventory, he was liable personally in full.

I

* See Institutes of Justinian 2.19.6.

This concept of the universal successor is firmly entrenched in continental systems of law: and the important question for our consideration is whether our English courts should recognise it and give effect to it. It is, be it noted, a very different concept from that of a receiver or administrator whose only duty is to collect and distribute the assets which come to his hands. We have nothing quite like it except the amalgamation of two corporations into one by statute, in which case the new amalgamated corporation succeeds to all the rights and liabilities of the former corporations, and is in effect the universal successor of them. Take, for instance, the amalgamation in 1923 of the numerous railway companies into four main companies*, or the amalgamation in 1947 of those four companies into one nationalised corporation, the British Transport Commission†. By our law the new corporation succeeded to all the assets and liabilities of the former companies. Even though one of the former companies was insolvent, nevertheless the new amalgamated company had to pay its debts in full: see *Re Lee-on-Solent Ry. Co. v. Southern Ry. Co.* (3) ([1923] 2 K.B. 771). This succession included their assets and liabilities, not only in this country, but also in foreign countries. The British Transport Commission succeeded, for instance, to the assets of the Southern Railway Company in France, and also to any liabilities incurred by that company for negligent navigation by their ships in French waters. I have reason to believe that the French courts, familiar as they are with the concept of a universal successor, hold without hesitation that the British Transport Commission succeeded to these assets and liabilities by virtue of the English statute without any further authority. Other countries would no doubt do the same. So also we should recognise a universal succession by foreign law.

Counsel for the new amalgamated company asked us, however, to ignore the laws of other countries and decide this case by English law: he said that if we were to recognise universal succession by foreign law, it might produce injustice to English creditors. His argument proceeded on these lines: In English law a creditor has a right to look to his debtor for payment of the debt and to the assets of that debtor: and he cannot be forced to take anyone else instead, unless there is a new agreement by which he does so. Take this very case and consider the creditors of the two former banks. The English creditors of the old Bank of Athens were entitled to look for payment to that bank; and, notwithstanding the moratorium, in case of default they were entitled to enforce their debt against the assets of that bank in England. On dissolution of the bank by Greek law, the English creditors could still have recourse to the English assets by means of a winding-up order: see ss. 399 and 400 of the Companies Act, 1948, and *Russian & English Bank v. Baring Bros. & Co., Ltd.* (4) ([1936] 1 All E.R. 505). Likewise the English creditors of the National Bank of Greece were entitled to look for payment to that bank: but, inasmuch as it had apparently little or nothing in the way of English assets, on its dissolution its English creditors had not much to gain from an English winding-up order. Now consider, it is said, what would happen if the English courts were to recognise the new amalgamated bank as the universal successor of the two former banks. The English creditors of the old Bank of Athens would have the English assets of that bank swept out of their grasp and made available for the English creditors of the old National Bank of Greece. If the assets were insufficient to pay the debts of both banks in full, the creditors of one bank would suffer a loss and the creditors of the other an advantage, contrary to the justice of the case.

This is a real difficulty, but I think it can be surmounted by taking a leaf out of the book of Roman law. The Roman jurists had to consider the case where the

* This amalgamation was effected under the Railways Act, 1921.

† This amalgamation was effected by the Transport Act, 1947; the succession to liabilities is governed by *ibid.*, s. 14, and provision for disclaimer of imprudent agreements is made by s. 15.

A testator was solvent but the heir was insolvent. When the heir took over as universal successor, there was a danger that he might use the testator's assets to pay his own creditors, and so the creditors of the dead man might suffer accordingly. To remedy this injustice the praetor gave relief by separating the assets. This meant that the creditors of the testator might apply to have the estates kept distinct until the debts were paid. This had to be done within a reasonable time, before the estates became inseparably mixed. No creditor who had in any way accepted the personal liability of the heir could afterwards claim to have the assets separated: see the DIGEST OF JUSTINIAN, book 42, title 6, ss. 1 (1), (10), (12), (15).

Likewise it seems to me that the English courts would be able to devise machinery to prevent injustice to any creditors or group of creditors: but we are not called on to decide that point in this case. Suffice to say that it is not sufficient to detract from the general principle of universal succession. It is obvious that in the great majority of cases it is just and convenient for this country to recognise universal succession by the law of the domicile: and we ought not to be deterred from this recognition by the hypothetical case of a possible injustice, especially when the law may well be able to meet it, if and whenever it should arise.

It is interesting to notice that the courts of the United States have faced a similar problem and have arrived at a similar conclusion. They draw a sharp distinction between a succession established for a corporation by the law of its creation, and a receiver or liquidator appointed for a corporation still in being; see *Clark v. Williard* (5) ((1933), 292 U.S. 112 at pp. 120, 121; (1934), 294 U.S. 211 at pp. 212, 213). The former is called a "statutory successor" and his title is recognised everywhere, whereas the title of a receiver is not. The principle is stated in the RESTATEMENT OF THE CONFLICT OF LAWS (para. 161) in these words:

"If a statute of the state of incorporation which is in force at the time of the dissolution of a corporation provides that all its assets shall, upon dissolution, pass to a person designated in the statute, the right of such person to the personal property, wherever situated and whether tangible or intangible, will be recognised and given effect by other states and the designated person can bring suit in any state upon claims due to the corporation . . . If the law of the state of incorporation provides that a statutory successor shall be subject to the obligations of the corporation, the liability of the statutory successor will be recognised in other states."

Although the principle of universal succession is thus clearly recognised by the courts of the United States, they have run into difficulties about the protection of local creditors. There is no uniform policy on this point (see *Clark v. Williard* (5), 294 U.S. 211 at pp. 214, 215), per CARDOZO, J.), but this does not detract from the principle itself.

My conclusion is, therefore, that the English courts will recognise this universal succession by the law of Greece and will accordingly hold that the new amalgamated company can sue and be sued here as a person who stands in the shoes of the former companies. It is entitled to all the assets and subject to all the liabilities of the former companies just as if it had itself contracted them. To take a parallel from ordinary life: just as the status of an individual, his birth, his death, his marriage and succession are governed by the law of his domicile: so also the status of a corporation, its creation, its dissolution, its amalgamation and succession are governed by the law of its incorporation.

This brings me to the second point. The new amalgamated company says that if the English courts recognise Greek law so as to make it liable as universal successor, so also they should recognise the Greek law of moratorium. The

English courts cannot, it is said, when dealing with the liability of the new amalgamated company, take the Greek law in part and reject it in part. They must recognise it in whole or ignore it altogether. A

This is a forceful argument, but I do not think we can give effect to it. The rules of private international law do not permit it. The debtor is a Greek debtor but the debt is an English debt. When we are considering the personality of the debtor or succession to his personal effects, we must apply Greek law because he is a Greek; but when we are considering the amount of the debt and the obligation to pay it, we must apply English law because it is an English debt. If the old National Bank of Greece had continued in existence, the English courts would give judgment against that company for immediate payment without regard to the moratorium. Greek law has destroyed the old National Bank of Greece and has set up the new amalgamated company in its place. We recognise that Greek law has power of life and death over the company which it created, and we must accept the substitute whom it has provided; but when the substitute stands in our courts to answer for an English debt, it must answer according to English law, which says that the debt must be paid according to its terms. B C

I am of opinion that the new amalgamated company is liable in this action, and I would dismiss the appeal. D

ROMER, L.J.: In this case the bondholder is suing the new amalgamated company on a guarantee to which the company was not a party. The guarantors were the National Bank of Greece but the bondholder's case is that by reason of a decree passed in Greece (which was the country of the National Bank's domicile) the bank ceased to exist in 1953 and the whole of its assets and liabilities, including the liability to the bondholder under the guarantee, became vested in the new amalgamated company. The bondholder does not, and could not, rely on novation, but he rests his claim solely on the decree coupled with the fact (now admitted by the new amalgamated company) that the proper law of the contract of guarantee was English. The new amalgamated company's answer, in short, is that our courts will not recognise or enforce against it a liability which it did not contractually accept but which was imposed on it by foreign law, viz., by the law of Greece. E F

The decree operated on the Bank of Athens as well as on the National Bank of Greece, and its effect under Greek law seems to be fairly clear, and was proved by experts who were called at the trial. In the course of his evidence Mr. Seferiades was asked by counsel for the bank what the expression "assets and liabilities" in art. 4 of Law No. 2292 comprised. He answered: G

"The construction of the whole article leaves in my opinion no doubt at all that by 'liabilities and assets' it includes all liabilities and rights, but the most important part of this section is the words 'universal successor'. It cannot be treated as anything else except as succession; not as a contractual relationship imposed by law. It would have been quite inconceivable. The law abolishes the personality of the one party. There is not the element of parties in a contract being imposed by law. There is not the element of a specific object. (SELLERS, J.): That gets over the necessity for the newcomer to contract? A.—Yes; it has universal succession." H I

A similar view was expressed by Mr. Zaoussis, who said in cross-examination:

"Imagine the following situation—that there was an action against the old bank, the action was served before the amalgamation and the trial was fixed after the amalgamation. Well, at the trial the new bank would take the place of the old bank and the position would remain exactly the same. The law provides this and it would be exactly the same. That is the meaning of

A art. 4. Q.—And that is the meaning of ‘universal successor’? A.—Yes, in this case.”

The position accordingly is that under Greek law the new amalgamated company became automatically entitled, on its creation, to the assets of the two former companies and subject to their then existing liabilities. By reason of s. 8 of Decree 2292, however, the obligations to which the new amalgamated company became subject were mitigated by such conditions and circumstances as had attended them previously; and amongst these was the moratorium which the Greek government had declared in relation to the bonds.

There is no direct authority on the point which we have to consider but, in the absence of some compelling reason to the contrary, one would suppose that, on general principles of international comity, our courts would accord full recognition to these results, under Greek law, of the 1953 amalgamation; just as we would expect the courts of another civilised country to recognise the effect of an amalgamation of English companies under the Companies Act, 1948.

The dissolution under Greek law of the National Bank of Greece is a fact which clearly has to be, and is, recognised by our courts. If a foreign corporation is dissolved by its own domestic law “its existence as a juristic person ceases in the eyes of English law” and thereafter it cannot be sued here (CHESHIRE’S PRIVATE INTERNATIONAL LAW (4th Edn.), p. 478). Accordingly, the old Bank of Greece ceased for all relevant purposes to exist in 1953. It is further established that the status and powers of a foreign corporation which is still in being are ascertained and determined by reference to the law of the country in which it has its domicile (DICEY’S CONFLICT OF LAWS (6th Edn.), pp. 194, 195), namely, the country in which it is incorporated. That being so, we would surely look also to the country of the company’s incorporation to discover what incidents had been attached by its laws to the body which it had created. Having ascertained what they are, effect would, in general, be given to them in our courts. I say “in general” because the recognition which we accord to foreign legislative or administrative acts is subject to one important qualification, namely, that municipal laws will not be given extra-territorial effect if they are prejudicial to the rights of other nations or to those of their subjects (per SELWYN, L.J., in *The Halley* (6) (1868), L.R. 2 P.C. 193 at p. 203). Subject to this qualification I can see no reason why we should not recognise and give effect to the new amalgamated company’s succession to the assets and liabilities of the former banks which resulted from (and which was indeed the whole object of) the amalgamating decree.

It cannot be said that the succession was in any way repugnant to our own system of jurisprudence, for we ourselves have adopted it in the amalgamation of companies under s. 208 of the Companies Act, 1948. Apart altogether from that, however, it is well-established that we will give effect to foreign adjudications (or their equivalent) of bankruptcy—provided at all events that the foreign bankruptcy does not discriminate against creditors in this country. Moreover it was held in *Dulaney v. Merry & Sons* (7) ([1901] 1 K.B. 536) that a trustee under a deed of assignment for the benefit of creditors executed by a foreign debtor in the country of his domicile, and valid by the law of that country, can establish in the courts of this country a good title, as against an execution creditor, to goods in this country belonging, at the date of the assignment, to the debtor, although the deed had not been registered pursuant to the Deeds of Arrangement Act, 1887. The deed in that case had been executed in the State of Maryland, and the learned judge (CHANNELL, J.) drew attention in his judgment to the fact, proved in evidence, that English creditors and other foreign creditors would rank *pari passu* with the American creditors in the administration of the estate under the deed. Another illustration of the recognition by our courts of succession under

foreign law is to be found in the case of the death of persons of foreign domicile; the beneficial succession, whether testate or intestate, to the movables of such persons is governed by the law of the domicile.

Finally, and of more direct relevance to the present case, is a proposition which is exemplified by Illustration No. 4 on p. 459 of DICEY. That is to the effect that if A., an Englishman, dies in a foreign country and B. becomes his successor there without benefit of inventory, B. can be sued here for a debt which A. had incurred in his lifetime to an English creditor. *Beavan v. Lord Hastings* (8) ((1856), 2 K. & J. 724) is cited in support of that proposition, though the learned editors recognise in the footnote that the case is not a direct authority; SIR WILLIAM PAGE WOOD, V.-C., did not in fact have to deal with the point for the only issue before him was whether the plaintiff creditor had a remedy in equity, and he decided that he had not. In the course of his judgment, however, the Vice-Chancellor does appear to be assuming that the plaintiff could have sued the defendant, as universal successor to his brother, by an action at law; but one cannot tell from the note of the argument to what extent (if at all) that aspect of the matter was canvassed.

The foregoing considerations all tend to support the view that we ought to recognise the effect under Greek law of the dissolution of the two former companies and the creation of the new amalgamated company; but subject always to the qualification to which SELWYN, L.J., referred in *The Halley* (6) (L.R. 2 P.C. 193). Under Greek law the new amalgamated company became entitled to such assets (if any) as the National Bank of Greece possessed in this country; and I can see no reason why, subject to safeguarding the rights of the creditors, our courts should not have assisted the new amalgamated company to obtain possession of those assets. As a corollary we should, in my opinion, also enforce against the new amalgamated company the liabilities which accompanied the right to the assets. Unless, therefore, the amalgamation is within SELWYN, L.J.'s qualification the liability on which the bondholder is suing in this action appears to me to be an incident of the amalgamation which should be recognised and enforced by our courts. That the incident is favourable to the English creditors of the old National Bank of Greece cannot be doubted. Whilst that corporation was still in existence it could have been sued here. Its dissolution prevented any such action from being taken thereafter, but the creditors could have presented a petition to wind it up under s. 400 of the Companies Act, 1948. The right to do so was not interfered with by the Greek decree (nor could it have been) but the creditors acquired in addition under that decree a right to payment out of the assets of the Bank of Athens to which the new amalgamated company succeeded. So far, therefore, as the English creditors of the old National Bank are concerned no question of detriment arises as an obstacle to our recognition of the amalgamation.

The position of the English creditors of the Bank of Athens is, of course, different; but it is not before us and we have no information as to those creditors. It is possible that their debts were paid or satisfactorily provided for when the amalgamation was effected. If, however, they had at that time sought the protection of our courts it may well be that their interests would have been safeguarded in the manner suggested by my Lord, whose judgment I have had the advantage of reading. It is, however, perhaps enough for me to say that it has not been established in these proceedings that the amalgamation was necessarily detrimental to the English creditors of the old Bank of Athens and their position in the matter can, in my opinion, be disregarded.

In my judgment, therefore, the bondholder is entitled to succeed in the claim which he has brought against the new amalgamated company; for the decree created a statutory universal succession of a kind which our courts will recognise, and the liability on which the bondholder sues is an incident of that succession

A which is favourable to the English creditors of the former National Bank of Greece.

B As to the new amalgamated company's second point, there is really nothing that I can add to my Lord's rejection of it. The new amalgamated company took over the whole of the liabilities of the former National Bank, and not merely those which could only be enforced in Greece. It became, of course, entitled to the same protection under the moratorium as the old bank had formerly enjoyed and could not therefore be sued in Greece. The moratorium, however, never afforded protection against proceedings in this country and in that respect the new amalgamated company cannot be in any better position than was its predecessor.

C For the above reasons, I agree that the appeal must be dismissed.

PARKER, L.J.: I have come to the same conclusion.

D The first point taken before this court is that the defendants, the new amalgamated company, are not liable on the guarantee since they are not parties to it, and it is not suggested that there has been a novation. The bondholder relies solely on a Greek decree whereby the entire assets and liabilities of the National Bank of Greece, the original guarantors, were transferred to the new amalgamated company, and such a transfer, it is contended, will not be recognised by our courts.

E Now the law of Greece has adopted the conception of "universal succession" as developed in Roman law. Under this conception a new person or entity continues the personality of another. All the rights and liabilities of the former are automatically transferred to and vested in the latter. The new person or entity succeeds "per universitatem" and not by a series of particular acts to each item of property. Thus, under many continental systems of law which adopt this conception two persons on marriage succeed in the absence of special contract to the goods of the other.

F "The spouses become co-owners of the whole without any act of transfer such as conveyance, registration, or assignment, by the mere fact of marriage, uno actu. The acquisition is similar to the 'universal succession' upon death. The 'couple' succeeds the husband, the 'couple' succeeds the wife":

G see MARTIN WOLFF'S PRIVATE INTERNATIONAL LAW (2nd Edn.), p. 357. Again, an heir who takes "without benefit of inventory" succeeds to the assets and liabilities of the deceased and becomes personally liable for the deceased's liabilities regardless of the value of the assets. Further, in many systems of law a trustee in bankruptcy succeeds in the same way to all the assets of the bankrupt. Similarly, under the relevant Greek law the new amalgamated company is

H "substituted, ipso jure and without any other formality in all rights and obligations of the amalgamated banks, as their universal successor."

I The question in issue is whether the English courts should recognise this law as vesting the liabilities of the amalgamated banks in the new bank. There is no doubt that the English courts recognise the law of the country of domicile as governing the status of a person and the law of the country of incorporation as governing the status of a body of persons. In the case of a corporation that is the law by which the creation and dissolution are governed, and our courts will look to that law to

"find out what this statutory creature is and what it is meant to do; and to find out what this statutory creature is you must look at the statute only, because there, and there alone, is found the definition of this new creature."

These are the words of BOWEN, L.J., in reference to an English company in *Baroness Wenlock v. River Dee Co.* (9) ((1883), 36 Ch.D. 674 note at p. 685).

Accordingly, it is clear that we recognise the existence of the new amalgamated company; but the more difficult question is whether we should also recognise its succession to the assets and liabilities of the old bank. Though no evidence was given as to the respective assets and liabilities of the amalgamated banks in this country, it may well be that, whereas both had liabilities, only one, the Bank of Athens, had assets here. If that were the case, then, if the total assets here were insufficient to pay off the liabilities of both the old banks, the creditors of the Bank of Athens would be prejudiced whereas the creditors of the National bank of Greece would gain an advantage. Looked at in this way, it could be contended that no transfer of assets and liabilities in this country should be recognised, and that the respective creditors should be left to wind up the old banks and to obtain payment or a dividend in the liquidations as in the case of the Russian Banks*. In the case of the Russian Banks, however, the foreign legislation purported to confiscate the assets here to the prejudice of all English creditors, whereas the assumptions made above in the present case the English creditors as a whole are in no way prejudiced, and the foreign legislation is in no sense confiscatory. In any event the point does not arise here since there is no evidence that any English creditors have been prejudiced.

I have come to the conclusion that we should recognise this transfer of assets and liabilities. Not only does the balance of convenience suggest that result, but it seems to me that such authority as there is points that way. Thus the English courts recognise the transfer of assets to husband and wife on marriage where by the law of the country of the matrimonial domicile there is, in the absence of contract, a "universal succession" by the couple to the goods of each spouse. As LINDLEY, M.R., said in *Re Martin, Loustalan v. Loustalan* (10) ([1900] P. 211 at p. 233):

"It is not necessary to cite authorities to show that it is now settled that, according to international law as understood and administered in England, the effect of marriage on the movable property of spouses depends (in the absence of any contract) on the domicile of the husband in the English sense."

Again, a foreign heir who elects to succeed "without benefit of inventory" could, it seems, if he came within the jurisdiction, be sued here by English creditors for payment in full of any debts irrespective of the amount of the assets. DICEY'S CONFLICT OF LAWS (6th Edn.), p. 459, cites *Beavan v. Hastings* (8) (2 K. & J. 724) for this proposition, and I think rightly. It is true that the action against the heir in equity failed since the latter had not rendered himself accountable as an executor de son tort, but the Vice-Chancellor clearly took the view that an action at law would lie.

It is, of course, true that a foreign administrator cannot sue or be sued here in that capacity. His status as an administrator is not recognised here and he must take out an English grant. There is, however, good reason for this. Not only is he not a "universal successor" but it is necessary to see that the rights of English creditors as a whole are safeguarded and that duties are paid.

Again,

"An assignment of a bankrupt's property to the representative of his creditors under the bankruptcy law of any foreign country, to whose jurisdiction he is properly subject, whether the bankrupt is domiciled there or not, is or operates as an assignment of the movables of the bankrupt situate in England":

see DICEY (6th Edn.), p. 440, and *Bergerem v. Marsh* (11) ([1921] B. & C.R. 195). This is, however, subject to the proviso that the foreign law enables the English creditors to share all the assets equally with the foreign creditors.

* See, e.g., *Re Azoff-Don Commercial Bank* ([1954] 1 All E.R. 947) and cases there cited.

A Finally, I am influenced in coming to this conclusion because, as it seems to me, our legislation has in effect adopted the conception of "universal succession" in s. 208 of the Companies Act, 1948. Thus, when an amalgamation of two companies is sanctioned by the court and the order provides for the transfer of property or liabilities, then by sub-s. (2)

B "... that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company . . . "

The property and liabilities there referred to are plainly intended to include property and liabilities abroad. It is true that creditors can object, but if they do not I should expect the foreign courts to recognise the transfer.

C The second point taken is an alternative. If the English courts recognise the Greek law transferring the liabilities then, it is said, they should also recognise the Greek laws suspending the liability under the guarantee. The bondholder cannot, it is said, rely in part on Greek law and reject the rest. Alternatively, it is said that on a true interpretation of the Greek decree effecting the amalgamation only those liabilities are transferred which are not contrary to the public policy of Greece. To transfer a liability to pay an English bondholder would be to transfer something which was illegal by Greek law and contrary to the public policy of Greece. These arguments, however, on analysis are not, in my opinion, valid arguments. The application of the foreign law to status does not involve applying the foreign law as to obligations. What was transferred was the liability under the guarantee, whatever it might from time to time be. If the old National Bank of Greece was liable to be sued in England, as it was, so is the new amalgamated company. Further, there is no room for any implication cutting down the type of liability transferred—indeed, any such limitation would be inconsistent with the conception of "universal succession" on which the new amalgamated company must rely to obtain the foreign assets.

E Accordingly, I would dismiss the appeal.

F *Appeal dismissed. Leave to appeal to the House of Lords granted.*

Solicitors: *Stibbard, Gibson & Co.* (for the new amalgamated company, the defendants); *Hardman, Phillips & Mann* (for the bondholder, the plaintiff).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

WOOD *v.* WOOD.

[COURT OF APPEAL (Lord Evershed, M.R., Hodson and Ormerod, L.J.J.), March 4, 5, 13, 1957.]

Justices—Husband and wife—Maintenance order—Discharge—Decree of divorce granted to husband by foreign court of competent jurisdiction—Decree on ground of non-cohabitation—Service of proceedings ineffective—Wife ignorant of proceedings until after decree—Wife innocent of any matrimonial offence under English law—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 7.

The parties were married in 1945, the husband being of English nationality and domicil. On Feb. 7, 1950, the wife obtained under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, a maintenance order on the ground of the husband's desertion. In March, 1954, the husband went to live permanently in Las Vegas and acquired a domicil of choice in the State of Nevada. In September, 1954, the court in Las Vegas granted the husband a decree of divorce on the ground that he and the wife had not lived together for three years. The wife had no notice of the proceedings in that court as service was effected by advertisement in a Las Vegas newspaper. In May, 1956, the husband, being temporarily in England, applied to the magistrates' court under s. 7* of the Summary Jurisdiction (Married Women) Act, 1895, for the discharge of the maintenance order of Feb. 7, 1950, on the ground that he and the wife were divorced, and the wife applied for the payments under the order to be increased on the ground (as the fact was) that the husband's circumstances had improved since the order was made. There was no evidence before the magistrates' court as to the law of Nevada regarding the rights of a divorced wife to maintenance or alimony. The wife was innocent of any matrimonial offence under English law. The magistrate refused to discharge the maintenance order of 1950 and increased the amounts payable thereunder. On appeal from a decision of the Divisional Court discharging the magistrate's maintenance orders of 1950 and 1956,

Held: the maintenance orders should be restored for the following reasons—

(i) on the true construction of s. 7 of the Act of 1895 dissolution of marriage, whether by decree of an English or of a foreign court and whether at the suit of the husband or of the wife, did not of itself put an end to a maintenance order, and the discretion under s. 7 of the Act of 1895 to vary a maintenance order therefore survived a dissolution of the marriage (see particularly p. 23, letters G and H, and p. 29, letter C, post).

Bragg v. Bragg ([1925] P. 20) approved.

Mezger v. Mezger ([1936] 3 All E.R. 130) and *Kirk v. Kirk* ([1947] 2 All E.R. 118) distinguished.

(ii) international comity did not require that the discretion under s. 7 of the Act of 1895 should be exercised by discharging the maintenance order when the court was informed of a valid divorce decree of a foreign court, though due regard should be had to the circumstances and incidents of the foreign decree (see particularly p. 24, letters G to I, p. 34, letter F, post).

(iii) the court was entitled to look at the grounds on which the foreign divorce decree had been made (see particularly p. 32, letter B, post), and, as this showed no matrimonial offence in English law on the part of the wife and as, on the other hand, the husband's means had increased, the magistrate had rightly exercised his discretion by increasing the amount of maintenance.

Decision of the DIVISIONAL COURT ([1956] 3 All E.R. 645) reversed.

* The relevant terms of the section are printed at p. 18, letters D to G, post.

A [**Editorial Note.** A magistrates' court will be entitled not only to look at the grounds and incidents of the foreign divorce decree when asked to discharge or vary its order for maintenance, but also to receive evidence material to the discharge or variation under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895 (see p. 29, letters G to I, post).

B The principle stated in para. (i) of the headnote seems to apply equally where an English court has made an order for alimony in a suit for judicial separation (see p. 31, letter D, post).

C Thus a distinction is drawn in divorce law between on the one hand matters of status and on the other hand matters of personal right and obligation flowing from a decree; for the English court accepted the foreign decree as ending the status of marriage, but did not accept that it discharged existing personal rights under the maintenance orders; to that limited extent only is the doctrine of "divisible divorce" accepted (see p. 24, letters F to H, p. 29, letter C, post). Compare, also, as regards the recognition of foreign law affecting status and the rejection of foreign law purporting to end personal obligations in another field of the conflict of laws, *Melliss v. National Bank of Greece and Athens* (p. 1, ante).

D As to the discharge by a magistrate's court of a maintenance order after a foreign divorce, see 12 HALSBURY'S LAWS (3rd Edn.) 492, para. 1091, note (h); and for cases on the subject, see 27 DIGEST (Repl.) 722, 723, 6908, 6909.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 7, see 11 HALSBURY'S STATUTES (2nd Edn.) 852.]

E Cases referred to:

(1) *Bragg v. Bragg*, [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 27 Digest (Repl.) 722, 6907.

(2) *Mezger v. Mezger*, [1936] 3 All E.R. 130; [1937] P. 19; 106 L.J.P. 1; 155 L.T. 491; 100 J.P. 475; 27 Digest (Repl.) 722, 6908.

F (3) *Kirk v. Kirk*, [1947] 2 All E.R. 118; 177 L.T. 151; 111 J.P. 435; 27 Digest (Repl.) 722, 6909.

(4) *Wood v. Wood*, [1949] W.N. 59; 93 Sol. Jo. 200; 27 Digest (Repl.) 723, 6911.

(5) *Pastre v. Pastre*, [1930] P. 80; 99 L.J.P. 20; 142 L.T. 490; 27 Digest (Repl.) 606, 5687.

G (6) *Estin v. Estin*, (1948), 334 U.S. 541.

(7) *Vanderbilt v. Vanderbilt*, (1956), 135 N.E. 2d 553.

(8) *Boettcher v. Boettcher*, [1949] W.N. 83; 93 Sol. Jo. 237; 11 Digest (Repl.) 487, 1117.

H (9) *Igra v. Igra*, [1951] P. 404; 95 Sol. Jo. 563; 11 Digest (Repl.) 518, 1324.

(10) *Lynn v. Lynn*, (1951), 97 N.E. 2d 748.

Appeal.

I The wife appealed from an order of the Divisional Court (LORD MERRIMAN, P., and COLLINGWOOD, J.), dated Oct. 19, 1956, and reported [1956] 3 All E.R. 645, reversing an order of a metropolitan magistrate at North London Magistrates' Court, dated June 21, 1956, whereby he dismissed the husband's application to discharge a maintenance order made in the wife's favour on Feb. 7, 1950, and, on an application by the wife, varied the maintenance order by increasing the amount payable thereunder. The Divisional Court discharged the maintenance order on the ground that the marriage had been dissolved by a foreign court of competent jurisdiction and there was no evidence that the wife was entitled to any rights in respect of maintenance before the foreign court.

Granville Sharp, Q.C., and D. Henderson for the wife.
C. L. Hawser for the husband.

A

Cur. adv. vult.

Mar. 13. The following judgments were read.

LORD EVERSHED, M.R.: On Feb. 7, 1950, the appellant in this court, Cynthia Wood (whom I will hereafter call "the wife"), obtained against her husband, the respondent Samuel Wood (to whom I shall refer as "the husband"), an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, from one of the magistrates' courts in London, that the husband should pay to the chief clerk of the court on the wife's behalf a weekly sum of 60s. and, in addition, a weekly sum of 15s. for the maintenance of each of the two children of the marriage (then aged nearly four and two years, respectively) until such child should attain the age of sixteen years. The custody of the two children was thereby given to the wife subject to access for the husband to them at all reasonable times. This order was based on the finding that the husband had, three months earlier, unlawfully deserted the wife. It will be noted that, as regards the payments ordered to be paid for the wife's benefit, the order was not conditional on the continued subsistence of the marriage; nor was there any other limitation set on the period of such payments.

B

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The husband is an Englishman by birth and he was at the date of the order domiciled in this country.* He is a showman exercising his profession through the medium of a troupe of chimpanzees. At the beginning of 1953 he went with his animals to the United States of America and while in that country found his way in due course to Las Vegas, Nevada. It was suggested to the husband in the later proceedings in May and June, 1956, before the North London magistrate (out of which this appeal has arisen and to which I shall later return) that the husband's primary purpose in going to Las Vegas and returning there in the following year was in order to obtain a dissolution by the courts of the State of Nevada of his marriage with the wife (having no cause to do so by the laws of this country) and, as a consequence, to disembarass himself of all further liability towards his wife and their two children, or, at least, towards the former. It is the fact that in September, 1954, the husband obtained in Nevada a decree of divorce against his wife and that he thereafter ceased to make the payments ordered by the magistrates' court in 1950, the arrears of which payments in June, 1956, amounted to about £250. On the other hand, the husband appears to have bought a house and land in Las Vegas and to have taken steps to obtain an immigration permit with a view to becoming in due course a citizen of the United States of America. In the course of the reasons for his decision of June, 1956, given for the benefit of the Divisional Court, the view is expressed by the North London magistrate that the husband may have been attracted to the State of Nevada by the circumstances that the rate of income tax there was less burdensome to him than the rate in England and that the Nevada climate better suited the dispositions of the chimpanzees—although it is not clear from the notes of evidence that these attractions were specifically put to the husband during the hearing. However that may be, the learned magistrate found as a fact that the husband had, before the divorce proceedings, decided to settle in Nevada and had acquired in that state a domicile of choice; and I agree with the Divisional Court that there was evidence on which he could so find. It follows that, according to the law of England, the decree of divorce in Nevada which I have so far but briefly mentioned was, if duly pronounced according to the local law, effective to determine the marriage between the husband and the wife.

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* The parties were married on June 9, 1945, and the husband, after visiting Las Vegas, Nevada, in 1953, returned there in March, 1954.

A The decree is dated Sept. 29, 1954, and recites that the defendant (that is, the wife) had not appeared in person or by attorney though "duly and regularly served . . . by publication" of a summons in the suit "in the Las Vegas Review-Journal . . . pursuant to an order of court first had and obtained". The order then proceeds:

B "the plaintiff introducing evidence in support of the allegations of his complaint, and the court being fully advised in the premises, and finding that the plaintiff is now and for more than six weeks prior to the commencement of this action and ever since has been an actual and bona fide resident of the County of Clark, State of Nevada, and actually domiciled therein during all of said period of time, and that this court has jurisdiction over
C both of the parties hereto and of this cause, and that all of the allegations contained in the plaintiff's complaint are true and that plaintiff is entitled to the relief prayed for in said complaint, and findings of fact, conclusions of law, and written notice of entry of judgment having been duly waived by the failure of the defendant to appear in this action . . . It is ordered, adjudged and decreed that the bonds of matrimony heretofore and now
D existing between the plaintiff, Samuel Wood, and the defendant, Cynthia Wood, be and the same are hereby dissolved and forever held for naught, and the said parties hereby released from all the obligations thereof and restored to the status of single persons."

We have not before us any copy of the "complaint" mentioned in the decree, but from the shorthand transcript (which is before us) of the few leading
E questions which were, at the hearing in Nevada, put to the husband by his attorney and the answers thereto, and from the husband's evidence in the North London court last year, it is quite clear that the sole ground of the husband's "complaint" was the fact that there had been no cohabitation between the husband and the wife since October, 1949, a period of time admittedly sufficient, according to the law of Nevada, to constitute a ground for dissolution of marriage.

F It should perhaps be stated in fairness to both the husband and the wife that in 1952 the husband had attempted, by invocation of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895 (the section now invoked again in the present proceedings), to obtain a discharge of the order of 1950 on the ground that the wife had committed adultery or, alternatively, that the husband had put an end to his desertion by a genuine offer to resume cohabitation which the wife
G had unjustifiably refused. The charge of adultery was found not to have been established, and the offer had the audacious characteristic that the wife was thereby invited to rejoin the husband in the company, not only of his chimpanzees, but also of the woman with whom the husband was then living and who was pregnant by him of a child, born in fact before the Nevada decree. In the circumstances it is not in doubt (and it has been conceded by counsel for the
H husband) that the wife must be regarded for the purposes of the present proceedings as having been at all times innocent of any matrimonial offence as understood by the law of England, and that the husband's desertion, which was the foundation of the order of 1950, was never determined otherwise than by the making of the decree of the Nevada court. No mention appears to have been made to the Nevada court of the English order of February, 1950.

I I have referred at a little length to the terms of the Nevada decree, for some of the argument before us has turned on the scope of its intended effect. The wife was, in fact, wholly unaware of the pendency of the husband's "complaint" to the Nevada court and it is clear that he did not expect nor, indeed, intend that she would have any knowledge, until after the event, of the suit that he was bringing. The suit was what is called in the American cases hereafter referred to an "ex parte suit", that is, a suit in which there never was any submission, in fact, by the wife to the jurisdiction of the Nevada court. It has

not, however, been suggested on the wife's behalf that there was any failure on the husband's part properly to comply with the formal requirements of Nevada law; so that, having regard to the finding that at the relevant date the husband had acquired a domicile of choice in Nevada, the decree of Sept. 29, 1954, was, by English law, at least effective to dissolve the marriage between the husband and the wife. A

In this state of events the husband, being then in England on a professional engagement at the Palladium in London, applied on May 18, 1956, to the North London Magistrates' Court for an order that the order of 1950 should be discharged "on the ground that he is now divorced". Five days later the wife applied to the same court for an order increasing the sums payable by the husband for the maintenance of herself and the two children on the ground that the husband's circumstances had since improved. The wife also sought to enforce payment by the husband of the arrears of maintenance already mentioned, but nothing now turns on this matter of the arrears. The applications for discharge and variation by increase of the order of 1950 were both made by reference to the terms of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended, which read: B C

"A court of summary jurisdiction . . . may, on the application of the married woman or of her husband, and upon cause being shown . . . to the satisfaction of the court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of five pounds*. If any married woman upon whose application an order shall have been made under this Act . . . shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged." D E

A proviso to the last sentence added by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (1), reads: F

"Provided that the court may, if the court think fit . . . (b) in the event of the order being discharged, make a new order that the legal custody of the children of the marriage shall continue to be committed to the wife, and that the husband shall pay to the wife or to any officer of the court or third person on her behalf, a weekly sum not exceeding thirty shillings† for the maintenance of each such child, until the child attains the age of sixteen years. In making such an order the court shall have regard primarily to the interests of the children." G

The learned magistrate took the view, in reliance on *Bragg v. Bragg* (1) ([1925] P. 20), that the decree obtained by the husband in Nevada, although it had effectively determined the marriage status, had not determined also his jurisdiction and discretion under s. 7 of the Act of 1895, and that since, on the facts, the merits were all with the wife, and since the husband's financial circumstances had substantially improved since 1950, the claims of natural justice required that he should dismiss the husband's application and should, on the wife's application to vary, increase the sums payable by the husband for maintenance of the wife and the two children to the maxima of £5 per week and 30s. per week each respectively. The Divisional Court, however, on Oct. 19, 1956, allowed the husband's appeal and ordered that the order of February, 1950 (as varied by the North London Magistrates' Court) be discharged, but gave leave to appeal H I

* The words "five pounds" were substituted for "two pounds" by the Married Women (Maintenance) Act, 1949, s. 1 (1).

† The words "thirty shillings" were substituted for "ten shillings" by the Guardianship and Maintenance of Infants Act, 1951, s. 2 (1).

A to this court. In the opinion of the Divisional Court ([1956] 3 All E.R. at p. 650) *Bragg v. Bragg* (1), although now of "unquestioned authority", should be treated "as based on a convenient use of the concurrent jurisdiction in this country" and, therefore, could not extend to a case such as the present where the husband had obtained a divorce in a foreign court of competent jurisdiction and it had not been shown whether the wife had any rights as to maintenance
B in the country of that foreign court. COLLINGWOOD, J., in delivering the judgment of the court, said (*ibid.*):

"It would appear . . . that the reasoning in *Bragg v. Bragg* (1) . . . leads to the following conclusions; viz., first, that in the case of an English divorce supervening on a magistrate's order, the order should be discharged if the wife is the divorcee, except possibly: (i) in the case of a decree to both parties, or (ii) where the Divorce Court has indicated the propriety of a compassionate allowance for the wife, and secondly, that in the case of a wife being divorced by a foreign court of competent jurisdiction the order must be discharged if the wife has been found not to be entitled to maintenance in that foreign court (see *Mezger v. Mezger* (2), [1936] 3 All E.R. 130); further, that if it is evident that her rights in the foreign country differ from those in this country, the proper course is to discharge the order and leave the wife to have recourse to whatever rights she may have in the foreign country (*Kirk v. Kirk* (3), [1947] 2 All E.R. 118). In our opinion, therefore, the same result as in the last case should follow also where, as in the present case, no evidence has been given that she is entitled to any rights at all in the foreign country."

E At the conclusion of the judgment COLLINGWOOD, J., added (*ibid.*, at p. 651):

"In our opinion it is most important to avoid any suggestion that effect is not being given to the foreign decree because of the grounds on which it is based, or on the ground that the substituted service was ineffectual, or that it is being assumed, without any evidence of the foreign law, that the husband's adultery or his desertion would be fatal according to the foreign law to his obtaining a decree on the ground of a three years' separation."

It will not escape attention that, if this conclusion and the grounds for it are correct, then it is necessary for the courts of this country to say, notwithstanding the terms of the added proviso to s. 7 which I have read, that the Nevada decree must be taken, in effect, to have put an end to the provision made for the maintenance of the two children living in this country and also (I assume) disabled the wife, although innocent of any matrimonial offence, from seeking any new order under the proviso to s. 7 for the children's benefit.

G Logically it is, then, first appropriate to consider the validity of the decision in *Bragg v. Bragg* (1) and, if valid, its ratio decidendi and scope; for it was the first contention of counsel for the husband that we should hold that *Bragg v. Bragg* (1), which now comes for the first time before the Court of Appeal, was wrongly decided. Alternatively, counsel contended that it rested on the convenience of preserving, in matrimonial proceedings, which are from first to last within the competence of English courts, the jurisdiction of those courts to grant maintenance both before and on or after the pronouncing of decrees for dissolution of marriage (or, indeed, other decrees) so as to be inapplicable to cases of dissolution of marriage by competent foreign tribunals, or, at least, so inapplicable where those tribunals have or may have (or are not shown not to have) jurisdiction to order maintenance in favour of a wife and, perhaps, of children. In support of this alternative contention counsel for the husband relied on the language of LANGTON, J., in *Mezger v. Mezger* (2) ([1936] 3 All E.R. at p. 136), where he said:

"The case of *Bragg v. Bragg* (1), as my Lord has said, has provided a very convenient instrumentality by which the courts of this country may,

so to speak, interweave their powers and obtain the advantage of local knowledge to supplement or implement the decree of the court.” A

There is an obvious attraction in the view that s. 7 of the Act of 1895, by its use of the phrases “the married woman” and “her husband”, was intended only to be applicable so long as the marriage subsisted which had given rise to the original application for maintenance. On this view, however, as was observed by HORRIDGE, J., in *Bragg v. Bragg* (1), “the husband” would be in difficulty in sustaining his locus standi when he asked that the order previously made should be discharged. On the other hand, if the previous order was (as in the present case) not qualified by any reference to the period of the marriage, it is no less difficult to see why it should automatically lapse on the event of a decree dissolving the marriage, wherever pronounced. In any case it is to be noticed that in the present case the husband’s application appears to be founded on s. 7 of the Act of 1895. But whatever view I might have taken had the matter been res integra (and I am not to be taken as indicating what that view might have been), I am for my part satisfied that it is now too late to impeach the correctness of the decision in *Bragg v. Bragg* (1). That decision was given in October, 1924. In the thirty-two years that have passed it has never been questioned, and I do not doubt that it has been acted on very many times. The citations by COLLINGWOOD, J., in the present case show that the present President LORD MERRIMAN, has, in the subsequent cases in which *Bragg v. Bragg* (1) has been considered in the Divisional Court, followed it not only loyally but “cordially”; and in the cases in which, on any view, it is applicable, I agree in thinking that it meets the requirements both of common sense and of justice. Moreover, Parliament has twice since October, 1924, had under consideration the terms of s. 7 of the Act of 1895, for that section was amended by s. 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, which was passed on July 31, 1925, and by s. 2 (1) of the Guardianship and Maintenance of Infants Act, 1951. B C D E

I, therefore, am of opinion that *Bragg v. Bragg* (1) must now be taken to have been correctly decided. It follows, first, that an order for maintenance made pursuant to the Act of 1895 does not automatically lapse on the determination of the marriage status of the parties to the order. I observe here that the order in the present case provided—as must commonly be the case—for maintenance both of the wife and of the children of the marriage; and it incidentally ordered that the sums payable for the children should be paid, not to the wife, but to the clerk of the court. The argument for a lapsing of the order so far as it related to the children must in any case be far less strong than that related to the maintenance of the wife. In the present case, indeed, the husband, as I have understood his case, has concentrated on his liability towards the wife, and I shall henceforth substantially (although not exclusively) confine my observations on the assumption that we are concerned only with the case of an order made on a husband, before an ensuing divorce, to provide a sum for his wife’s maintenance. In considering, however, the correctness of *Bragg v. Bragg* (1) and its ratio decidendi, as well as in considering the significance, both to these proceeding questions and also to the exercise of any discretion which survives a decree, of who was the petitioner or “plaintiff” in the divorce suit and of the country where the decree was made, it is to be noted that, by the proviso added to the final sentence of s. 7, the court is empowered, in the primary interests of the children, to make a fresh order for custody and maintenance of the children even where the original order has to be discharged by reason of proof of adultery on the part of the wife. F G H I

The question then remains: What did *Bragg v. Bragg* (1) decide and what was the ground of the decision? Put more precisely, for present purposes, if the

A court's discretion survives in such a case the dissolution of the marriage, on what principles should the discretion be exercised?

The facts in *Bragg v. Bragg* (1) may be shortly stated. A wife, having obtained an order for maintenance for herself and the children of the marriage against her husband, subsequently obtained a dissolution of her marriage on the ground of her husband's adultery and bigamy. The parties were at all relevant times of English nationality and domicile and the decree of divorce was made by the English court. After the divorce the husband took out a summons in the magistrates' court seeking to have the maintenance order discharged on the ground that the wife, having by her own act put an end to the marriage, had put an end also to the statutory jurisdiction to award maintenance. The argument was rejected by the magistrate and, on appeal, by the Divisional Court consisting of SIR HENRY DUKE, P., and HORRIDGE, J. At the beginning of his judgment SIR HENRY DUKE, P., said ([1925] P. at p. 23):

"On the face of it it seems anomalous that a woman who has obtained an order for maintenance as a wife, such maintenance to be provided by her husband, when she has put an end to the relation of husband and wife may still say that the order for the maintenance of the wife by the husband subsists. It is not because it seems anomalous that that may not be the result of the statutory provision, and neither is it conclusive to show that it is contrary to common sense."

The conclusion of the judgment was as follows—and I quote it at length because of its important bearing on the ratio of the decision. Referring to the argument of counsel for the wife, SIR HENRY DUKE, P., said (*ibid.*, at p. 25):

"Section 7 is, he says, the only section which limits the operation of the order when it has once been obtained. Under that section it is in the power of the court of summary jurisdiction upon fresh evidence to alter, vary or discharge the order and to increase or diminish the amount of the weekly payment. Then there is this proviso: 'If any married woman upon whose application an order shall have been made under this Act', and so on, 'shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged'. That is the only limitation the legislature imposed. When this Act was passed in 1895 a woman who added to desertion a grievance of her husband's adultery might proceed for a divorce. One must assume that the authors of this Act and the legislature which enacted it were aware of that elementary fact. They took the view which this appellant took, that such an order once made and while the parties are alive is not got rid of except by an order of the court of summary jurisdiction, and that an application must be made. On the whole, I think the appellant was right in his original view that he must go to a court of summary jurisdiction to get rid of this order, although there had been a decree absolute for divorce, and it seems to me to follow from that that if there were not the statutory grounds of discharge of the husband from his obligation under the order, then before the appellant could succeed he must satisfy the magistrate that justice required that the order should be altered, varied or discharged. He failed to so satisfy the magistrate. I entirely agree with the reasons upon which the magistrate founded that view. The magistrate thought it was a very convenient thing that this order should subsist and that a court, which was close at hand to the parties, should be able to give the wife assistance if she needed it, or give the husband relief if he was entitled to it."

HORRIDGE, J., in his short concurring judgment, confined himself entirely to the language and meaning of the Act. He said (*ibid.*, at p. 26):

"The question in this appeal is whether or not there is any provision in the Summary Jurisdiction (Married Women) Act, 1895, which limits the

operation of orders made under s. 5 to the period of the existing marriage. I can find no such words. In s. 5 (c) the provision that 'the husband shall pay to the applicant personally' is merely defining the husband at the time of the application. The 'applicant personally', of course, is the wife, but there are no words to show that the order itself is to be limited to the period of marriage. That being so, the court of summary jurisdiction is thrown back on s. 7, and under that it is a matter of discretion which I think in this case the learned magistrate has properly exercised, and this appeal ought to be dismissed."

It is, in my judgment, clear that the decision of the court in *Bragg v. Bragg* (1) was founded on the language of the Act of 1895, and of s. 7 in particular, which was interpreted as having the necessary effect that an order for maintenance, once made, was not determined by the automatic effect of dissolution of the formerly subsisting marriage and that there had been conferred on the appropriate court, after and notwithstanding the cesser of the marriage status, a discretion to decide on the application of either party whether the order should be discharged or varied either by reduction or increase of the sums ordered to be paid—including, of course, the sums ordered to be paid for the maintenance of the children. It is true that SIR HENRY DUKE, P., referred in the course of his judgment to matters of common sense; but he did so by way of illustration and support for the parliamentary intention expressed in the Act, and the reference to convenience at the end of his judgment was a reference to the reasons of the magistrate for the exercise of his discretion. I am, therefore, unable to agree with the view (for example) expressed by LANGTON, J., in the passage which I have already quoted from *Mezger v. Mezger* (2), and also by COLLINGWOOD, J., in the judgment now under review, that the jurisdiction conferred by s. 7 of the Act and preserved after decree is founded on, and, therefore, limited by, considerations of convenience and the concurrent jurisdiction of our courts as to maintenance. On the other hand, I do not doubt that such questions may properly be taken into account by the magistrates' court in the exercise of the statutory discretion—as they were taken into account, in one direction, by the magistrate in *Bragg v. Bragg* (1) and by the Divisional Court, in the other direction, in *Kirk v. Kirk* (3). In the present case, however, it would obviously be a somewhat cynical disregard of realities to suggest, on any ground of convenience, that the wife, who appears in this court as a legally aided litigant, should make her way to the court of Nevada and seek there to exercise such rights (if any) as she, an Englishwoman now domiciled in England, may have to receive support there from her former husband.

I will refer here as briefly as I may to the three later cases cited to us and to the Divisional Court in which the latter court, while acknowledging the authority of *Bragg v. Bragg* (1), nevertheless reversed the refusal of the magistrates' court to discharge their previous order after dissolution of the respective marriages. They were *Mezger v. Mezger* (2), *Kirk v. Kirk* (3), and *Wood v. Wood* (4) ([1949] W.N. 59). *Pastre v. Pastre* (5) ([1930] P. 80) was also cited, in which HILL, J., may be said to have indicated his own doubts about *Bragg v. Bragg* (1), but I do not further refer to it, for it was not a case under the Act of 1895, and I have already given my reasons for the view that it is now in any case too late to question the authority of *Bragg v. Bragg* (1). In *Mezger v. Mezger* (2) the parties were both Germans, domiciled and resident in Germany at the time of the dissolution of their marriage by the German court; but they had lived for a time in England and during that period a court of summary jurisdiction here had made an order under the Act for the maintenance of the wife by the husband. The divorce in Germany had been pronounced on the husband's suit, and, although the ground alleged would not have sufficed according to English law, it was not in doubt that according to the German law, which was the proper law for the purpose, the order of the German court effectively dissolved the marriage.

A What is more important, the parties had "mutually recriminated" in the German proceedings and the German court decided, adversely to the wife, the issue raised by her that the husband had failed properly to maintain her. The court of summary jurisdiction here had, nevertheless, refused to exercise their discretion to discharge the former maintenance order, on an application for that purpose by the husband, on the grounds, first, that the German decree had been
B invalid (which was erroneous in point of law and fact) and, secondly, that the wife was in need of financial assistance. In such circumstances it is not surprising that the Divisional Court held that the justices had failed properly to exercise their discretion.

In *Kirk v. Kirk* (3) the wife, after obtaining a maintenance order from an English court, later obtained, on her own invocation of the jurisdiction, a decree
C of divorce in Scotland, in which country the parties had at all times been domiciled. There were no children of the marriage. The Divisional Court, after directing an inquiry as to the (innocent) wife's rights in Scotland to the proper officer of the Court of Session, took the view that in all the circumstances of the case it would be more convenient and appropriate that all financial questions between the wife and husband should be dealt with by the Scottish court;
D but they expressly stated (in my view, rightly) that the fact that the divorce had been obtained in a foreign country did not necessarily require that the court's discretion under s. 7 of the Act must be exercised by discharging the original order. It is clear that the matter of convenience wears a very different aspect where the foreign court is at Edinburgh and not, say, in Germany or the United States of America.

E In *Wood v. Wood* (4) the parties (who were, of course, wholly distinct from the parties in the present appeal) were at all relevant times English and domiciled in England. After the wife had obtained an order for maintenance, the husband obtained a decree against her in England on the ground that she had deserted him. Again, the court of summary jurisdiction had founded their discretion exclusively on the wife's financial needs and, in the absence of evidence of any
F other circumstances properly relevant to the exercise of the discretion, the Divisional Court discharged the order, affirming once more their adherence to the decision in *Bragg v. Bragg* (1).

In my judgment, these later cases do not at all qualify what I hold to be the true foundation of the decision in *Bragg v. Bragg* (1), namely, the proper consequence of the interpretation of the terms of the statute. And if, according to
G the terms of the statute, the discretion survives and was intended to survive the cesser of the marriage status, it must, in my judgment, follow that it is immaterial whether that cesser has been brought about by an English or a foreign decree; although I do not, of course, doubt that the proved incidents of the foreign decree, so far as relevant to questions of maintenance (including convenience),
H will be matters proper to be taken into account in the exercise of the discretion. It follows equally and of necessity that it is immaterial to the survival of the jurisdiction and of the discretion under the Act of 1895 whether (save in cases falling within the last sentence of s. 7) the divorce is obtained at the suit of the wife or of the husband, although, again, the grounds on which the decree was obtained would clearly be circumstances most relevant to the exercise of the
I discretion. I refer again to what I have earlier said, without repeating it, about orders made for maintenance of the children.

There remains, however, the further question which formed the subject of the last paragraph (which I have already read) of the judgment of COLLINGWOOD, J., and the negative answer to which, as I read the judgment, formed the main ground of the decision, viz.: whether in such a case as the present any exercise of the court's power and discretion, other than by way of a discharge of the original order, is consistent with the payment of proper respect to the judgment

of a court of competent jurisdiction of another state and with international comity? A

The decision of the Divisional Court in the present case was the subject of a note by PROFESSOR GOODHART in the LAW QUARTERLY REVIEW, vol. 73 (Jan., 1957), p. 29, in which he referred to certain American cases, and particularly to *Estin v. Estin* (6) ((1948), 334 U.S. 541), in the Supreme Court of the United States, and *Vanderbilt v. Vanderbilt* (7) ((1956), 135 N.E. 2d 553), a decision of the Court of Appeals of New York. In both cases the questions before the court were primarily directed to the impact of art. IV, s. 1*, of the Constitution of the Union (commonly called the "full faith and credit clause") on the law of New York State as expounded or enacted, a matter with which we are not, of course, concerned. In my judgment, however, it clearly emerges from the two cases that, if a wife had obtained from her husband, then domiciled in New York, a maintenance order or its equivalent (as by the law of the state she might clearly do), and if thereafter her husband acquired an English domicile and obtained in England (the law of England being for this purpose assumed to be the same as the law of Nevada) an "ex parte" divorce in terms and circumstances similar to the decree in the present case, the courts of New York State would regard themselves as perfectly free to continue or vary, as they thought fit, their own pre-existing maintenance order, either on the ground that the principle of comity did not require any greater acknowledgment of the "ex parte" decree than a recognition of the determination of the marriage status, or on the ground that, since the English decree, on its face, did not purport to do more than determine the married status (and particularly did not purport to affect the New York law as to maintenance and the order made thereunder), it was a matter wholly within the competence of the New York courts to decide what, according to their own law, was the effect of the English decree on the position and personal rights of its own citizens (including the children of the marriage). The two cases were concerned, of course, with the State of New York; but it follows, in my judgment, that the result would be the same for any other state in the Union whose laws were the same as the laws of New York. And, in my judgment, a somewhat broader proposition follows also which does not involve acceptance by our courts of the so-called doctrine of divisible divorce—a phrase which I prefer, for my part, to avoid, save so far as it serves to distinguish, in the case of a divorce, between matters purely of status, on the one hand, and matters of personal rights and obligations, on the other, which flow from or are involved in a decree. In my judgment, the courts of any state in the Union whose laws included powers comparable to those contained in the Summary Jurisdiction (Married Women) Act, 1895, and an interpretation of those laws according to the ratio decidendi of *Bragg v. Bragg* (1), would not be at all likely to regard themselves as limited by the principle of comity to accord to an English decree of divorce (according to our present laws) a scope which necessarily required the discharge of any pre-existing personal rights subsisting under a maintenance order of their own in favour of a wife or (perhaps still more) of children—at least unless, on its face, the English order purported to determine also all relevant questions of maintenance. If this is right, then, since questions of reciprocity must always be relevant on the matter of comity, it seems to me that the foundation of the Divisional Court's judgment disappears and it is not necessary that a proper respect on our part for the Nevada decree (which we, of course, concede) demands that the discretion vested in our courts by s. 7 of the Act of 1895 must in the present case be so exercised that the order of 1950 should be discharged. No doubt, in the exercise of that discretion due regard should be had to the circumstances and incidents of the foreign decree and to the

* Article IV, s. 1, of the American Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

A rights, if any, as to maintenance and otherwise which the decree may confer or involve, as also to the question of convenience of forum. But on the facts of the present case, as proved, these considerations carry no weight in favour of the husband.

B In *Estin v. Estin* (6) the facts (with one exception presently mentioned) were entirely comparable with those of the present case, if the State of New York substituted for England—that is, the wife had obtained against her husband a support order (equivalent to our maintenance order) from the New York courts at a time when both were domiciled in that state. Later, the husband, having acquired a domicile in Nevada, obtained an “ex parte” decree of divorce. The highest court in New York having (as the majority of the Supreme Court thought) held that their jurisdiction to maintain the support order survived the divorce, C the question was whether that conclusion was consistent with the full faith and credit clause of the Constitution. The only difference in the facts in *Estin v. Estin* (6) from those in the present case was that the Nevada court appears, in the former, to have been aware of the New York support order (see 334 U.S. at p. 543).

D There was a division of opinion in the Supreme Court, JACKSON, J., being of opinion that New York was discriminating against a particular kind of decree, an “ex parte” decree, and that it could not do so consistently with the obligation of the full faith and credit clause; and FRANKFURTER, J., not being satisfied that the New York Court of Appeals had, in truth, reached the conclusion attributed to them and favouring a reference back to the New York court accordingly. It does not anywhere appear from the report before us what was the E form of the Nevada decree, but there seems to have been some divergence of view as to its purported effect. I should assume that the decree was in the same form as that in the present case, being (as I also assume) the common form of decree used by the Nevada court and being the form in fact used in *Vanderbilt v. Vanderbilt* (7).

F The view of the majority of the court rested, as I follow it, on the circumstance that the decree was an “ex parte” decree. Taking the view that the highest court in New York had held that a support order could survive such a divorce and that the support order in the case before them had so survived, they were of opinion, first, that a change in marital capacity did not necessarily involve the result that all the legal incidents of marriage—including the quasi-proprietary personal rights of a wife under a support order—were thereby affected: and, G secondly, that in the case of an “ex parte” divorce, there was nothing offensive to the full faith and credit clause—which, in effect, substituted command for comity (see 334 U.S. at p. 546)—in the view of the New York courts that the scope of the Nevada decree did not, outside Nevada, extend beyond a determination of the marriage status. The majority opinion of the court by DOUGLAS, J., contained this passage (ibid., at p. 547): “Nevada . . . apparently follows the H rule that dissolution of the marriage puts an end to a support order”. I take this to be a reference to the view taken in Nevada of the effect of the decree of their own courts. The majority of the court further said (ibid., at p. 548) that the claim of the husband, if accepted, would involve “nothing less than an attempt by Nevada to restrain [the wife] from asserting her claim under [the] judgment” of the New York court.

I FRANKFURTER, J., although differing from the majority of the court, none the less agreed (ibid., at pp. 549, 550) that the New York courts might, consistently with the full faith and credit clause, hold that a separate maintenance decree of one of its courts survived a decree of divorce (whether ex parte or not) pronounced whether in New York or Nevada. His doubt was whether such had been shown to be the New York law. As regards what the learned justice called the third ground of the majority’s decision—above referred to, namely, that the Nevada court, although purporting according to its own law to determine the

support order of New York, could not effectively do so in the absence of having personal jurisdiction over the obligee—FRANKFURTER, J., said (*ibid.*, at p. 551):

“ My difficulty with the third ground of the court’s opinion is that Nevada did not purport, so far as the record discloses, to rule on the survival of the New York separate maintenance decree. Nevada merely established a change in status. It was for New York to determine the effect, with reference to its own law, of that change in status. If it was the law of New York that divorce put an end to its separate maintenance decree, the respondent’s decree would have been terminated not by the Nevada divorce but by the consequences, under the New York law, of a change in status, even though brought about by Nevada.”

In *Vanderbilt v. Vanderbilt* (7) the question concerned the right of a New York court, consistently with the full faith and credit clause, to grant maintenance for the first time to an ex-wife subject to the New York jurisdiction after a dissolution of her marriage by an “ ex parte ” decree of the Nevada court on her ex-husband’s suit, the power so to do having been conferred by an enactment passed after the decision in *Estin v. Estin* (6), pursuant to a recommendation of a Law Revision Commission which had drawn attention to the fact that the scope of the decision in *Estin v. Estin* (6) was limited to cases where a support order had been made before the divorce. In the Court of Appeals of New York there was also a division of opinion. It appears from the dissenting judgment of FULD, J. (135 N.E. 2d at p. 559) that the form of the Nevada decree was the same as that in the present case, including the reference to release from “ all the duties and obligations ” of the marriage; and it was, accordingly, his opinion that the decree must be taken (if proper effect was to be given to it in accordance with the full faith and credit clause) to have removed the basis on which a maintenance order could be founded. In this respect he thought that the order under review materially differed from an order made before the divorce, “ the wife’s property right ” in which “ would then have assumed a status independent of the continuance of the marital relationship . . . ” (*ibid.*).

The view of the majority of the court, however, was that, once the limited effect was accepted of an “ ex parte ” Nevada decree, namely, that it should not be recognised extra-territorially as doing more than putting an end to the marriage status, then there was no ground for distinguishing between the right of New York, quoad those under its own jurisdiction, to make maintenance orders against a former husband for the first time after the status of marriage had ceased, and the right to maintain an order which had been made against the former husband while the marriage subsisted: and it appears that, in the view of the majority, the Nevada decree, notwithstanding the language already quoted (and, I assume, notwithstanding any view in Nevada as to the effect of that language), did not by its terms extend to a wife’s property rights. DESMOND, J., with whose judgment the majority of the court concurred, said (135 N.E. 2d at p. 558):

“ But under ‘ the divisible divorce ’ doctrine, defendant’s Nevada divorce had no effect (any more than it said anything in terms) as to plaintiff’s property rights. Its sole effect was to end a marriage and it has been given that effect in New York.”

Having regard to the circumstance that the questions involved in the American cases were primarily directed to the constitutional position imposed by the full faith and credit clause, I have thought it right to refer to them in some particularity and to extend my references to the opinions of the dissenting minorities. In my judgment, consideration of *Estin v. Estin* (6) and *Vanderbilt v. Vanderbilt* (7) justifies the conclusion which I have earlier formulated and provides, as counsel for the wife contended, not only persuasive authority in support of his

A contention but also, in law, an answer to the final paragraph of the judgment of COLLINGWOOD, J., on which the decision of the Divisional Court is founded.

It is one of the difficulties of this case that no evidence was given before the North London court of the effect and scope of the Nevada decree according to the laws of that state. The husband appears to have stated in his evidence that "the decree only gave him a liability to maintain the children". The husband, however, was not a competent witness on such a matter, and it may fairly be said that, since the husband was seeking a discharge of the order of 1950 on the sole ground of the Nevada divorce, it was for him to prove, if he could, that the decree, at least according to the law of that state, comprehended and put an end to all liability for maintenance of his wife, and (presumably) of his children.

In the circumstances it is necessary for this court to form the best view which it can of the scope of the decree according to its form—not forgetting the formula "the said parties are hereby released from all obligations" (of the marriage). We are assisted also by the views of the judges in *Estin v. Estin* (6) and *Vanderbilt v. Vanderbilt* (7). The judgments disclose, as I have earlier mentioned, some divergence of view. I conclude, however, that, whatever might be the intent as to further obligations, marital (strictly so called) or otherwise, the Nevada court did not purport, and could not have purported, to override or "set at naught" the obligations and rights in England created by virtue of the Act of 1895 and the order made thereunder in 1950, of which the court knew nothing.

If I am right so far, what remains can be briefly stated. On the husband's application I can see no ground whatever, having due regard to all the circumstances of the case and of the two parties, for interfering with the exercise of the discretion by the North London Magistrates' Court or for quarrelling with the view expressed by that court that a discharge of the order would be contrary to justice. I am, indeed, assisted to the conclusion by the fact that counsel for the husband did not contend, on the hypothesis on which I am now proceeding, that any other order could or should have been made.

On the wife's application I also reach the same result. It must, no doubt, be a very rare thing indeed for the court here to vary a former maintenance order by increasing its amount after the wife has been divorced by a foreign court of competent jurisdiction. It is, however, clear that in the present case the fact that the wife was the respondent (or "defendant") to the divorce proceedings is itself of no significance. The law of Nevada appears to be that non-cohabitation in fact for the requisite period gives to either party to the marriage the right to seek dissolution. As I have earlier stated, the case has proceeded on the view that the wife (unlike the husband) has at all times been wholly innocent of any matrimonial offence or of any conduct which would disqualify her from seeking relief under the Act of 1895. The husband appeared and gave evidence, as did the wife, before the North London Magistrates' Court. He submitted to its jurisdiction and the circumstances of both parties were closely investigated. It was proved in evidence that the troupe of chimpanzees, exhilarated, no doubt, by the North American climate, have increased the husband's disposable income to a figure six or eight times as great as that which he enjoyed in 1950.

In my judgment, nothing in the facts or incidents of the divorce decree, nothing in the conduct of either party, nothing in their financial circumstances, justifies any interference with the exercise by the magistrates' court of its discretion, which was arrived at without any misapplication of legal principle. I am again comforted by the fact that counsel for the husband did not really suggest that there was any ground of unfairness or misdirection as to the facts on which he could complain of the assessment of his client's liability at the maximum figure of £8 per week for the wife and two children.

For the reasons which I have expressed I think that this appeal should be allowed and that the two orders of the magistrates' court of June 21, 1956, should be restored. A

HODSON, L.J.: The following questions arise on this appeal: (i) Does an order for maintenance payable by a husband to a married woman under the provisions of the Summary Jurisdiction Acts, 1895-1949, survive a divorce? B (ii) Does the answer to the first question depend on whether the divorce is pronounced in favour of the wife? (iii) Does it depend on whether the decree of divorce is pronounced by an English or by a foreign court? (iv) If the order survived the divorce, must the court discharge the order on being informed of the divorce? (v) If there is no compulsion to discharge the order, is there a discretion to discharge and vary the order and how is that discretion to be exercised? C

There is much to be said for the view that the effect of the dissolution of the marriage is to destroy automatically the obligations that arise therefrom. As DOUGLAS, J., graphically put it in the American case, *Estin v. Estin* (6) ((1948), 334 U.S. 541 at p. 544), "the tail must go with the hide". This result is logical, but the question turns on the construction of an English Act of Parliament, namely, the Summary Jurisdiction (Married Women) Act, 1895, s. 7, which, as now amended, provides: D

"A court of summary jurisdiction . . . may, on the application of the married woman or of her husband, and upon cause being shown . . . to the satisfaction of the court at any time, alter, vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made . . . If any married woman upon whose application an order shall have been made . . . shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged." E

The Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (1), added a proviso to the effect that on resumption of cohabitation the order should cease to have effect. F

On the construction of s. 7 of the Act of 1895 it can be fairly argued that, since the title of the Act is the Summary Jurisdiction (Married Women) Act, 1895, and the words "married woman" and "husband" are used throughout to describe the persons who may apply for orders and the persons against whom orders may be made, so such orders must expire with the marriage. Section 7 contains the power in the court to vary or discharge an order and it is contended that "married woman" and "husband" must bear the same meaning in this section as in the rest of the Act and cannot include divorced women and divorced husbands. Moreover, the power to discharge an order is normally exercised when, for example, the desertion on which the order was founded has come to an end and the right to receive separate maintenance is, therefore, at an end. When the husband and wife are divorced, the order can never be discharged on this ground since, their right to consortium having gone, the possibility of desertion no longer exists. Hence it is said that the statute has no application to divorced persons and any order made thereunder must die with the marriage when a decree of divorce takes effect. G H

In *Bragg v. Bragg* (1) ([1925] P. 20), decided by the Divisional Court, an opposite conclusion, however, was reached. It was held that the decree does not ipso facto discharge a maintenance order obtained under the Act of 1895, nor does such dissolution compel the court to discharge such an order. Every such case, it was held, comes within the discretion given to the court by s. 7 of the Act to vary or discharge the order on evidence of fresh facts. HORRIDGE, J., pointed out (*ibid.*, at p. 26) that there were no words in the Act to show that the I

A order itself is to be limited to the period of marriage. SIR HENRY DUKE, P., thought (*ibid.*, at p. 24) that there were

“ grounds of common sense why an order which dealt with maintenance and not with the general obligations of married life should continue to subsist.”

B *Bragg v. Bragg* (1) was decided in 1924 and has been followed consistently since, and Parliament, when amending the Act of 1895 in 1925 and again in 1951*, has not taken the opportunity of limiting the scope of the Act as interpreted by the Divisional Court.

C If *Bragg v. Bragg* (1) was correctly decided, the answer to the first question is in the affirmative. In my opinion it was, and there is nothing contrary to common sense or the plain language of the statute in this construction, even though it produces the result of what is called in the United States “divisible divorce”, that is to say, it does not follow that, because a marriage is dissolved, the prior financial obligations of a husband to a wife must necessarily fall with it.

D In *Estin v. Estin* (6) the Supreme Court of the United States held that a New York support decree survived a subsequent Nevada divorce. The decision of the Supreme Court turned mainly on art. IV, s. 1, of the Constitution, “the full faith and credit clause”, but it appears from the decision that the New York court had maintained that its order was not destroyed by the Nevada decree. See also *Vanderbilt v. Vanderbilt* (7) ((1956), 135 N.E. 2d 553), a decision of the Court of Appeals of New York, which maintains the same principle, although carrying it to a length outside the scope of the English Summary Jurisdiction (Married Women) Act, 1895, or the Matrimonial Causes Act, 1950, which, in the first case, does not provide for an application for the first time after divorce and, in the second, does not provide for such an application after a decree which is not an English decree: see s. 19 of the Matrimonial Causes Act, 1950. These cases are of persuasive authority.

F As to the second question, the Divisional Court seems to have thought that the principle in *Bragg v. Bragg* (1) should not be applied when the wife is the unsuccessful party to the divorce, except in a limited class of case of which the present case is not one. See also the observations of LORD MERRIMAN, P., in *Wood v. Wood* (4) ([1949] W.N. 59 at p. 60), but the President was careful to make clear that he was not saying that “in no circumstances can justices exercise their discretion to keep an order alive in favour of an unsuccessful wife”. The court will, if it has a discretion under s. 7 of the Act of 1895, be entitled to receive evidence as to the facts. In this case we know that, on the facts proved, the husband deserted the wife prior to the divorce. The order of the court of summary jurisdiction was made on that ground and, as the Divisional Court stated, there appears to be no reason to suppose that the desertion had been terminated at the time of the foreign decree, the only suggestion to that effect being that when the husband went to America the wife declined to go with him, her explanation of this refusal having been found to be that she was unwilling to make a third with the husband and his pregnant mistress. The validity of the Nevada divorce is not in question and the grounds on which relief was claimed (immaterial to the question of jurisdiction) were that the parties had not lived together for three years. No matrimonial offence was there alleged and there are no facts to justify the conclusion that, because the wife was not the petitioner or actor in the divorce proceedings, she should, therefore, be in a worse position than if she had been a successful suppliant for relief. It would be open to the husband to raise any relevant matters to show cause why the summary jurisdiction order should not be continued. Indeed, in this case we were told that in 1952 he did so and endeavoured unsuccessfully to show that the wife was or had been living an unchaste life.

* See footnote, p. 18, ante.

On the facts it seems difficult to envisage a set of circumstances more favourable to the wife and I cannot regard the fact that she was respondent to the proceedings and divorced on the prayer of her husband as a matter to be put in the scales against her. Indeed, the Nevada proceedings exemplify a tendency to be found in the modern exercise of divorce jurisdiction to permit proceedings to be taken, not on the ground of an injury inflicted on the petitioner or claimant by the opposite spouse, but on the ground that it is thought desirable or expedient that there should be a divorce. The ground of three years' separation involves no imputation of guilt.

The case of a wife who, as in the present case, has no knowledge of proceedings taken at the instance of her husband which have the effect of bringing her marriage to an end is, I should have thought, a stronger one than that of the petitioner in such a case as *Kirk v. Kirk* (3) ([1947] 2 All E.R. 118). In that case a wife, who had obtained a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895, in England, subsequently sued her husband for divorce in Scotland. It was held, in effect, by the Divisional Court that she must take the consequences and rely on such remedies as the Scottish courts could give her, and she was not permitted to enforce the summary jurisdiction order. In the instant case the wife, on the other hand, has been quite helpless in the divorce proceedings from beginning to end and has had no part or lot in them.

As to the third question, once the question of the validity of the foreign decree is determined, the position is, in my opinion, exactly the same as if the decree had been an English one; compare *Mezger v. Mezger* (2) ([1936] 3 All E.R. 130) and *Kirk v. Kirk* (3). In the former case the exercise of discretion by a court of summary jurisdiction was reversed since neither of the reasons given, to one of which I return later, showed a judicial exercise of discretion, and, further, because the wife's allegations of failure to maintain had been disproved in the foreign proceedings, to which she was an active party. In *Kirk v. Kirk* (3), where there had been a Scottish divorce following on an English order for maintenance, the court expressly refrained from deciding against the wife merely because the foreign decree ipso facto destroyed her right to maintenance.

It was suggested in argument that the form of the Nevada decree, which ends with the words "the said parties hereby released from all the obligations thereof and restored to the status of single persons", is destructive of the wife's claim and brings the case into line with *Mezger v. Mezger* (2), in which the maintenance obligation had been litigated between the parties. I do not accept this contention since, in the present case, there was no evidence that the Nevada court ever entertained, much less adjudicated on, a claim for maintenance, and there is no reason on this account why any discretion there may be to keep the order alive should not be exercised in favour of the wife.

As to the fourth question, it was contended that, even accepting the construction put on the Act of 1895 in *Bragg v. Bragg* (1) to the effect that the order survived the divorce, the court must, on proof of a valid decree, discharge the order. This contention was based on the reasoning of HILL, J., in *Pastre v. Pastre* (5) ([1930] P. 80), the headnote of which reads:

"The basis of a wife's right to receive permanent alimony from her husband is that the marriage is subsisting and that she is still a wife. If after a decree for judicial separation and an order for the payment of alimony the marriage is put an end to by the decree of a court of competent jurisdiction the status of the woman as wife and her consequential right to alimony have ceased to exist. The order for alimony, however, which in its common form is limited till further order, remains effective till an application is made for its discharge."

A HILL, J., said (*ibid.*, at p. 82) that the order was expressed to be until further order and that until further order it was effective. He added (*ibid.*):

B "I am now asked to make a further order—namely, to discharge the order for payment in the future. In my opinion I have no alternative but to do so. I cannot order a man who has ceased to be a husband to pay alimony to a woman who has ceased to be a wife. The whole basis of an order for permanent alimony is gone."

HILL, J., distinguished *Bragg v. Bragg* (1) as depending on the terms of the Summary Jurisdiction (Married Women) Act, 1895, which he described (*ibid.*, at p. 85) as an Act of a very special nature giving magistrates powers which the Divorce Courts did not possess in some respects.

C The jurisdiction to order alimony depends on statute, the then relevant provision being s. 190 (4)* of the Supreme Court of Judicature (Consolidation) Act, 1925, which read:

D "Where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the court may make such order for alimony as the court thinks just."

E If the order for alimony survives the divorce, as HILL, J., thought, there is nothing in the statute to show that it must be discharged on divorce, any more than there is a provision to that effect in the Summary Jurisdiction (Separation and Maintenance) Act, 1925. It may be that different considerations apply to alimony, but I am not persuaded by the reasoning of HILL, J., that the decision in *Bragg v. Bragg* (1) that a maintenance order could be permitted to remain in force after a divorce was wrong. It is to be noted that the decision in *Pastre v. Pastre* (5) could, in any event, be supported on the ground that the wife was an active participant in the French divorce proceedings.

F As to the fifth question, if there is no compulsion to discharge the order, it is, I think, clear on the language of s. 7 of the Act of 1895 that there is a discretion in the justices to alter, vary or discharge the order on cause being shown to the satisfaction of the court at any time. This discretion was exercised by the learned stipendiary magistrate by refusing the husband's application to discharge the order and by varying the amount payable to the wife in an upward direction. It is not suggested that the amount payable under the proposed variation is in itself excessive.

G In considering the question of discretion I have been indebted to an article in the BRITISH YEAR BOOK OF INTERNATIONAL LAW (1952), p. 286 et seq., by DR. MORRIS, who has considered the American doctrine of divisible divorce. It is necessary on this matter to distinguish between the decree dissolving the marriage and any ancillary relief which may be claimed. The grounds for divorce are irrelevant so far as the status of the spouses are concerned and the fact that the wife received no notice of the proceedings does not affect this conclusion, as was rightly held, in my opinion, in *Boettcher v. Boettcher* (8) ([1949] W.N. 83) and *Igra v. Igra* (9) ([1951] P. 404). DR. MORRIS points out that, if effective notice were necessary, the decree of divorce being analogous to a judgment in rem, great uncertainty in family relationship would result in cases where parties have re-married in reliance on a foreign decree, for, if want of notice were a ground for contesting a foreign decree, the defect could not be waived by the party who received no notice.

I The same considerations do not apply to orders for support or maintenance. If the wife litigates the maintenance at the same time as the foreign divorce and fails, it is not to be expected that she will be permitted to re-litigate the

* This section of the Act of 1925 was repealed by the Matrimonial Causes Act, 1950, s. 34 (1), and Schedule, and replaced by s. 20 (2) and s. 22 (2).

same question in the English courts. Such a case was *Mezger v. Mezger* (2), which, in my opinion, was rightly decided on that ground. The Court of Appeals of New York has held in *Lynn v. Lynn* (10) ((1951), 97 N.E. 2d 748) that the principle of *Estin v. Estin* (6) does not apply in a case where the wife participates in the Nevada divorce. When, however, the wife, as in the present case, takes no part in the Nevada proceedings of which she was unaware, there is no obstacle to the exercise of the discretion in her favour of the particular kind which confronted the wife in *Mezger v. Mezger* (2). The court is, in my view, entitled to look at the grounds of the foreign divorce before deciding whether it is just to continue the existing maintenance order in her favour. I would, therefore, take a different view from the Divisional Court in *Mezger v. Mezger* (2) in so far as it criticised the justices for exercising their discretion by relying in part on the fact that the foreign divorce was pronounced on a ground not sufficient by English law.

The Divisional Court, in the present case, ended its judgment with the following sentence ([1956] 3 All E.R. at p. 651):

"In our opinion it is most important to avoid any suggestion that effect is not being given to the foreign decree because of the grounds on which it is based, or on the ground that the substituted service was ineffectual, or that it is being assumed, without any evidence of the foreign law, that the husband's adultery or his desertion would be fatal according to the foreign law to his obtaining a decree on the ground of a three years' separation."

These considerations apply forcefully to the recognition of the foreign decree as affecting the status, but do not conclude the matter, in my view, as regards rights in personam, such as property rights of the wife which, as I have endeavoured to show, are subject to different considerations. Accordingly, taking into account the wife's conduct throughout, the Nevada decree pronounced against her without effective notice and the ground of the decree, I am of opinion that the exercise of discretion under review is not open to criticism and I would allow the appeal.

ORMEROD, L.J.: I agree. The first question to consider is the submission of counsel for the husband that *Bragg v. Bragg* (1) ([1925] P. 20) was wrongly decided and that a decree of dissolution of marriage automatically puts an end to a maintenance order previously obtained by a wife under the Summary Jurisdiction (Married Women) Act, 1895. If he is right in this, it is, of course, an end of the matter, provided, and it is not here disputed, that the decree obtained in the State of Nevada is valid in this country. I agree with my brethren that this submission should not prevail, particularly having regard to the fact that *Bragg v. Bragg* (1) has been accepted as good law since 1925 and has been approved on more than one occasion by LORD MERRIMAN, P., sitting in the Divisional Court. The question to be decided, therefore, is whether the magistrate was entitled to exercise his discretion as he did in refusing to discharge the order, having regard to the fact that the decree was a foreign one and particularly having regard to the requirements of comity. Counsel for the husband contended that, assuming that *Bragg v. Bragg* (1) was good law, its application should be limited to cases where the decree is obtained in this country. This contention, as I understand it, is based on the reasoning that the ratio decidendi of *Bragg v. Bragg* (1) was that it was a convenient and common-sense use of the machinery provided by the Summary Jurisdiction (Married Women) Act, 1895, in cases where there was the concurrent jurisdiction of the Divorce Court. I do not agree that this was the basis of the decision. It is true that the questions of common sense and convenience were discussed by SIR HENRY DUKE, P., in relation, as I read his judgment, to the matters to be

A taken into account by the magistrate in the exercise of his discretion. The case, however, was decided on the proper construction of the Act and, in particular, of s. 7. SIR HENRY DUKE, P., said ([1925] P. at p. 25):

B “On the whole, I think the appellant was right in his original view that he must go to a court of summary jurisdiction to get rid of this order, although there had been a decree absolute for divorce, and it seems to me to follow from that that if there were not the statutory grounds of discharge of the husband from his obligation under the order, then before the appellant could succeed he must satisfy the magistrate that justice required that the order should be altered, varied or discharged.”

C In other words, that the magistrate must exercise his discretion.

D If this is the proper view to take of the decision in *Bragg v. Bragg* (1), then I see no reason why in a proper case it should not apply where a decree has been obtained in a foreign country. I have in mind that in *Kirk v. Kirk* (3) ([1947] 2 All E.R. 118), where the wife obtained a decree in Scotland, her husband being domiciled there, it was held by the Divisional Court that the proper exercise of the justices' discretion was to discharge an order for maintenance previously obtained in this country and to leave the wife to pursue her relief in Scotland. That, however, was a case in which the wife herself instituted the Scottish proceedings and there was information before the Divisional Court of the relief available to the wife in Scotland if she cared to seek it. In his judgment in the Divisional Court in the present case ([1956] 3 All E.R. at p. 650), COLLINGWOOD, J., pointed to the fact that

E “. . . there is no reported case in which an order has been maintained in favour of a wife against whom a decree has subsequently been granted, whether by an English or a foreign court.”

F This may well be so, but it must be borne in mind that in this country, with only a few exceptions, the wife against whom a decree has been granted is considered to be the guilty party. In the present case, so far as can be ascertained from the documents, no charge was made against the wife in Nevada and the only ground on which the marriage was dissolved was that the parties had not cohabited since 1949. My view in these circumstances is that the wife is in the same position as she would have been if her marriage had been dissolved in this country in proceedings in which she was an innocent party, and that, subject to the question of comity, the magistrate acted rightly in exercising his discretion as he did.

G It appears from the last two paragraphs of the judgment of COLLINGWOOD, J., that the Divisional Court was chiefly influenced in coming to its decision by the necessity of observing the principle of comity. COLLINGWOOD, J., said ([1956] 3 All E.R. at p. 651):

H “. . . we do not think that it is permissible to allow these considerations [that is, the wife's position in relation to her husband's conduct] to weigh against the propriety of setting aside the order in light of the foreign decree.”

I In the next sentence he deals with the importance of avoiding any suggestion that effect is not being given to the foreign decree on the various grounds there set out. It is, of course, essential that the principle of comity should be observed and that proper weight should be given to the decree of the Nevada court. It appears, however, that the question whether the Nevada decree should be regarded as of such effect that the only proper exercise by the magistrate of his discretion would be to put an end to the order requires careful consideration in the light of two recent cases in the United States of America. In *Estin v. Estin* (6) ((1948), 334 U.S. 541), a decision of the Supreme Court of the United

States, the spouses were originally domiciled in New York, where the wife obtained a decree of separation and alimony. Having acquired a domicile in Nevada, the husband subsequently obtained a Nevada decree in proceedings of which the wife was notified constructively, which, I suppose, means, as in this case, by advertisement. The husband then stopped paying alimony on the ground of the Nevada decree and the New York courts, while upholding the Nevada decree as putting an end to the status of marriage, granted to the wife judgment for arrears of alimony on the ground that the decree had not put an end to the order of the New York court. The Supreme Court held that the judgment of the New York court did not deny "full faith and credit" to the Nevada decree and so did not offend against art. IV, s. (1), of the Constitution. The same principle appears to have been followed in *Vanderbilt v. Vanderbilt* (7) ((1956), 135 N.E. 2d 553), a decision of the Court of Appeals of New York dealing with an order for alimony made in New York, in accordance with a recent enactment, after a Nevada decree had been made dissolving the status of marriage. It does not appear from the report in *Estin v. Estin* (6) whether the decree was in the same form as in the present case, but it certainly was so in *Vanderbilt v. Vanderbilt* (7). The decree, after ordering that the marriage be dissolved, goes on to release the parties "from all . . . obligations thereof". There is no indication in the present case that the question of alimony was ever raised in the Nevada court—indeed, all the indications are to the contrary—nor was there any evidence before the learned magistrate or the Divisional Court of the effect of the decree on questions of alimony or whether there was any alimony or other relief available for a divorced wife in Nevada. It would seem that the position in *Estin v. Estin* (6) is very much the same as in the present case and it is difficult in these circumstances to see why the decree of the Nevada court, which admittedly put an end to her married status, should be allowed to interfere with a personal right which the wife has in this country for maintenance under an order made in pursuance of a statute. If the course adopted in *Estin v. Estin* (6) did not offend against the provision for "full faith and credit", it would, in my view, be wrong to hold that the exercise of the magistrate's discretion in this case offended against the principles of comity. As was stated in the judgment of the court in *Estin v. Estin* (6) (334 U.S. at p. 546), art. IV, s. 1, of the Constitution substituted a command for the earlier principles of comity, and it seems likely that the requirements of "full faith and credit" would be more, rather than less, exacting than the requirements of comity. For these reasons the appeal should, in my opinion, be allowed and the orders of the magistrate restored.

Appeal allowed. Order of the magistrate of Feb. 7, 1950, as varied by the magistrate on June 21, 1956, restored.

Solicitors: *J. C. Clifford Watts* (for the wife); *Tringhams* (for the husband).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

FOURMAIDS, LTD. v. DUDLEY MARSHALL (PROPERTIES), LTD.

[CHANCERY DIVISION (Harman, J.), March 20, 1957.]

Mortgage—Possession of mortgaged property—Mortgagee's right to possession—Mortgage containing no restriction on mortgagee's right—Judges' Practice Directions—R.S.C., Ord. 55, r. 5A.

On Feb. 17, 1956, by a registered legal charge a mortgagor charged his land to secure the repayment of a principal sum of £6,000 together with interest payable half-yearly on Aug. 17 and Feb. 17 of each year. It was provided that if the mortgagor should pay the interest within seven days after it became due, the principal money should not be called in before Dec. 31, 1958. On Aug. 29, 1956, the interest not having been punctually paid, the mortgagee gave notice to the mortgagor requiring repayment of the principal. On Sept. 27, 1956, the arrears of interest were paid. On Jan. 4, 1957, the principal being still unpaid, the mortgagee issued an originating summons asking for possession of the mortgaged property. The mortgagor contended that according to the Judges' Practice Directions under R.S.C., Ord. 55, r. 5A, the court had a discretion to postpone the making of the order.

Held: the mortgagee was entitled to an order for possession because a legal mortgagee's right to possession was absolute, apart from any restriction expressed or implied in the document of mortgage, and was exercisable immediately on the execution of the mortgage without any default on the part of the mortgagor; in the present case the restriction in the mortgage had become no longer applicable, and the court had no discretion but to make the order.

Per CURIAM: the Judges' Practice Direction [which is concerned with evidence where possession is sought] under Ord. 55, r. 5A, is limited to the most common form of mortgage whereby the principal, as well as the interest, is paid by the mortgagor by commuted periodical sums and whereby the mortgagee precludes himself expressly or by implication from going into possession so long as those periodical payments are punctually made (see p. 37, letter B, post).

[As to the mortgagee's right to possession, see 23 HALSBURY'S LAWS (2nd Edn.) 358, para. 535; and for cases on the subject, see 35 DIGEST 397, 398. 1394-1404.]

Case referred to:

(1) *Hughes v. Waite*, [1957] 1 All E.R. 603.

(2) *Alliance Perpetual Building Society v. Belrum Investments, Ltd.*, [1957] 1 All E.R. 635.

Adjourned Summons.

By a registered legal charge dated Feb. 17, 1956, registered on Feb. 25, 1956, the defendant, Dudley Marshall (Properties), Ltd. (herein called "the mortgagor") charged its leasehold property No. 6 Whitechapel High Street in the County of London with repayment to the plaintiff, Fourmaids, Ltd. (herein called "the mortgagee") on Aug. 17, 1956, of the principal sum of £6,000 (then paid by the plaintiff to the defendant) together with interest thereon at the rate, as to each payment of interest, of 10s. per centum over the bank rate current on the day of payment with a minimum of £5 per centum per annum payable half yearly on Aug. 17 and Feb. 17 in every year as therein stated. The mortgagor thereby demised to the mortgagee the land charged for the residue of the term granted by the registered lease except the last three days thereof, subject to cesser on redemption. It was provided by the charge that if the mortgagor should pay each instalment of

interest within seven days after the day on which the same should become due and should comply with all the mortgagor's obligations thereunder, the principal moneys should not be called in before Dec. 31, 1958. The mortgagor failed to pay the instalment of interest which fell due on Aug. 17, 1956, within seven days after that date, and on Aug. 29, 1956, the mortgagee served on the mortgagor a written notice requiring the mortgagor to pay forthwith the principal sum of £6,000 with the interest owing on the date of payment. On Sept. 27, 1956, the mortgagor paid to the mortgagee the amount of the interest which became due on Aug. 17, 1956. No part of the principal was repaid. On Jan. 4, 1957, the mortgagee issued this originating summons for possession of the mortgaged premises.

M. O'C. Stranders for the plaintiff, the mortgagee.

D. C. L. Potter (Muir Hunter with him) for the defendant, the mortgagor.

HARMAN, J.: This subject seems to be one which is constantly being agitated in this court. I have had my attention called to some observations I made on it as recently as Jan. 31 of this year in *Hughes v. Waite* (1) ([1957] 1 All E.R. 603). Even more recently a case came before me on an application* to commit the editor of the "Daily Mail" newspaper for comments on a mortgagee's action for possession exactly similar to the present one. The comments, and indeed the arguments of counsel for the editor, showed an entire misapprehension of the nature of an originating summons for possession. They all assumed that it involved some kind of default on the part of the mortgagor, but I said in that case, and I repeat, that the right of the mortgagee to possession in the absence of some specific contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless by a term expressed or necessarily implied in the contract he has contracted himself out of that right. He has the right because he has a legal term of years in the property. If there is an attornment clause, he must give notice. If there is a provision expressed or to be implied that, so long as certain payments are made he will not go into possession, then he has contracted himself out of his rights. Apart from that, possession is a matter of course.

I think that the confusion which has arisen about this matter is a natural one stemming from the alteration of the Rules of the Supreme Court in 1936. Before that date practitioners were familiar with the complaint of mortgagors that judgment for possession had been signed against them in default in the King's Bench Division, and that they had had no opportunity of stating their case and found an order made against them without proof of the mortgagee's rights. It was thought that in mortgage cases it was better that, as the mortgagee's other rights had to be dealt with by summons in the Chancery Division, so should his right to possession be dealt with here. I think that up to that time one could ask for possession in the Chancery Division only as part of the relief sought on an originating summons for other remedies of a mortgagee. R.S.C., Ord. 55, r. 5A, was then altered allowing the mortgagee to ask for possession alone. It was a novelty; and I think that it was not until after the beginning of the last war that this remedy started to be popular, but, as I pointed out the other day, it has become a very fashionable form of relief because, owing to the conditions now prevailing, if a mortgagee desires to realise his security by sale, he wants vacant possession. Therefore, the mortgagor being in occupation, the mortgagee takes out a summons for possession, and he does not ask for any other relief at all. He is then in a position to exercise his power of sale to advantage.

In 1936 the Chancery judges made Practice Directions, which now appear in the notes to Ord. 55, r. 5A, in the ANNUAL PRACTICE, 1957, at p. 1123. One

* *Alliance Perpetual Building Society v. Belrum Investments, Ltd.*, (2) ([1957] 1 All E.R. 635).

- A passage* in these directions has led to a good deal of confusion, because if one reads it without remembering the principles of the matter, it looks as if every time a mortgagee applies to the court for possession, the court would look into the question what payments had been made, what arrears there were, and what were the prospects of payment, and so forth, and would adjourn the matter from time to time to give the mortgagor an opportunity of making his peace with his mortgagee. The practice direction*, as I have always been and remain of opinion, is limited to that most common form of mortgage whereby the principal, as well as the interest, is paid by the mortgagor by commuted periodical sums, and whereby the mortgagee precludes himself from going into possession, so long as those periodical payments are punctually made. That is the way by which most people purchase their houses nowadays. The building societies do not want to go into possession. The whole purpose of building societies is to maintain the householder in possession of his house so long as he pays the instalments to the society, and these practice directions are directed to that matter. In the case of an old fashioned type of mortgage, such as there is here, none of those considerations applies. The mortgagee can go into possession whenever he chooses whether there are arrears or not, whether there is default or not.
- D The mortgagor in this case says that his default is of a very small order. So it is. If this were a case where there was discretion in the matter, I should feel that it was a hard case; but the mortgagor has entered into a contract with the mortgagee, and the mortgagee wants his rights under the contract, and this court, in my judgment, has no power to refuse him those rights.

- E The mortgage was made in February, 1956. There was a provision that so long as interest was punctually paid the mortgage money would not be called in before Dec. 31, 1958; but the mortgage interest was not punctually paid in August, 1956.

- F On Aug. 29, 1956, the mortgagee, as he was entitled by his contract to do, called in his mortgage money. Within three months of that he became entitled under the Law of Property Act, 1925, s. 103, to exercise his power of sale, the mortgage money not having been paid to him. That time having passed, the present originating summons was taken out on Jan. 4, 1957, there being at that time no default in the payment of interest because the arrears had been paid up. There is no interest default at the present moment; but, in my judgment, that has nothing to do with the matter.

- G The master at the hearing on Feb. 22, 1957, held that the mortgagee was entitled to his order, but, nevertheless, deferred the effect of it for two months. Whether he had authority to go so far I feel some doubt. Twenty-eight days is the ordinary time. But he did it, and the mortgagee did not object. I propose to treat that order as having been made, so far as delay in the execution of it is concerned, with consent. In my judgment, I could not possibly upset the master's order. It is quite clear that the mortgagee is entitled to his relief, and there is no power in the court to refuse him the relief which he asks. There will be an order for possession, the mortgagee not objecting, within two months from today.

Order accordingly.

Solicitors: *Bell & Ackroyd* (for the plaintiff); *Ronald Fletcher & Co.* (for the defendant).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

* The relevant part of the Practice Directions in respect of applications by originating summons for payment or possession under R.S.C., Ord. 55, r. 5A, is as follows: "Where the application asks for possession the affidavit must show the circumstances under which the right to possession arises and the state of the account between the mortgagor and mortgagee setting out:—(a) the amount of the advance (b) the amount of the repayments (c) the amount of any interest or instalments in arrear and (d) the amount remaining due under the mortgage or charge . . ."

DAVIE v. NEW MERTON BOARD MILLS, LTD. AND OTHERS. A

[QUEEN'S BENCH DIVISION (Ashworth, J.), February 27, 28, March 1, 4, 14, 1957.]

Master and Servant—Liability of master—Accident to servant—Tool bought from reputable manufacturers—Defect due to negligence in manufacture—Defect not discoverable by employers, but patent to manufacturers. B

Dangerous Goods—Negligence—Liability of manufacturers—Tool supplied for use in trade—No intermediate examination—Tool not used exactly in way intended by manufacturers.

The plaintiff, a maintenance fitter, was struck in the eye by a piece of metal which flew off the head of a drift as he struck it with a hammer in the course of his work. The blow with the hammer was not an unreasonably hard blow. The drift, a tool used for separating pieces of metal, had been provided by the first defendants, the plaintiff's employers, for the use of their fitters. The employers had purchased the drift from a reputable supplier who had obtained it from the second defendants, the manufacturers, who were old-established tool makers. The drift appeared to be in good condition, but, owing to negligence in the heat treatment of the drift in its manufacture, its head was excessively hard for its purpose, and the chip of metal flew off as a result of this excessive hardness. At the time of the accident, the plaintiff was not using the drift in conjunction with the socket for which it was designed and supplied, but, even if the drift had been used solely with the socket, occasions might have arisen when the drift would have had to be struck as hard as it was struck at the time of the accident. In an action by the plaintiff for damages for negligence from the employers and the manufacturers, C D E

Held: (i) the employers were liable to the plaintiff in damages because (a) they owed a duty to him to exercise proper care in providing safe tools and they could not escape liability by showing that the negligence which had caused the injury was that of independent manufacturers, and (b) although the employers were unaware of the defect in the drift and could not reasonably have discovered it, the defect was not latent to the manufacturers, for whose negligence the employers were responsible to the plaintiff. F

Paine v. Colne Valley Electricity Supply Co., Ltd. & British Insulated Cables, Ltd. ([1938] 4 All E.R. 803), *Donnelly v. Glasgow Corpn.* (1953 S.C. 107) followed and dictum of LORD MAUGHAM in *Wilsons & Clyde Coal Co., Ltd. v. English* ([1937] 3 All E.R. at p. 646) applied. G

Mason v. Williams & Williams, Ltd. & Thomas Turton & Sons, Ltd. ([1955] 1 All E.R. 808) not followed.

(ii) the manufacturers were liable to the plaintiff in damages because (a) they had been negligent in the manufacture of the drift which was supplied by them in a condition likely to cause danger to anyone using it, (b) no intermediate examination of the drift between the time of the manufacture and the time of its use was reasonably to be expected, and (c) the drift was used by the plaintiff for a purpose not so different from the use intended or contemplated by the manufacturers as to absolve them from liability. H

Dictum of LORD WRIGHT in *Grant v. Australian Knitting Mills, Ltd.* ([1936] A.C. at p. 104) considered. I

[As to a master's duty of care at common law, see 22 HALSBURY'S LAWS (2nd Edn.) 187, 188, para. 314; and for cases on the subject, see 34 DIGEST 194-196, 1580-1601.]

As to the liability of the manufacturer of dangerous goods, see 23 HALSBURY'S LAWS (2nd Edn.) 632, para. 887; and for cases on the subject, see 36 DIGEST (Repl.) 85-88, 455-470.]

A Cases referred to:

- (1) *Mason v. Williams & Williams, Ltd. & Thomas Turton & Sons, Ltd.*, [1955] 1 All E.R. 808; 3rd Digest Supp.
- (2) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (3) *Paine v. Colne Valley Electricity Supply Co., Ltd. & British Insulated Cables, Ltd.*, [1938] 4 All E.R. 803; 160 L.T. 124; Digest Supp.
- (4) *Donnelly v. Glasgow Corpn., Henderson v. Glasgow Corpn., Ross v. Glasgow Corpn.*, 1953 S.C. 107; 3rd Digest Supp.
- (5) *Taylor v. Sims & Sims*, [1942] 2 All E.R. 375; 167 L.T. 414; 36 Digest (Repl.) 153, 806.
- (6) *Cilia v. James (H.M.) & Sons*, [1954] 2 All E.R. 9; 3rd Digest Supp.

C

- (7) *Hodgson v. British Arc Welding Co., Ltd. & B. & N. Green & Silley Weir, Ltd.*, [1946] 1 All E.R. 95; [1946] K.B. 302; 115 L.J.K.B. 400; 174 L.T. 379; 2nd Digest Supp.
- (8) *Thomson v. Cremin*, [1953] 2 All E.R. 1185; 3rd Digest Supp.
- (9) *London Graving Dock Co., Ltd. v. Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 36 Digest (Repl.) 54, 296.

D

- (10) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, 458.
- (11) *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85; 105 L.J.P.C. 6; 154 L.T. 18; 36 Digest (Repl.) 86, 461.

Action.

E

The plaintiff, James Gibson Davie, claimed damages for personal injuries and consequential losses and expenses occasioned to him by an accident arising out of the negligence of the first defendants, New Merton Board Mills, Ltd., and the second defendants, Frank Guylee and Son, Ltd.

F

The plaintiff was employed by the first defendants as a maintenance fitter at their premises. On Mar. 8, 1953, in order to knock out a metal key which he was trying to fit into a coupling, he required a drift, a tool for separating one metal part from another when the two have been brought together too tightly to be released by hand. Being unable to find his own drift, he took a drift (referred to hereinafter as "the drift P.2") from the first defendants' store cupboard. The second blow which he struck with a hammer on the head of the drift P.2 caused a piece of metal to enter his left eye and, as a result of the injury, he had lost all useful vision in that eye.

G

The action was originally brought only against the first defendants, but, when the action came on for trial in April, 1956, counsel for the first defendants intimated that he would contend that the plaintiff's remedy, if any, lay against the second defendants on the ground that they were the manufacturers of the drift P.2. The action was then stood over and leave was given to the plaintiff to amend the writ and the statement of claim by adding the second defendants as co-defendants.

H

When the action on the amended pleadings came on for hearing before ASHWORTH, J., HIS LORDSHIP, after reviewing the evidence, found that the piece of metal which entered the plaintiff's eye came from the drift P.2; that the drift was made from silico manganese steel; that the hardness of its head was greatly in excess of the hardness which should have existed having regard to the fact that the drift was intended and designed to be struck on its head with a hammer; that, in the circumstances, the drift was dangerous in that chips or particles might fly off it when it was struck; and that the condition of excessive hardness would not have occurred if proper care had been taken in the manufacture of the drift during the heat treatment process. HIS LORDSHIP further found that tools, including the drift P.2 and other drifts, were purchased by the first defendants in July, 1946, from wholesalers, C. A. Baldwin and Co., Ltd., that the drift P.2 was purchased by the wholesalers from the second defendants,

I

who were old-established tool-makers; and that the second defendants made the drift. It was not disputed by the first defendants that they provided the drift for use by their fitters. A

Martin Jukes, Q.C., and Malcolm Morris for the plaintiff.

Tudor Evans for the first defendants, the employers.

N. G. L. Richards, Q.C., and M. R. Hoare for the second defendants, the manufacturers. B

Cur. adv. vult.

Mar. 14. **ASHWORTH, J.**, read a judgment in which, after stating the facts and his findings, he said: The problem of liability must be considered on the basis that the first defendants (referred to hereinafter as "the employers") provided for their employee, the plaintiff, a dangerous tool which had been negligently made by the second defendants. I consider first the question whether in these circumstances the employers are liable. C

In the first place, it is clear that no negligence can be attributed to any of the employers' own servants or agents. The drift P.2 was apparently in good condition and no allegation was or could be made that the employers' system of maintenance or inspection was at fault. Moreover, the employers bought the drift from a reputable supplier and paid a reasonable price for it. The problem arises in naked simplicity: Are they responsible to the plaintiff because the drift was negligently manufactured by the second defendants? D

An exactly similar problem came before **FINNEMORE, J.**, at Chester Assizes in 1955 in *Mason v. Williams & Williams, Ltd. & Thomas Turton & Sons, Ltd.* (1) ([1955] 1 All E.R. 808), and he decided it in favour of the employers. Apparently, no cases were cited to him in argument and he was able to approach the problem unfettered by authority. The principle on which he decided the case appears in this passage from his judgment (*ibid.*, at p. 809): E

"I take the view that employers, if they buy reputable tools from reputable manufacturers, are not bound to make an examination, either before issuing a tool or after it has been in use for days or weeks or even months, unless there is something which suggests that there is something wrong. Employers have to act as reasonable people and take reasonable care, but if they buy their tools from well-known makers, such as the manufacturers in this case are, they are entitled to assume that the tools will be proper for the purpose for which both sides intended them to be used, and will not require daily, weekly or monthly inspection to see that in fact all is well." F

Counsel for the plaintiff conceded that, if the principle so stated is correct in law, the claim against the employers in the present case must fail, but he went on to contend that authorities, not cited to **FINNEMORE, J.**, compel me to take a different view. The decision in *Wilsons & Clyde Coal Co., Ltd. v. English* (2) ([1937] 3 All E.R. 628) was naturally the foundation on which his argument was based, and, in particular, the speeches of **LORD WRIGHT** and **LORD MAUGHAM**. **LORD MAUGHAM** said (*ibid.*, at p. 646): H

"The proposition would be more correctly stated to be that his duty is to supply and install proper machinery so far as care and skill can secure this result. He can, and often he must, perform this duty by the employment of an agent, who acts on his behalf; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employer's duty. This has sometimes been expressed by saying that the duty is personal to the employer; but the adjective if unexplained is apt to mislead, like the word 'absolute' and the word 'delegate'. The employer can, of course, and often must, delegate the performance of any of his duties to skilled agents; but it would need an altogether new implied term in the I

A contract between employer and employee before a court could properly hold that this delegation has the result of freeing the employer from his liability."

In that case the negligence which caused the respondent's injury was the negligence of someone who was in the appellants' employment and it was held that the appellants could not escape liability for breach of their personal obligation as employers merely by proving that they were careful to select a competent agent to supervise the working of the colliery. The case did not directly involve the question whether employers could escape liability by proving that they had been careful to select a competent independent contractor who turned out to be negligent. Shortly afterwards, however, GODDARD, L.J., had to deal with this very question in *Paine v. Colne Valley Electricity Supply Co., Ltd. & British Insulated Cables, Ltd.* (3) ([1938] 4 All E.R. 803) and said (*ibid.*, at p. 807):

"It follows, in my opinion, not only that there had been a breach of the Factory and Workshop Act, 1901, but also that the first defendants had failed to provide a safe place for their workmen, and had, therefore, committed a breach of their common law duty as recently laid down in *Wilsons & Clyde Coal Co., Ltd. v. English* (2). This is a duty which cannot be avoided by delegation. It is no answer to say, as counsel for the first defendants submitted: 'We employed competent contractors to provide a safe place or plant'. The class of cases in which the employment of a competent contractor affords a defence belongs to a wholly different category in the law of negligence. I have no hesitation in holding that the first defendants have no defence whatever to the plaintiff's claim."

A somewhat similar question arose in Scotland in *Donnelly v. Glasgow Corpn., Henderson v. Glasgow Corpn.* (4) (1953 S.C. 107), where the pursuers sued their employers for injury sustained by them when acting as conductor and driver respectively of one of the defendants' omnibuses. The cause of the injuries was a defect in the chassis, which was manufactured by independent contractors, and the defendants contended that the defect was one of design for the non-discovery of which they could not be blamed, as they relied and were entitled to rely on the manufacturers. In rejecting this contention the Lord Justice-Clerk (LORD THOMSON) said (*ibid.*, at p. 122):

"So far as the driver's and conductor's cases are concerned, they both being servants of the corporation, I have no doubt that the defences are irrelevant. It is admitted by the corporation that the omnibus was defective and they aver that their suppliers were responsible for the defective condition. But on this branch of the law a master cannot escape liability to his servant for defective plant by blaming his agents. The personal responsibility which the law lays on the master in respect of plant covers the activities of any person whom the master employs to provide that plant. The supplier and the master are as one. If then the supplier erred, the master is saddled with the results of that error. It may be that the master is able to have recourse against the supplier on account of his error, but that is no concern of the injured servant, and, indeed, one of the reasons behind the development of this branch of the law is to give the workman the advantage of being able to go directly against his master. Of course, the master does not warrant the plant and he is not liable where the defect is latent in the sense that it was not discoverable by the exercise of reasonable care. If the position in the present case had been that the corporation had been able to say that neither they nor their suppliers could have discovered the defect by means of any reasonable inspection, the defence would be relevant. But, as I have already said, the corporation agree that the defect was patent to their suppliers, and that in this branch of the law means that it was patent to them."

Counsel for the employers, in the present case, acknowledged that in regard to defective plant or premises an employer must accept responsibility if the defect is due to negligence on the part of the employer himself or on the part of someone who can properly be described as the employer's servant or agent. He contended, however, that the term "agent" should not be applied to an independent contractor, and he urged me not to follow the decision in *Donnelly v. Glasgow Corpn.* (4) in which the Lord Justice-Clerk equated independent suppliers with agents: "The supplier and the master are as one". In support of this contention counsel prayed in aid decisions in which employers have escaped liability to their employees when the cause of the injury has been a defect in premises occupied by third parties to which the employees had been sent to work: see, for example, *Taylor v. Sims & Sims* (5) ([1942] 2 All E.R. 375) and *Cilia v. H. M. James & Sons* (6) ([1954] 2 All E.R. 9).

In *Hodgson v. British Arc Welding Co., Ltd. & B. & N. Green & Silley Weir, Ltd.* (7) ([1946] 1 All E.R. 95 at p. 97), HILBERY, J., said:

"In accordance with the usual custom, the first defendants' workmen, including the plaintiff, found a stage and scaffolding provided by the second defendants, and there was no reason to suppose that it would not be a reasonably safe scaffolding. I think it is putting the duty of an employer in those circumstances too high to say that an electric arc welding firm, or any other sub-contractor doing a specialised type of work, is under a duty separately to inspect every piece of scaffolding in order to see that what the shipwright has done has been done with proper care and skill. They are not competent, or qualified, to criticise what the shipwright does in the way of erecting a scaffolding. The shipwright is an expert in the matter, whereas the sub-contractors probably know nothing about it. It would be ridiculous to say that the employer in those circumstances was responsible to his workmen, because he (the employer) who knows nothing about the erection of scaffoldings, and how to make them reasonably safe, did not inspect with the eye of ignorance the work which was being done with the eye of knowledge and skill. I do not think that there was any breach of duty by the first defendants which led to this accident—i.e., breach of any duty owed in law."

In this class of case an employer will not escape liability to his injured employee if the dangerous condition of the third party's premises was manifest and the employer took no action about it. As LORD WRIGHT said in *Thomson v. Cremin* (8) ([1953] 2 All E.R. 1185 at p. 1192), which was decided in 1941 but reported in 1953:

"No doubt, if there are apparent indications which he observes, or ought to observe, that the structure is defective, he owes a duty to take reasonable measures for the protection of his men."

In accordance with this last-mentioned principle, counsel for the employers recognised that, if equipment obtained by an employer from an independent supplier was manifestly defective, an employer would be liable if he issued such equipment to an employee and injury resulted. He went on to submit, however, that there was no logical distinction between an employer's position in regard to a third party's premises and his position in regard to equipment reasonably and perhaps necessarily obtained by him from an independent supplier. In substance his argument came to this: (a) an employer's duty is to take care himself and is not a duty to see that care is taken by other persons not in his employment or under his control; (b) in the present case the employers fully discharged their duty to take care.

In my judgment, notwithstanding the decision of FINNEMORE, J., in *Mason v. Williams & Williams, Ltd.* (1), from which I am naturally reluctant to differ, the authorities to which I have referred constrain me to hold the employers

A liable. In addition, there is another passage in LORD WRIGHT'S speech in *Thomson v. Cremin* (8) ([1953] 2 All E.R. at p. 1191) which may usefully be cited:

B "The duty of the invitor towards the invitee is, in my opinion, a duty personal to the former, in the sense that he does not get rid of the obligation by entrusting its performance to independent contractors. It is true that the invitor is not an insurer: he warrants, however, that due care and skill to make the premises reasonably safe for the invitee have been exercised, whether by himself, his servants, or agents or by independent contractors whom he employs to perform his duty. He does not fulfil the warranty merely by leaving the work to contractors, however reputable or generally competent. His warranty is broken if they fail to exercise the proper care and skill."

C It is true that LORD WRIGHT is there dealing with the position of an invitor, but the duty of an employer to his workmen is certainly no less. Indeed, in *London Graving Dock Co., Ltd. v. Horton* (9) ([1951] 2 All E.R. 1 at p. 5), LORD PORTER said: "Admittedly the duty of a master to his servant is higher than that of an invitor to his invitee".

D For the sake of completeness, I should add that counsel for the employers also contended that the employers should escape on the ground that the defect in the drift was latent, or at least latent to them. While I am satisfied that the employers were unaware of any defect in the drift, and could not reasonably have discovered it, I am also satisfied that the defect was not latent so far as the second defendants were concerned. If the employers were to escape on the ground that the defect was latent, they would, in my view, need to establish that it was latent in regard to the second defendants. This very point was considered by the Lord Justice-Clerk in *Donnelly v. Glasgow Corpn.* (4), and I respectfully follow that decision.

F Much of the argument of counsel for the second defendants was addressed to the question whether the plaintiff had proved that the particle in his eye came from the drift P.2 and that the drift in question was manufactured by the second defendants. On those points the second defendants have failed. It was, however, still contended that they were under no liability to the plaintiff and that *Mason v. Williams & Williams, Ltd.* (1), in which the manufacturers of the chisel were held liable, was no authority to the contrary. It is true that, at the time when the plaintiff met with his accident, he was not using the drift in conjunction with the sleeve or socket for which it was designed and supplied. He was using the drift in order to knock out a metal key which he was trying to fit into a coupling. The key was too large for the opening and, when removed, would have to be filed down. As already stated, I accept the plaintiff's evidence that he did not strike an unreasonably hard blow, and, although as a rule a drill could be released from a sleeve or socket by means of a light blow, the evidence satisfied me that, even if the drift were used solely for that purpose, occasions would probably arise when the drift would have to be struck at least as hard as it was struck on the day in question.

H The question, therefore, arises whether it is enough for the second defendants to show that the use to which the drift was actually put was not the use for which the drift was supplied, even though the stress on the drift would have been the same in both cases. The argument for the second defendants was put in a two-fold form, although both forms were founded on the premise that the plaintiff was using the drift for a purpose and in a manner different from that intended by the second defendants. In the first place, it was said that by using the drift as he did the plaintiff took himself out of the class of persons comprehended in the word "neighbour" used and explained by LORD ATKIN in *M'Alister (or Donoghue) v. Stevenson* (10) ([1932] A.C. 562 at p. 582). Secondly, it was said that the duty of care only extended to occasions when the drift was used in the

manner intended, and reference was made to the judgment of the Privy Council in *Grant v. Australian Knitting Mills, Ltd.* (11) ([1936] A.C. 85), in which these words occur (*ibid.*, at p. 104):

"Equally also may the word 'control' embarrass, though it is conveniently used in the opinions in *Donoghue's* case (10) to emphasise the essential factor that the consumer must use the article exactly as it left the maker, that is in all material features, and use it as it was intended to be used."

While I would accept the contention that use of an article for a purpose materially different from that for which the maker designed it or which he might reasonably be taken to have contemplated might afford him an answer to a claim founded on the article's dangerous or defective condition, I do not think that such an answer is available to the second defendants in the present case. Maybe it is a question of degree and, in so far as that is correct, I hold that the use of the drift by the plaintiff was not so foreign to the use intended or contemplated as to absolve the second defendants from liability. I do not agree with the contention that use for a different, albeit similar, purpose *ipso facto* frees the makers from liability. In support of this contention it was urged that by giving effect to it the court would be spared the difficult task of comparing the actual with the intended use and the possible effect of each on the article. This way of escape may appear attractive, but in my view the task of comparing the uses ought to be undertaken, and the question is ultimately one of fact.

In my judgment, the second defendants are liable to the plaintiff because their servants were negligent in the heat treatment of the drift P.2, which was supplied by them in a condition likely to cause danger to anyone using it. I also hold that no intermediate examination of the drift between the time of the manufacture and the time of its actual use was reasonably to be expected. It seems to me wholly unreasonable to expect an employer to test a drift for hardness before issuing it to his employee, and no other examination would have revealed the danger existing in this particular drift.

Counsel for the second defendants did not argue before me any point on the Limitation Act, 1939, s. 2 (1), as amended by the Law Reform (Limitation of Actions, Etc.) Act, 1954, s. 2 (1), but expressly reserved the right to do so on appeal, when in his view there would be more scope for him to challenge or distinguish cases binding on me.

The plaintiff is now thirty-two years old and is for all practical purposes a one-eyed man. Fortunately, he was able to resume his work without any long absence after the accident. The agreed special damage amounts to £30. In my judgment, general damages may fairly be assessed at the sum of £2,000 and, accordingly, I give judgment for the plaintiff against both defendants for the sum of £2,030.

Judgment for the plaintiff.

Solicitors: *W. H. Thompson* (for the plaintiff); *E. P. Rugg & Co.* (for the first defendants); *Doyle, Devonshire & Co.*, agents for *Kershaw, Tudor & Co.*, Sheffield (for the second defendants).

[Reported by E. COCKBURN MILLAR, *Barrister-at-Law.*]

ATTORNEY-GENERAL OF THE COMMONWEALTH OF
AUSTRALIA v. REGINAM AND THE BOILERMAKERS'
SOCIETY OF AUSTRALIA AND OTHERS.

KIRBY AND OTHERS v. REGINAM AND THE
BOILERMAKERS' SOCIETY OF AUSTRALIA AND OTHERS.

[PRIVY COUNCIL (Viscount Kilmuir, L.C., Viscount Simonds, Lord Morton of Henryton, Lord Tucker, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow), January 14, 15, 16, 17, 21, 22, 23, March 19, 1957.]

Privy Council—Australia—Constitution of the Commonwealth of Australia—Separation of judicial and executive power—Combination of arbitral power and judicial power in Court of Conciliation and Arbitration—Validity—Commonwealth Conciliation and Arbitration Act, 1904-1952, s. 29 (1), s. 29A—Constitution of the Commonwealth of Australia, 1900 (63 & 64 Vict. c. 12, s. 9), s. 51 (xxxix), Chapter III.

The Commonwealth Conciliation and Arbitration Act, 1904-1952, whose primary purpose was the settlement of industrial disputes by conciliation and arbitration, established the Commonwealth Conciliation and Arbitration Court as a superior court of record and vested in it original jurisdiction to alter standard hours of work, basic wages, and other matters. Thus there were vested in the court functions of an administrative, arbitral and executive character. By s. 29 (1) (b), (c) and s. 29A of the Act, judicial powers were conferred on the court to enable it to order compliance with its awards and to enjoin persons from committing contraventions of its awards and to punish for contempt.

In January, 1952, the conciliation court made an award binding on an association of employers and the respondent union. This award included a provision that no organisation party to it should be concerned in any way in any ban or restriction on working in accordance with the award. In May, 1955, the court made an order requiring the respondent union to obey the award and in June, 1955, the court made an order fining the respondent union £500 for contempt. The respondent union obtained a writ of prohibition on the ground that s. 29 (1) (b), (c) and s. 29A of the Act were repugnant to the Constitution of the Commonwealth of Australia and were invalid. On appeal,

Held: (i) on the true construction of the Constitution of the Commonwealth of Australia, having regard among other enactments particularly to s. 51 (xxxix), the Federal Parliament could validly legislate in regard to the judicial power only through and within the limits of Chapter III of the Constitution; there was nothing in Chapter III which justified judicial and non-judicial functions being united in one body and, therefore, s. 29 (1) (b), (c) and s. 29A of the Conciliation and Arbitration Act, 1904-1952, which purported to unite in the Court of Conciliation and Arbitration judicial power and non-judicial functions, were invalid as being *ultra vires*.

(ii) the appeal did not involve any inter se question and was not, therefore, excluded by s. 74 of the Constitution of the Commonwealth of Australia.

Per CURIAM: the functions of an industrial arbitrator are completely outside the realm of judicial power and are of a different order (see p. 49, letter I, post) . . . the exercise of the judicial function is concerned, as the arbitral function is not, with the determination of a justiciable issue (see p. 55, letter I, post).

Appeal dismissed.

[As to the distribution of powers under the Constitution of the Commonwealth of Australia, see 5 HALSBURY'S LAWS (3rd Edn.) 510, para. 1120. A

For the Constitution of the Commonwealth of Australia (1900) s. 51 (xxxix) and Chapter III, see 6 HALSBURY'S STATUTES (2nd Edn.) 277, 281-283.]

Cases referred to:

- (1) *Waterside Workers Federation v. Alexander*, (1918), 25 C.L.R. 434; Digest Supp. B
- (2) *New South Wales (State of) v. Commonwealth etc., Commonwealth v. The State of New South Wales (The Wheat Case)*, (1915), 20 C.L.R. 54; 8 Digest (Repl.) 754, 796.
- (3) *Victorian Stevedoring & General Contracting Co., Pty., Ltd. v. Dignan*, (1931), 46 C.L.R. 73; Digest Supp.
- (4) *Dalgarno v. Hannah*, (1903), 1 C.L.R. 1. C
- (5) *Re Judiciary*, (1921), 29 C.L.R. 257; 8 Digest (Repl.) 757, 845.
- (6) *R. v. Federal Court of Bankruptcy, Ex p. Lowenstein*, (1938), 59 C.L.R. 556; 11 A.L.J. 521; 10 A.B.C. 115; 44 A.L.R. 173; Digest Supp.
- (7) *Huddart Parker & Co., Pty., Ltd. v. Moorehead*, (1908), 8 C.L.R. 330.
- (8) *Queen Victoria Memorial Hospital v. Thornton*, (1953), 87 C.L.R. 144.
- (9) *R. v. Davison*, (1954), 90 C.L.R. 353. D
- (10) *R. v. Bernasconi*, (1915), 19 C.L.R. 629; 8 Digest (Repl.) 756, 823.
- (11) *Porter v. R., Ex p. Yee*, (1926), 37 C.L.R. 433; 8 Digest (Repl.) 757, 851.

Appeals.

Consolidated appeals by special leave by the Attorney-General of the Commonwealth of Australia and by three judges of the Commonwealth Court of Conciliation and Arbitration from an order of the High Court of Australia (SIR OWEN DIXON, C.J., McTIERNAN, FULLAGAR, KITTO, WILLIAMS, WEBB and TAYLOR, J.J.), dated Mar. 2, 1956, making absolute an order nisi for a writ of prohibition directed against the judges of the Commonwealth Court of Conciliation and Arbitration and the Metal Trades Employers' Association, all of whom were respondents to the writ of prohibition. The order for the writ of prohibition, which was applied for by the Boilermakers' Society of Australia, prohibited further proceedings under two orders made by the Court of Conciliation and Arbitration under the Commonwealth Conciliation and Arbitration Act, 1904-1952. The first of these orders, dated May 31, 1955, required obedience by the Boilermakers' Society of Australia to a provision in the Metal Trades Award, 1952, by ceasing to be a party to a ban on work in support of strike action; and the second order dated June 28, 1955, fined the Boilermakers' Society of Australia £500 for contempt of court for failure to comply with the first order. E F G

The facts appear in the judgment of VISCOUNT SIMONDS.

Solicitor-General of the Commonwealth of Australia (K. H. Bailey, Q.C.), D. I. Menzies, Q.C., and C. I. Menhennitt (all of the Australian Bar) for the appellants.

The respondents did not appear and were not represented. H

VISCOUNT SIMONDS: These consolidated appeals from an order of the High Court of Australia raise questions of great constitutional importance on which the judges of that court were not able to agree. This has had for their Lordships the advantage that both sides of the case have been presented with the cogency and clarity which distinguish the judgments of the court, an advantage the more valuable because they have not had the assistance of argument by counsel for the respondents. I

The constitutional issues that arise can best be understood if the relevant facts are first briefly stated. The respondents, the Boilermakers' Society of Australia, which will be called the union, is an organisation of employees registered in accordance with the provisions of the Conciliation and Arbitration Act, 1904-1952, a Federal Act, which will be referred to as the Act. The Metal Trades Employers' Association is an organisation of employers similarly registered.

A On Jan. 16, 1952, an award was made under the Act binding both the union and the association, of which cl. 19 (ba) (i) was as follows:—

“No organisation party to this award shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the performance of work in accordance with this award.”

B The association, alleging that the union had not complied with this clause of the award, applied to the Commonwealth court of Conciliation and Arbitration, a court established under the Act which will be referred to as “the court”, for a rule that the union should show cause why an order should not be made under s. 29 (1) (b) of the Act ordering compliance with the said clause of the award, and an order under s. 29 (1) (c) of the Act enjoining them from committing or continuing a breach of the same clause. On May 16, 1955, the court made an order accordingly. The rule came on for hearing on May 31 before the court constituted by KIRBY, DUNPHY and ASHBURNER, JJ., and (subject to certain immaterial amendments) was made absolute, the union being ordered to comply with the award as therein stated and being enjoined from further breach of it. The union having, as the association alleged, disobeyed the order of the court of May 31, 1955, the latter issued a summons directed to the former to answer a charge of contempt of the court in respect of such disobedience and, on the hearing of this summons, the court, on June 28, 1955, made orders fining the union £500 for contempt and ordering them to pay the costs of the association.

D At this stage the controversy begins which has now reached their Lordships, for, on July 30, 1955, the union applied to the High Court of Australia and obtained from McTIERNAN, J., an order nisi directed to the judges of the court which had made the orders of May 31 and June 28, 1955, and to the association to show cause why a writ of prohibition should not issue prohibiting them from further proceeding with or on the said orders. The ground of the application and order may conveniently be set out in full. It was

F “That the provisions of s. 29 (1) (b) and s. 29 (1) (c) and s. 29A of the Conciliation and Arbitration Act, 1904-1952, are ultra vires and invalid in that:—(A) the Commonwealth Court of Conciliation and Arbitration is invested by statute with numerous powers, functions, and authorities of an administrative, arbitral, executive and legislative character, and (B) the powers which s. 29 (1) (b), s. 29 (1) (c) and s. 29A respectively of the Conciliation and Arbitration Act, 1904-1952, purport to vest in the said court and exercised by it in making the said orders are judicial, and (C) the said s. 29 (1) (b), s. 29 (1) (c) and s. 29A are accordingly contrary and repugnant to the provisions of the Constitution of the Commonwealth and, in particular, Chapter III thereof.”

H The matter duly came before the High Court and was heard by seven judges in August, 1955. On Mar. 2, 1956, the order nisi was made absolute, a majority judgment being given by SIR OWEN DIXON, C.J., and McTIERNAN, FULLAGAR and KITTO, JJ., and separate dissentient judgments by WILLIAMS, J., WEBB, J., and TAYLOR, J.

I After this brief statement of the facts it will be convenient to turn to the Act, and it must be considered in the first place in the form which it bore at the date when the relevant orders were made. It will be necessary at a later stage to refer to some of the changes which were made before it assumed that form. The title of the Act is not without importance. It is (and always has been) intituled

“An Act relating to Conciliation and Arbitration for the prevention and settlement of Industrial Disputes extending beyond the limits of any one state.”

The chief objects of the Act are stated to be (s. 2)

“(a) to establish an expeditious system for preventing and settling industrial disputes by the methods of conciliation and arbitration: (b) to promote goodwill in industry and to encourage the continued and amicable operation of orders and awards made in settlement of industrial disputes: (c) to provide for the appointment of conciliation commissioners having power to prevent and settle industrial disputes by conciliation and arbitration: (d) to provide means whereby a conciliation commissioner may promptly and effectively, whether of his own motion or otherwise, prevent and settle threatened, impending, probable or existing industrial disputes: (e) to provide for the observance and enforcement of such orders and awards: (f) to constitute a Commonwealth Court of Conciliation and Arbitration having exclusive appellate jurisdiction in matters of law arising under this Act and limited jurisdiction in relation to industrial disputes; and (g) to encourage the organisation of representative bodies of employers and of employees and their registration under this Act.”

Such being the title of the Act and such its chief objects, it cannot be denied that its primary purpose and, in effect, its only purpose is the settlement of industrial disputes by conciliation and arbitration. It is necessary, however, to see what part is to be played by the court established under the Act in a field apparently so remote from the proper exercise of the judicial function.

After certain introductory matters in Part I, the Act proceeds to provide, in Part II, for the appointment of conciliation commissioners and to prescribe their duties and functions. The importance for the present purpose of this Part of the Act lies in the fact that it is made competent for, and in certain events compulsory on, the conciliation commissioner to refer disputes in which he has original cognisance to the chief judge of the court who may in turn refer them to the court for hearing and settlement. The jurisdiction of the court (if, in this connexion, jurisdiction is a proper term to use) extends to industrial disputes beyond those specially referred to it by later provisions of the Act. Part III of the Act establishes the court. It enacts that there shall be a Commonwealth Court of Conciliation and Arbitration, that it shall consist of a chief judge and such other judges as are appointed in pursuance of the Act and that it shall be a superior court of record. It provides that the chief judge and each other judge shall be appointed by the Governor-General and shall not be removed except by the Governor-General on an address from both Houses of the Parliament in the same session, praying for his removal on the ground of proved misbehaviour and incapacity, and it makes provision for remuneration. It thus complies with the provisions of s. 72 of the Constitution in regard to the justices of the High Court and of the other courts created by the Parliament. It then prescribes what jurisdiction may be exercised by a single judge, other jurisdiction being exercised by not less than three judges. By s. 25, an important original jurisdiction is conferred on the court. It enacts that the court may, for the purpose of preventing or settling an industrial dispute, make an order or award (a) altering the standard hours of work in an industry, (b) altering the basic wage for adult males (that is to say, that wage, or that part of a wage, which is just and reasonable for an adult male, without regard to any circumstance pertaining to the work on which, or the industry in which, he is employed) or the principles on which it is computed, (c) making provision for or in relation to, or altering a provision for or in relation to, long service leave with pay, (d) determining or altering the basic wage for females as therein mentioned.

Enough has been said to place it beyond dispute that there have been vested in the court powers, functions, and authorities of an administrative, arbitral, and executive character as alleged in the application for a writ of prohibition.

Next it must be asked whether judicial power also has been vested in it. It is clear that that is a purpose of the Act. For otherwise it would not be

- A called a court or a superior court of record, or make such provision for the appointment of judges as has already been mentioned. But, if this is not enough, it is necessary only to look at s. 29 (1) and s. 29A of the Act. Under s. 29, the court is empowered (a) to impose penalties as therein mentioned for a breach or non-observance of an order or award proved to the satisfaction of the court to have been committed, (b) to order compliance with an order or award proved
- B to the satisfaction of the court to have been broken or not observed, (c) by order to enjoin an organisation or person from committing or continuing a contravention of the Act or a breach or non-observance of an order or award, (d) to give an interpretation of an order or award, together with divers other powers. And by s. 29A, it is provided (i) that the court has the same power to punish contempts of its power and authority, whether in its relation to its judicial powers
- C or otherwise, as is possessed by the High Court in respect of contempts of the High Court, (ii) that the jurisdiction of the court to punish a contempt of the court committed in the face or hearing of the court, when constituted by a single judge, may be exercised by that judge, and that in any other case the jurisdiction of the court to punish a contempt of the court shall (without prejudice as therein mentioned) be exercised by not less than three judges, (iii)
- D that the court has power to punish, as a contempt of the court, an act or omission although a penalty is provided in respect of that act or omission under some other provision of the Act, (iv) that the maximum penalty which the court is empowered to impose in respect of a contempt of the court consisting of a failure to comply with an order of the court made under s. 29 (1) (b) or (c) is—(a) where the contempt is by (i) an organisation not consisting of a single employer, £500, or (ii) an
- E employer, or the holder of an office in an organisation as therein mentioned, £200 or imprisonment for twelve months, or (b) in any other case £50. No other section of the Act need be mentioned. It has become clear that, just as administrative, arbitral and executive powers, functions and authorities are vested in the court so also is judicial power vested in it even to the extent of fining a citizen or depriving him of his liberty.
- F At this stage their Lordships would refer to a significant passage in the majority judgment of the High Court which is as follows (94 C.L.R. at p. 271):

“There is, of course, a wide difference—and probably it is more than one of degree—between a denial on the one hand of the possibility of attaching judicial powers accompanied by the necessary curial and judicial character to a body whose principal purpose is non-judicial in order that it may better accomplish or effect that non-judicial purpose and, on the other hand, a denial of the possibility of adding to the judicial powers of a court set up as part of the national judicature some non-judicial powers that are not ancillary but are directed to a non-judicial purpose. But if the latter cannot be done clearly the former must be then completely out of the question.”

Their Lordships by no means dissent from this statement, but they make use of it in order to emphasise that the substance of the matter must be regarded and that, in the matter under consideration, the primary and essential object of the Act was the settlement of industrial disputes, that this object can be fulfilled only by the intermediacy of a body of persons established for that purpose, that the functions of a body so established are not judicial, that to call it a court or a superior court of record does not convert its non-judicial functions into judicial functions, and that to add judicial functions or powers to them means only that a body created to exercise non-judicial functions has now vested in it judicial functions also. Before turning to a consideration of the vital question in this case, it is desirable to repeat that (as was said in the majority judgment) the function of an industrial arbitrator is completely outside the realm of judicial



power and is of a different order. As was said by ISAACS and RICH, J.J., in *Waterside Workers Federation v. Alexander* (1) ((1918), 25 C.L.R. 434 at p. 463):

"... the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not to enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other."

And as was said by TAYLOR, J., in his dissentient judgment in the present case (94 C.L.R. at p. 341):

"It is, of course, much too late in the day to contend that 'arbitral' functions of the nature created by the Conciliation and Arbitration Act can ever constitute any part of the judicial power of the Commonwealth."

With this statement counsel for the appellants expressed his agreement. It is necessary throughout to bear in mind that the words "arbitration" and "arbitral functions" refer exclusively to the arbitration and arbitral functions for which the Act provides. The same words in another context may mean something closely resembling a judicial process.

It must be stated here that in their formal Case the respondents objected to the competence of this appeal on the ground that it raised what has become familiarly known as an inter se question and, therefore, fell within s. 74 of the Constitution. The argument in favour of the objection was fully stated in the Case and their Lordships gave the question long consideration. They have, however, been satisfied that the objection is not a valid one and will state their reasons after they have dealt with the case on its merits.

The problem can now be stated. Is it permissible under the Constitution of the Commonwealth of Australia for the Parliament to enact that on one body of persons, call it tribunal or court, arbitral functions and judicial functions shall be together conferred? The problem can be solved only by an examination of the Constitution itself. The expression "arbitral functions" is here used to describe compendiously the functions exercisable by the court other than its judicial functions.

The Constitution was enacted and established by an Act of the Imperial Parliament (63 & 64 Vict. c. 12)*. The Act recited that the people of New South Wales, Victoria, South Australia, Queensland and Tasmania had agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom and under the Constitution thereby established and, by s. 9, enacted that the Constitution of the Commonwealth should be as therein followed. Some weight has been attached to the fact that the Act was an Imperial Statute, but it is difficult to see how this can affect its interpretation. It can safely be assumed (and it is the historical fact) that in convention after convention in Australia the terms of the Constitution were hammered out by members of the several states who were profoundly conversant with the political systems of the United Kingdom and the United States and were, in particular, well aware both of the advantages of the separation of powers in a federal system and of the danger of a too rigid adherence to that theory. It is with this background that the Constitution must be interpreted, and their Lordships find it equally easy to accept as general propositions the statement of the appellants that, whereas under the United States Constitution there is a complete separation of powers, in the Australian Constitution which in some aspects follows the British model, the doctrine is not strictly followed, and on the other hand

* The Commonwealth of Australia Constitution Act, 1900, 6 HALSBURY'S STATUTES (2nd Edn.) 268.

A the statement of the respondents, founded on the highest authority, that "the Constitution is based on a separation of the functions of government and the powers which it confers are divided into three classes—legislative, executive and judicial." Both these statements are true, but both are subject to the qualifications which are to be found in the Constitution itself.

B That the Constitution is based on a separation of the functions of government is clearly to be seen in its structure, which closely follows the model of the American Constitution. By s. 1, which is contained in Chapter I "The Parliament", it is provided that the legislative power of the Commonwealth shall be vested in a Federal Parliament, and the following fifty-nine sections deal broadly with its composition and powers. It is only necessary at this stage to refer to s. 51, which provides that the Parliament shall, subject to the Constitution, C have power to make laws for the peace, order, and good government of the Commonwealth with respect to (amongst other matters)

"(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state."

D By s. 61, which is the first section of Chapter II "The Executive Government", it is provided that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of the Constitution, and of the laws of the Commonwealth. The following nine sections of Chapter II deal with the exercise of executive power. By s. 71, which is the first section of Chapter III "The Judicature", it is provided that the judicial power of the E Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The following nine sections of Chapter III deal with the appointment of judges, their tenure of office and remuneration, the appellate jurisdiction of the High Court, appeals to the Queen in Council, the original and additional jurisdiction F of the High Court, the power of the Parliament to define jurisdiction and certain other matters.

Such is the bare structure of the Constitution, and it will be necessary to look more closely into some of its provisions. But enough has been said to suggest that, in the absence of any contrary provision, the principle of the separation of powers is embodied in the Constitution. Section 1, which vests G legislative power in a Federal Parliament, at the same time negatives such power being vested in any other body. In the same way, s. 71 and the succeeding sections, while affirmatively prescribing in what courts the judicial power of the Commonwealth may be vested and the limits of their jurisdiction, negatives the possibility of vesting such power in other courts or extending their jurisdiction beyond those limits. It is to Chapter III alone that the Parliament must have H recourse if it wishes to legislate in regard to the judicial power. That chapter is, in its terms, detailed and exhaustive, and their Lordships dissent from the contention sometimes explicitly, sometimes implicitly, advanced that, inasmuch as there is no express prohibition of other legislation in this field, it is open to the Parliament to turn from Chapter III to some other source of power.

I Yet this general proposition is subject to a qualification, and it is a qualification which powerfully supports the proposition. For in s. 51*, the final matters in respect of which the Parliament is empowered to make laws are found in placitum (xxxix):

"Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government

* Constitution of the Commonwealth of Australia, 1900 (63 & 64 Vict. c. 12 s. 9), s. 51 (xxxix); 6 HALSBURY'S STATUTES (2nd Edn.) 277.

of the Commonwealth, or in the Federal Judicature, or in any Department or officer of the Commonwealth." A

This placitum looks forward to the vesting of power in the Federal Judicature which is found in Chapter III; it assumes such vesting, and empowers the Parliament to make laws in respect of matters incidental to the execution of such power. The conferment of such a limited power of legislation in s. 51 makes it very clear that it is in Chapter III alone that a larger power is contained. There could not well be a clearer case for the application of the maxim "Expressio unius exclusio alterius". B

The argument so far appears to lead irresistibly to the conclusion that it is only in Chapter III that legislative authority is to be found to vest the judicial power of the Commonwealth. If so, it is to the provisions of that chapter that one must look to find authority for the vesting in a court powers and functions which are not judicial, or to vest in a body of persons exercising non-judicial functions part of the judicial power of the Commonwealth. The problem is advisedly stated in this alternative form, because it appears to their Lordships (to use words familiar in connexion with another much debated section) that it would make a mockery of the Constitution to establish a body of persons for the exercise of non-judicial functions, to call that body a court and, on the footing that it is a court, vest in it judicial power. In *Alexander's* case (1), which has already been referred to, GRIFFITH, C.J. (25 C.L.R. at p. 442), once and for all established this proposition in words that have not, perhaps, always been sufficiently regarded. He said: C D

"It is impossible under the Constitution to confer such functions [i.e., judicial functions] upon any body other than a court, nor can the difficulty be avoided by designating a body, which is not in its essential character a court, by that name, or by calling the functions by another name. In short, any attempt to vest any part of the judicial power of the Commonwealth in any body other than a court is entirely ineffective." E

And in the same case these words came from BARTON, J. (*ibid.*, at p. 451): F

"Whether persons were judges, whether tribunals were courts, and whether they exercised what is now called judicial power, depended and depends on substance and not on mere name."

The question in whatever form it is stated is whether and how far judicial and non-judicial power can be united in the same body. Their Lordships do not doubt that the decision of the High Court is right and that there is nothing in Chapter III, to which alone recourse can be had, which justifies such a union. It may be repeated that this is subject to such qualification as is imposed by s. 51 (xxxix). G

Little reference has so far been made to the great volume of authority on this subject. Their Lordships have thought it right to make an independent approach to what is, after all, a short, if not a simple question of construction of the Constitution. They must add that the exhaustive examination of the problem and the review of the relevant authorities which are to be found in the majority judgment of the High Court have been of the greatest assistance to them and appear to lead inevitably to the conclusion which they and the High Court have reached. H I

It is proper, however, if only out of respect to the dissentient judgments in the High Court and to the argument of learned counsel for the appellants, to refer to certain aspects of the case. In the first place it has been a matter of somewhat theoretical controversy how far the Constitution embodies the doctrine of separation of powers. It is a doctrine, said WILLIAMS, J., which should be applied "with great circumspection". Their Lordships do not dissent, but must bear in mind how often it has been stated in the High Court

A that the Constitution is based on a separation of the functions of government. One among many examples may be found in the *Wheat Case* (*State of New South Wales v. Commonwealth*) (2) ((1915), 20 C.L.R. 54 at p. 88). But, first and last, the question is one of construction, and they doubt whether, had Locke and Montesquieu never lived nor the Constitution of the United States ever been framed, a different interpretation of the Constitution of the Commonwealth could validly have been reached. Their Lordships would adopt the words of DIXON, J., in *Victorian Stevedoring & General Contracting Co. Pty., Ltd. v. Dignan* (3) ((1931), 46 C.L.R. 73 at p. 96):

C “But an independent consideration of the provisions of the Commonwealth Constitution unaided by any such knowledge [i.e., knowledge of the Constitution of the United States] cannot but suggest that it was intended to confine to each of the three departments of government the exercise of the power with which it is invested by the Constitution.”

D It was consistent with this view that, in the very early days of the Commonwealth, the High Court construed the Constitution as containing negative implications, saying in *Dalgarno v. Hannah* (4) ((1903), 1 C.L.R. 1 at p. 10) that Parliament “has no authority to create any additional appellate jurisdiction.”

E Then it has been urged that the doctrine has not always been closely observed in regard to the separation of legislative and executive powers. That is, perhaps, so, but the explanation of it rests not on a theoretical rejection of the doctrine but on the text of the Constitution as expounded in a series of cases culminating in *Dignan's* case (3), from which the majority judgment in the present case cites significant passages. It is worth noting that in the judgment of GAVAN DUFFY, C.J., and STARKE, J., in that case a distinction is made between the union of legislative and executive power on the one hand and the union of judicial and other power on the other hand.

F “It does not follow that, because the Constitution does not permit the judicial power of the Commonwealth to be vested ”

G etc., are the opening words of a passage (46 C.L.R. at p. 84) in which the granting of a regulative power akin to a legislative power to a body other than Parliament itself was justified. Nor, if any further justification is sought than that of the text itself of the Constitution, would it be difficult to find a distinction. The delegation of regulative power by the legislature to an executive body does not mean that the legislature has abdicated a power constitutionally vested in it. For the executive body is at all times subject to the control of the legislature. On the other hand, in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital Constitutional safeguard.

I Reference at this stage may conveniently be made to an illuminating case, *Re Judiciary* (5) ((1921), 29 C.L.R. 257). The Judiciary Act, 1903-1920, purported to give the High Court jurisdiction to hear and determine any question of law as to the validity of a Federal Law which the Governor-General might refer for hearing and determination, and to make the determination final and conclusive and subject to no appeal. The Act was held to be invalid. The jurisdiction purported to be given was treated as judicial power but as a judicial power falling outside the judicial power which alone could, under Chapter III of the Constitution, be conferred on a court. It is, as is pointed out in the majority judgment in the present case, at least a question whether any judicial power in a real sense was conferred by the Act; for it might truly be said that what the Governor-General was empowered to refer was rather an academic question than a justiciable issue. But it was treated as judicial

power and, on that footing, the Act was held invalid. The High Court justly A
observes that it would be strange indeed if the Parliament was incompetent
to vest in the judicature judicial power outside the provisions of Chapter III
but competent to vest in it executive or other powers. Would the result, it
might be asked, have been different, if the High Court in the case cited had taken
the alternative view that the Act does not purport to confer judicial power ?
It is possible that the case may have a deeper significance. For it has by many B
been thought an unwise practice to try to anticipate judicial decisions extra-
judicially by obtaining the opinion or advice of the judges, the reason being
that it is regarded as tending to sap their independence and impartiality. More
serious objection may, for the same reason, be taken to vesting in them powers
which, if exercised by another, would be open to challenge on all the grounds
that are available to a citizen who thinks his rights have been infringed. For C
it is their own executive act which they may be invited judicially to examine.

These considerations lead directly to a question which is of the utmost
importance because it has a close bearing on the dissentient judgment of
WILLIAMS, J. If the judicial power can (contrary to their Lordships' opinion)
be united in one body with other powers beyond those prescribed by s. 51 (xxxix)*,
with what powers can it be so united ? There have, no doubt, from time to D
time been judicial statements that such a union is possible. In *Dignan's* case (3),
for example, EVATT, J., said in general terms that a court set up by the Federal
Parliament might exercise non-judicial functions, though he clearly did not
mean any and every non-judicial function. In other cases it has been suggested
that the union is possible so long as the power joined to the judicial power is
not "incompatible" or "inconsistent" with it: see, for example, the judgment E
of LATHAM, C.J., in *R. v. Federal Court of Bankruptcy, Ex p. Lowenstein* (6)
((1938), 59 C.L.R. 556 at p. 566). But in the present case it became necessary
to face the question squarely and ask what was the test of legitimate union.
It fell to counsel for the appellants, who argued the case with conspicuous
ability, to answer the question. His answer was that any power might be F
joined with the judicial power which was not inconsistent with its exercise.
Pressed to say what, in this context, "inconsistent" meant, he replied
that he meant any power which it would be contrary to natural justice for
the judicial authority to exercise. It appears to their Lordships very difficult
to determine the intended scope of this exception, but it would be reasonable G
to include within it any combination of functions in which a tribunal might be
both actor and judge. The fundamental principle which makes such a com-
bination appear contrary to natural justice is not remote from that which inspires
the theory of the separation of powers. Far different was the test suggested
by WILLIAMS, J. Generally he acceded to the appellants' contention that
judicial power might be united in the same body with other powers. But, H
after referring to the decision under s. 122 of the Constitution (which will be
later briefly examined), he said (94 C.L.R. at p. 315):

"This being so, it would be irrational to imply a prohibition against the
Parliament imposing similar functions on federal courts by legislation under
s. 51. In each case the implied limitations must be the same. The functions I
must not be functions which courts are not capable of performing consis-
tently with the judicial process. Purely administrative discretions governed
by nothing but standards of convenience and general fairness could not be
imposed upon them. Discretionary judgments are not beyond the pale
but there must be some standards applicable to a set of facts not altogether
undefined before a court can hear and determine a matter."

* Constitution of the Commonwealth of Australia, 1900 (63 & 64 Vict. c. 12 s. 9),
s. 51 (xxxix); 6 HALSBURY'S STATUTES (2nd Edn.) 277.

A Here the word "inconsistent" is used but, apart from their common use of this word, there is little similarity between the conclusion to which WILLIAMS, J., came and the case as presented on appeal to their Lordships' Board. If there is any other similarity it lies in this, that the very functions, whose joinder with judicial power the learned judge would prohibit, closely resemble the functions of conciliation and arbitration which are joined with judicial power in the impugned Act. In the result, it appears that either test, vague and unsatisfactory though it is, may yet be fatal to the appellants' case. Their Lordships, however, prefer to abide by the text of the Constitution which neither under Chapter III alone nor under that chapter aided by s. 51 (xxxix) supports the one test or the other. Their view is reinforced by the obvious difficulty of arriving at a sure conclusion if it is sought by implication to read something into the Constitution which is not there.

C In his dissentient judgment TAYLOR, J., makes a somewhat different approach to the problem. He accepts the view that Parliament may not confer on courts powers which are essentially legislative or executive in character except in so far as they are strictly incidental to the performance of their judicial functions. He says (94 C.L.R. at p. 341):

D "The investing of courts with such powers would clearly be in conflict with constitutional principles and, in turn, with judicial authority."

E Here is a clear denial of the appellants' case which demands any union short of inconsistency and here, too, another illustration of the dangers that beset a departure from the straight path of interpretation. But the learned judge, while maintaining that judicial functions could not be united with essentially legislative or executive power, was of opinion that such arbitral functions as were conferred by the Act on the court did not bear the indelible imprint of legislative or executive character, and, accordingly, in the absence of any clear provision or implication to the contrary in the Constitution it was competent for Parliament to combine such functions with the exercise of judicial power. F He was fortified in this opinion by the consideration that, as it appeared to him, the arbitral functions both in their nature and exercise presented a number of features which are characteristic of judicial functions.

G In their Lordships' opinion, this approach to the question cannot be supported. The conferment of judicial power is limited by the express enactment of Chapter III aided by s. 51 (xxxix); it is not to be regarded as unlimited except so far as it is expressly prohibited. It is not only functions "essentially" legislative or executive in character which cannot be conferred on a court; only those judicial functions can be so conferred which fall within Chapter III and s. 51 (xxxix). This does not mean that there may not be room for controversy what are powers "incidental to the execution of any power vested by this Constitution . . . in the Federal Judicature" within s. 51 (xxxix) (as may be seen from the judgments in *Lowenstein's case* (6)) nor even (despite the classic and widely accepted definition given by GRIFFITH, C.J., in *Huddart Parker & Co. Pty., Ltd. v. Moorehead* (7) ((1908), 8 C.L.R. 330)) what is the precise scope and meaning of judicial power. But whatever latitude may be given in either of these directions, it does not appear to their Lordships that the appellants' case is advanced. They must wholly dissent from the view that arbitral functions I (as that expression is here used) have any relevant similarity to judicial functions. The essential difference has already been pointed out. Such facts as that the same qualities of fairness, patience and courtesy should be exhibited by conciliator, arbitrator or judge alike, and that none of them should act without hearing both sides of the case do not weigh against the fact that the exercise of the judicial function is concerned, as the arbitral function is not, with the determination of a justiciable issue. But it must be added that the judgment of the learned judge indicated that, in his view, there were powers which could not

be brought within the description of legislative, executive or judicial (or, presumably, be described as incidental to the execution of such powers), and that it was this fourth category of powers in particular that could be united with judicial functions. But if, as their Lordships think, the true criterion is not what powers are expressly or by implication excluded from the scope of Chapter III but what powers are expressly or by implication included in it, it is irrelevant whether there is such a fourth category. Even if there is, it is outside Chapter III, except in those matters which are incidental to the execution of the judicial power. With regard to the possible width of this exception, their Lordships would say nothing to qualify what fell from the High Court in *Queen Victoria Memorial Hospital v. Thornton* (8) ((1953), 87 C.L.R. 144) and *R. v. Davison* (9) ((1954), 90 C.L.R. 353). Their Lordships would indorse what was said in the former case by the High Court (87 C.L.R. at p. 151):

"Many functions perhaps may be committed to a court which are not themselves exclusively judicial, that is to say, which considered independently might belong to an administrator. But that is because they are not independent functions but form incidents in the exercise of strictly judicial powers."

Reference must be made here to two matters relied on by the appellants, the one as inconsistent with the interpretation placed on Chapter III, the other as illustrating the substantial departure from the principle of the separation of powers which has taken place.

The first matter relates to the decision of the High Court admitting an appeal from the courts established by Parliament in the Territories of the Commonwealth. By Chapter VI of the Constitution*, which is headed "New States", it is provided (by s. 121) that the Parliament may admit to the Commonwealth or establish new states, and may on such admission or establishment make or impose such terms and conditions as it thinks fit, and (by s. 122) that the Parliament may make laws for the government of any territory surrendered by any state to, and accepted by, the Commonwealth, or of any territory placed by the Queen under the authority of, and accepted by, the Commonwealth. Under this power, the Parliament has made legislative provision for an appeal from the courts of the territories to the High Court, and the validity of such a law has been upheld. If this is right, so runs the argument, the provisions of Chapter III cannot be an exhaustive statement of the jurisdiction of the High Court, and reference is made to such cases as *R. v. Bernasconi* (10) ((1915), 19 C.L.R. 629), and *Porter v. R., Ex p. Yee* (11) ((1926), 37 C.L.R. 433). It appears to their Lordships that these decisions (the latter of which was not reached without difficulty and dissent) can be satisfactorily reconciled with the opinion they have formed in the present case by regarding Chapter III as exhaustively describing the federal judicature and its functions in reference only to the federal system of which the territories do not form part. There appears to be no reason why the Parliament having plenary power under s. 122 should not invest the High Court or any other court with appellate jurisdiction from the courts of the territories. The legislative power in respect of the territories is a disparate non-federal matter. If in regard to it an exception is made to the exclusiveness of Chapter III, it has no bearing on the problem which faces their Lordships.

The other matter to which their Lordships must refer has already been mentioned. It is the departure from the principle of separation of powers in matters legislative and executive. They refer to this matter again lest it should be thought that in anything they have said in relation to the judicial power they intended to cast any doubt on the line of authorities where the union of legislative and executive power has been considered. Reference has

* Constitution of the Commonwealth of Australia, 1900 (63 & 64 Vict. c. 12 s. 9), s. 121 to s. 124; 6 HALSBURY'S STATUTES (2nd Edn.) 289, 290.

A already been made to *Dignan's* case (3), and a salient passage from it cited. From the same case in exhaustive judgments of DIXON, J., and EVATT, J., many other passages will be found which illustrate how different are the measures which have been and ought to be meted out to the union of legislative and executive powers on the one hand and the union of such powers and judicial power on the other. Two instances must suffice. DIXON, J., after asserting the essential proposition that the Parliament is restrained both from reposing any power essentially judicial in any other organ or body and from reposing any other than that judicial power in such tribunals and referring to the vesting of the legislative power of the Commonwealth in the Parliament asks (46 C.L.R. at p. 98):

C “Does it follow that in the exercise of that power the Parliament is restrained from reposing any power essentially legislative in another organ or body?”

and, after a review of the authorities, concludes that the Constitution does not forbid the statutory authorisation of the Executive to make a law. In part, at least, this is justified in these words (*ibid.*, at p. 101):

D “The existence in Parliament of power to authorise subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law.”

A passage from the judgment of EVATT, J. (who generally took a more liberal view of the union of powers) may also be cited. He said (*ibid.*, at p. 117):

E “The observation of ISAACS, J. (as he then was)*, that there is a ‘separation’ of powers only ‘to a certain extent’ has a special application when the question concerns the exercise of legislative functions and powers by executive bodies. Questions of judicial power occupy a place apart under the Constitution, not only because of the special nature of the judicial power but because of the elaborate provisions of Chapter III. As SIR W. HARRISON MOORE has pointed out in his well known work on the Australian Constitution† ‘between legislative and executive power on the one hand and judicial power on the other, there is a great cleavage.’”

Finally it is necessary to consider an aspect of this difficult case which has been in the forefront of the appellants’ argument. And it can best be introduced by a brief history of the legislation which, when these proceedings were started, had assumed the form of the Conciliation and Arbitration Act, 1904 to 1952. Their Lordships will refer only to the immediately relevant changes that have been made since the Act was first enacted under its present title as No. 13 of 1904. The objects were stated in seven headings and did not refer to the enforcement of awards or any other judicial process. By s. 11, it was enacted that there should be a Commonwealth Court of Conciliation and Arbitration which should be a court of record and should consist of a president who was to be appointed from among the justices of the High Court and was to hold office for seven years. The court and the president were fully equipped with the functions of conciliation and industrial arbitration. The Act created a number of specific offences which were punishable by summary proceedings before courts exercising federal jurisdiction. But power plainly judicial was conferred on this court itself to impose penalties for breaches or non-observance of orders and awards which were proved to the satisfaction of the court to have been committed. Between 1904 and 1918 the Act was amended by conferring further judicial power on the court by provisions corresponding with s. 29 (1) (b) and s. 29 (1) (c) and s. 29A of the present Act. In 1918 came *Alexander's*

* In *Federal Comr. of Taxation v. Munro*, (1926), 38 C.L.R. 153 at p. 178.

† COMMONWEALTH OF AUSTRALIA (2nd Edn.), p. 101.

case (1). It was in that case decided that, as s. 72 of the Constitution requires A that judges of Federal Courts created by Parliament should be given life tenure and as the judges of the court had not been given such tenure, they could not exercise any part of the judicial power of the Commonwealth. Great importance has been attached by counsel for the appellants to the fact that no attack was made on the conjunction of judicial and arbitral functions in the court. B After *Alexander's* case (1) the Act was amended so as to remove from the court to courts exercising the judicial power of the Commonwealth some at least of the powers which had been invalidly conferred on the court. Thus the matter rested for nearly eight years, the court continuing to exercise its conciliation and arbitral functions under the Act as amended.

In 1926 important amendments of the law were made by Act No. 22 of 1926. It is sufficient to say of it and the many subsequent amending Acts that, by 1952, C the court has assumed the form and been invested with the powers which have already been described. It remains the same court throughout; its primary function was at all times the settlement of industrial disputes by conciliation and arbitration, but unmistakably from 1926 onwards it was invested with, and exercised, judicial power; not, indeed, always the same measure of judicial power, for s. 29A was only inserted after 1951, but power which was indubitably D part of the judicial power of the Commonwealth.

It is, therefore, asked, and no one can doubt that it is a formidable question, why for a quarter of a century no litigant has attacked the validity of this obviously illegitimate union? Why in *Alexander's* case (1) itself was no challenge made? How came it that in a series of cases, which are enumerated in the majority and the dissentient judgments, it was assumed without question that E the provisions now impugned were valid?

It is clear from the majority judgment that the learned chief justice and the judges who shared his opinion were heavily pressed by this consideration. It could not be otherwise. Yet they were impelled to their conclusion by the clear conviction that consistently with the Constitution the validity of the impugned provisions could not be sustained. Whether the result would have been different F if their validity had previously been judicially determined after full argument directed to the precise question and had not rested on judicial dicta and common assumption it is not for their Lordships to say. On a question of the applicability of the doctrine of *stare decisis* to matters of far-reaching constitutional importance they would imperatively require the assistance of the High Court itself. But here no such question arises. Whatever the reason may be, just as there was G a patent invalidity in the original Act which for a number of years went unchallenged, so for a greater number of years an invalidity which to their Lordships as to the majority of the High Court has been convincingly demonstrated, has been disregarded. Such clear conviction must find expression in the appropriate judgment.

Their Lordships must now return to a question the discussion of which has H been postponed. The respondents, though they did not appear by counsel at the hearing of the appeal, put in a formal Case and in it submitted that the appeal was not competent in that it raised an *inter se* question and the High Court had not given a certificate under s. 74 of the Constitution that the question was one which ought to be determined by Her Majesty in Council. The issue, I then, is whether there is involved in this appeal

“any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any state or states*.”

More narrowly stated, the issue is whether the validity or invalidity of those sections of the Act which purport to give the court judicial power is a question

* See s. 74 of the Constitution; 6 HALSBURY'S STATUTES (2nd Edn.) 282.

A as to the limits inter se of the Constitutional powers of the Commonwealth and the states respectively.

It appears to their Lordships that this issue does not raise an inter se question. They would not in any way narrow the scope of those questions which are reserved to the High Court subject to its own discretionary power to grant a certificate. But if the wide test, which has become the settled interpretation of the section, is adopted, it cannot fairly be held to cover the present case. That test, so far as relevant, is whether the decision under appeal is a decision on the extent of a paramount power of the Commonwealth over the concurrent powers of the state. If the power is one the exercise of which is denied to Commonwealth and states alike, for example because s. 92 invalidates it, no inter se question arises. If the power is one, of which the exercise is exclusively vested in the Commonwealth, no such question arises. It is only where the delimitation of the Commonwealth power necessarily implies a decision as to the extent of a subordinate state power that an inter se question truly arises. For in such a case the advance of the Commonwealth power must pro tanto reduce the state power.

If that test is applied here, it appears to their Lordships that a decision for or against the validity of the impugned sections neither advances the Commonwealth power nor reduces the state power. It is undeniable that it is competent for the Commonwealth Parliament by appropriate legislation to provide for the enforcement of the awards of the Conciliation and Arbitration Court and for the punishment of a breach of them. It cannot be said that, what has been described as the undefined residue of absolute and uncontrolled power remaining to the states, is in any real sense affected by a decision that a power which might have lawfully been exercised in one way has been unlawfully exercised in another way. It is implicit in an inter se question that between the powers of Commonwealth and state there should be a mutual relation and a reciprocal effect. Neither of those features are present in a question the answer to which whatever it may be will not alter the boundaries of the respective powers. In these circumstances, their Lordships, though they have carefully weighed the arguments advanced by the respondents in their formal Case, have concluded that s. 74 of the Constitution has no application to the question before them.

Having taken the matter into their consideration accordingly they will humbly advise Her Majesty that these appeals should be dismissed.

Appeals dismissed.

Solicitors: *Coward, Chance & Co.; Waterhouse & Co.*

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

VICKERS v. E. GOMME, LTD.

[COURT OF APPEAL (Jenkins, Morris and Sellers, L.JJ.), February 20, 21, 22, 1957.]

Factory—Dangerous machinery—Cutter of vertical spindle moulding machine—Wood to be held in jig or holder—Such work as cannot be performed with an efficient guard for the cutter—Woodworking Machinery Regulations, 1922 (S.R. & O. 1922 No. 1196), reg. 18.

A vertical spindle moulding machine had an electrically driven revolving cutter which protruded $\frac{3}{8}$ inch through a slot in a fence, viz., a board or screen standing vertically opposite the operator on the opposite side of the table on which the operator worked. The slot in the fence was at the level of the surface of the table and immediately above the slot was a block of wood $\frac{7}{8}$ inch above the surface of the table. Thus the protruding portion of the revolving cutter was protected from above. The rails which it cut (long narrow lath-like pieces of wood $13/16$ inch deep and rather wider) when placed in front of the slot virtually filled the vertical space between the surface of the table and the lower surface of the wood block, and rendered it impossible for any part of the operator's person to come into contact with the cutter, provided that the rail was squarely presented to the cutter and held firmly up against the fence. A rail that was to be cut would be fitted into the angle of the back stop, which was a wooden L-shaped member on one side of the table, and would be pushed away from the operator towards the fence, the back end of the rail being kept against the back stop to prevent any kick-back when the rail came into contact with the cutter. If the machine were operated carefully in this way, its use involved no appreciable risk of accident, but at any time when a piece of wood being worked was not blocking the slot through which the cutter protruded anyone's hand at the level of the table of the machine might come into contact with the cutter.

The plaintiff was employed by the defendants at their factory. When the plaintiff was working at the machine a rail that he was cutting was kicked back from the fence and the plaintiff's hand came into contact with the cutter that thus had been exposed and was injured. The plaintiff sued the defendants for damages for, among other causes of action, breach of statutory duty under reg. 18 of the Woodworking Machinery Regulations, 1922*, which required that for such work as could not be performed with an efficient guard for the cutter the wood should, if practicable, be held in a jig or holder. No jig or holder was provided.

Held: the defendants were in breach of duty under reg. 18 of the Woodworking Machinery Regulations, 1922, since (i) the obligation under that regulation that the wood should be held, if practicable, in a jig or holder applied where the guard for the cutter was not (as it was not in the present case) a guard of unqualified efficiency (that is, a guard affording complete protection to the operator from the cutter), and (ii) there could be a breach of reg. 18 notwithstanding that the guard of the machine satisfied reg. 17 by being the most efficient guard that could practicably be provided having regard to the nature of the work to be performed.

Appeal dismissed.

* The Woodworking Machinery Regulations, 1922, reg. 17, reg. 18, are as follows: "17. The cutter of every vertical spindle moulding machine shall when practicable be provided with the most efficient guard having regard to the nature of the work which is being performed.

"18. For such work as cannot be performed with an efficient guard for the cutter, the wood being moulded at a vertical spindle moulding machine, shall, if practicable, be held in a jig or holder of such construction as to reduce as far as possible the risk of accident to the worker."

A [Editorial Note. The decision shows that the obligations imposed by reg. 17 and reg. 18 of the Woodworking Machinery Regulations, 1922, are not mutually exclusive alternatives, but that, where a guard that is the best that it is practicable to provide is used, and reg. 17 accordingly is satisfied, nevertheless there may be a breach of reg. 18 if the guard is not one hundred per cent. efficient as a protection to the worker and if, assuming that it would be practicable to use a jig or holder, one is not used; see particularly p. 65, letter H, p. 68, letter H, post.

As to the duties under the woodworking machinery regulations, see 17 HALSBURY'S LAWS (3rd Edn.) 133, para. 210; and for cases on the subject, see SUPPLEMENTS to 24 DIGEST 908, 68.

C For the Woodworking Machinery Regulations, 1922, reg. 17, reg. 18, see 8 HALSBURY'S STATUTORY INSTRUMENTS 117.]

Cases referred to:

- (1) *Stapley v. Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663; 3rd Digest Supp.
- (2) *National Coal Board v. England*, [1954] 1 All E.R. 546; [1954] A.C. 403; 3rd Digest Supp.
- D** (3) *Williams v. Sykes & Harrison, Ltd.*, [1955] 3 All E.R. 225; 3rd Digest Supp.
- (4) *Summers (John) & Sons., Ltd. v. Frost*, [1955] 1 All E.R. 870; [1955] A.C. 740; 3rd Digest Supp.
- E** (5) *British Fame (Owners) v. MacGregor (Owners), The MacGregor*, [1943] 1 All E.R. 33; [1943] A.C. 197; 112 L.J.P. 6; 168 L.T. 193; 2nd Digest Supp.

Appeal and Cross-Appeal.

F The defendants appealed against an order of His Honour JUDGE RAWLINS, made in West Wycombe County Court on Dec. 6, 1956, awarding the plaintiff £62 10s. damages in respect of personal injuries which he had sustained while working for the defendants. The figure of £62 10s. was reached as follows: the damages to the plaintiff, who lost part of the thumb of his left hand by the accident, were assessed at £250, and the plaintiff's proportion of the responsibility for the accident (he being found guilty of contributory negligence) was assessed at seventy-five per cent.—accordingly the amount awarded to him was one quarter of £250, viz., £62 10s. The defendants' grounds of appeal were that:

G (i) on the facts found by the county court judge he was bound in law to enter judgment for the defendants; (ii) the judge misconstrued regs. 17 and 18 of the Woodworking Machinery Special Regulations 1922-1945; (iii) the finding of the judge that the defendants were in breach of reg. 18 was against the weight of the evidence. In a cross-appeal by the plaintiff, the grounds of appeal were that:

H (i) on the facts found by the judge he was bound in law to find that the plaintiff was not negligent; (ii) the finding of the judge that the plaintiff was negligent was against the weight of the evidence. By leave of the court during the hearing the grounds were amended to include the contention that the plaintiff was liable to a less extent than that found by the judge or alternatively was not negligent to the extent found by the judge (seventy-five per cent.).

I The defendants carried on a furniture manufacturing business at High Wycombe. The plaintiff had been in their employment for rather less than a year but had had ample previous experience of a vertical spindle moulding machine. The following description of the machine, the material that it treated and the method of working are taken from the judgment of JENKINS, L.J.

This machine includes a table at which the operator stands. Facing the operator on the other side of the table there is a vertical board or screen which is referred to as a fence. That runs the length of the far side of the table from the

operator's position. In the centre of this fence at the back of the table there is a slot some three or four inches wide on a level with the surface of the table. The segment or arc of the cutter is exposed; that segment or arc protrudes at the most $\frac{3}{8}$ inch past the surface of the screen or fence over the surface of the table. That degree of exposure of the cutter enables the work for which the machine is designed to be done. The cutter is electrically driven and revolves anti-clockwise at high speed. Immediately above the slot through which the cutter protrudes there is a block of wood some six inches wide. That block is so positioned that its lower surface is $\frac{7}{8}$ inch from the surface of the table. It also projects horizontally $\frac{3}{8}$ inch from the fence at the back of the table, or, in other words, $\frac{1}{2}$ inch beyond the farthest point of protrusion of the cutter. Thus this block, which is over the slot through which the cutter protrudes, protects anyone approaching the cutter from above. The material treated on this machine consisted of long narrow lath-like pieces of wood known as rails. These rails were $13/16$ inch deep and rather wider than that. If placed on their broad side in front of the slot where the cutter is, these rails would fill the vertical space between the surface of the table and the lower surface of the block immediately above the opening in the fence, except for a matter of only $1/16$ inch. Thus, when a piece of wood was squarely presented to the cutter and held firmly up against the fence, it would not be possible for the operator to bring any part of his person in contact with the cutter. On the right of the table from the operator's point of view there is a wooden member known as a back stop. That is an L-shaped member which can be adjusted on the table so as to bring it further from or nearer to the cutter according to the length of wood which is being treated. The short leg of the L, which is at the right-hand end of the table from the operator's point of view, is in the shape of an arc with its concave side towards the table. On the left side of the table there is another device known as a front stop.

The method of working the machine is this. The rail to be dealt with is placed on the table and positioned with its back end butting up against the angle of the L-shaped back stop, the position of that angle having been suitably adjusted beforehand. Then the rail is slanted till the fore end meets the fence at the back of the table, the point at which it will do that being predetermined by the setting of the back stop and the length of the rail. Assuming that the motor driving the cutter is running, the next step taken by the operator is this: placing both his hands on the wood under treatment (or work-piece) he pushes it away from him, keeping the butt end at all times in contact with the arc of the back stop. The effect of that operation, if properly carried out, will be to hold the fore end of the work-piece firmly against the screen at the desired point beyond the cutter, and, as the work-piece follows the arc of the back stop, it will pivot on a centre represented by the fore end, until the whole of its length comes up flush against the fence. The action of bringing the wood into contact with the cutter is called "dropping on". The rail having been thus dropped on, it is essential that the operator should maintain the requisite degree of pressure on the rail away from himself and towards the screen. At the same time he must push it towards his left in order that the portion of it desired to be cut should be drawn across the sharp edge of the cutter. If the machine were carefully operated in this way, there would be no appreciable risk of accident, for, the cutter being masked or screened to the extent indicated by means of the wooden block above the orifice through which it protrudes, its cutting edge will at all times be separated from the hands or person of the operator by the wood under treatment. Proper use of the back stop is, therefore, essential to the success of the operation, for it is only thus that a cut of the requisite predetermined length can be made. The back stop also has this importance: if the fore end or the left-hand portion of the work-piece is not held with sufficient firmness at the time of dropping on, the phenomenon known as "kick-back" is

A liable to occur. That happens when the teeth of the cutter, instead of biting into the wood, simply strike it and push it away. If there were nothing at the butt end of the rail to prevent its moving entirely under the influence of the cutter in that way, there might be an accident; but if the butt end of the rail is up against the short arm of the back stop its movement will be arrested. Experience has shown that, save possibly in exceptional circumstances, the back stop is an effective protection against the danger of a kick-back. The effect of a kick-back could be to cause the hand (probably the left hand) of the operator to slip off the wood and come up against the cutter.

B No suggestion of any improvement which it would be practicable to make on this method of protection was made, and there was no evidence of any previous accidents, save in the isolated case of a charge-hand in the employment of the defendants, who had cut himself when trying to mould a warped piece of wood and had removed the guard, i.e., the block above the slot through which the cutter protruded.

C *Martin Jukes, Q.C., and John Hobson for the defendants.*

John Thompson, Q.C., and D. H. D. Bunn for the plaintiff.

D **JENKINS, L.J.**, after stating that the sole question in the appeal before the court was whether the defendants were in breach of duty under reg. 18 of the Woodworking Machinery Regulations, 1922, and having described the machine at which the plaintiff was working when the accident occurred, continued: There is a certain amount of mystery about the way in which the present accident was brought about, but it appears that the plaintiff having come to work at 7.30 a.m. on the day of the accident, which was Sept. 29, 1955, had by 7.45 a.m. done about twenty of these rails. Then he put a rail through the machine and found on inspection that a few inches down from the top of the bevelled cut which had been made—I take the top as being at the left-hand end of the rail as it went past the cutter—there was a slight protuberance. It was very small and hardly visible, but could be felt with the finger. The plaintiff was dissatisfied with this piece of work and thought that if he put it through the machine again he would remove this slight inequality. He accordingly did so, and somehow or other the rail must have kicked back away from the screen and thus exposed the cutter, and the plaintiff's hand must have slipped off the rail and thus come into contact with the cutter.

F The problem is to divine how this came about. The plaintiff was an experienced man, and, if he had followed the usual routine, which he had done literally hundreds of times—I think that he had cut more than two hundred of these rails—and had simply put the imperfectly moulded rail past the cutter again in accordance with the usual routine, the accident would not have happened. Inspection of the particular rail after the accident showed that it had been cut some three or four inches further up the fore end of it than the process required. The plaintiff could not account for this. He said he had as usual kept the butt end up against the back stop; but, if he had done that, it seems reasonably plain that the extra cut which was found on the rail could not well have been made, because, if it had been properly positioned, the whole of that part of the rail would have been beyond the cutter. The most plausible theory of the way in which the accident happened appears to me (as it did to the learned judge) to be that the plaintiff for some reason or other positioned the rail some inches back away from the table, so that its butt end was overlapping the back stop instead of being lodged up against it.

I The only regulation the breach of which is now in issue is reg. 18 of the Woodworking Machinery Regulations, 1922, but for purposes of construction it is necessary to look also at the immediately preceding reg. 17. That is in these terms:

"The cutter of every vertical spindle moulding machine shall when practicable be provided with the most efficient guard having regard to the nature of the work which is being performed."

Regulation 18 provides:

"For such work as cannot be performed with an efficient guard for the cutter, the wood being moulded at a vertical spindle moulding machine, shall, if practicable, be held in a jig or holder of such construction as to reduce as far as possible the risk of accident to the worker."

Those are the two vital provisions, reg. 17, as I think, being vital because its construction has an important bearing on the construction of the actually relevant reg. 18. Regulation 19 provides:

"A suitable 'spike' or push-stick shall be kept available for use at the bench of every vertical spindle moulding machine."

It appears that in fact "spikes" or push-sticks were available, but that their use in connection with this particular machine would not be practicable, and accordingly nothing turns on reg. 19 in this case.

It is not now in dispute that the defendants complied with reg. 17, but it is said that nevertheless they are in breach of reg. 18. Counsel for the defendants contests that proposition and, as I understand it, his argument is that reg. 17 and reg. 18 are alternatives, and that once it is shown that the defendants complied with reg. 17, reg. 18 cannot touch them. He says that these regulations deal with two alternative situations: the first the situation where one can have a guard, in which case one is obliged to have the best guard one can; the other where one cannot have a guard, in which case if practicable, one must provide a jig or holder.

That argument counsel seeks to support in this way. He says reg. 17 requires that:

"The cutter of every vertical spindle moulding machine shall when practicable be provided with the most efficient guard having regard to the nature of the work which is being performed."

He says that those words mean that one must provide the most efficient guard one can having regard to the nature of the work, and having done that one will have provided an efficient guard within the meaning of reg. 18. He says "the most efficient guard" must be "an efficient guard" and he calls in aid the fact that no better guard for this particular kind of machine has been devised. He emphasises the fact that, where woodworking machinery is concerned, it is, generally speaking, impossible to carry out the requisite operations if there is anything in the nature of a complete screen or guard. If access to the cutter was completely blocked from every direction, it would be impossible to work the machine at all, for the wood could then never be brought into contact with the cutter.

After paying the best attention I can to counsel's argument, I find myself unable to accept it. It seems to me that reg. 18 is designed to give protection, or additional protection, to persons operating the machine in cases in which they cannot be fully protected by a guard. I think that the words "with an efficient guard" in reg. 18 mean something different from the words "the most efficient guard" in reg. 17. That becomes apparent if the experiment is tried of substituting for the words "an efficient guard" in reg. 18 the words "the most efficient guard" from reg. 17. It is obvious that reg. 18 could not sensibly be made to read: "For such work as cannot be performed with the most efficient guard having regard to the nature of the work which is being performed . . ."

A Regulation 17 places an obligation on the employer when practicable to provide (as indeed it says)

“the most efficient guard having regard to the nature of the work which is being performed.”

B As I see it, that means that the employer must consider the work which is being performed and, having done so, must provide the most efficient guard consistent with the performance of that work and also, I think, the guard which is best adapted to protect the worker in the performance of that particular work. I think the words “having regard to” can be construed as having that double meaning. But quite plainly the most efficient guard having regard to the nature of the work which is being performed need not necessarily be a guard of unqualified efficiency. Indeed, what counsel has told us about the position in regard to guards in this industry amply bears that out. There may be some processes or some types of moulding machine in which it is possible to have a complete guard. Counsel says the contrary, but for the purposes of construction I am not prepared to hold that these regulations were drafted on the assumption that this was an impossibility. So there may be cases in which a complete guard is possible; there may be other cases in which it is impossible consistent with the work in hand to provide a guard that has anything more than a very moderate or qualified degree of efficiency, so that it still leaves open the risk of that which a guard is designed to prevent, namely, the contact of the person of the operator with the cutter. That then seems to me to be the effect of reg. 17.

E I think the intention of reg. 18 is to provide additional protection for the operatives to meet the risk from which the best guard it is possible to provide (if indeed it is possible to provide any guard) does not sufficiently protect them. In the context of reg. 18, I think “an efficient guard” means a guard of unqualified efficiency. A parallel was suggested in the course of the argument with s. 14 of the Factories Act, 1937. It was pointed out that, as has been authoritatively stated, “securely fenced” in that section does not mean “somewhat securely fenced” or “fairly securely fenced”; it means “securely fenced”. Although one must not press the parallel too far, because I think that “securely” has a more absolute connotation than the word “efficient”, yet I think the comparison is not without value.

F In my view then, “an efficient guard” in reg. 18 means a guard of unqualified efficiency. To my mind that conclusion is borne out by the concluding words of reg. 18, viz.:

G “shall, if practicable, be held in a jig or holder of such construction as to reduce as far as possible the risk of accident to the worker.”

H That, I think, suggests that reg. 18 might be read in this way: “For such work as cannot be performed with a guard which will protect the worker from accident, then the wood being moulded on a vertical spindle moulding machine shall, if practicable, be held in a jig or holder of such construction as to reduce as far as possible the risk of accident to the worker”. Where the guard (if there is one) falls short of efficiency in the above sense, it is a guard which leaves open a risk of accident, and reg. 18 is designed to remedy that state of affairs by requiring as an additional precaution the use of a jig or holder so as to reduce the risk of accident to the worker as far as possible.

I I should add that to my mind no assistance is to be derived in the construction of these two regulations from the argument that this will require a jig or holder to be used in almost every case, as an efficient guard in the sense I have ascribed to it is barely to be found throughout the whole woodworking industry. I cannot regard that argument as having any weight. The jig or holder only has to be used if practicable. So far as I know it is not an expensive apparatus or difficult to use. If it is unduly difficult to use in any particular case, then, no

doubt, within the meaning of the regulation, it would be held impracticable to use it. A

The point of construction is a short one and does not admit of any great elaboration, but having read and re-read the two regulations and heard interesting arguments on either side I have come to the conclusion that the learned judge was right in holding that the defendants were here in breach of reg. 18.

Counsel for the defendants had a second argument against that conclusion. B He said: "Be it so, supposing reg. 18 does apply, nevertheless it does not touch the defendants because their guard is an efficient guard". For that proposition he relies on the evidence in the case and bases on that evidence much the same arguments as are commonly raised in answer to a claim based on negligence at common law. He says that this machine is a machine of a well-known type, one which has been widely used for many years, which is illustrated with C apparent approval in the Ministry of Labour's publication "Safety Hints on the Use of Woodworking Machinery". It is, moreover, a machine in connexion with which accidents are of extremely rare occurrence. Therefore, he says, it is an efficient guard, efficiency being a question of fact and degree.

In my view that argument fails. The question here is whether there is an efficient guard for the cutter. Simply looking at this machine it is obvious that D there is a segment of the cutter which, from the point of view of approach at the level of the table, is not guarded at all. Anyone's hand slipping along the table could come in contact with the cutter at any time when there was not a work-piece blocking up the orifice through which the edge of the cutter protrudes. Accordingly, physically speaking and simply looking at the machine, one finds that there is not in fact an efficient guard for that part of the cutter. E The fact that the machine has been worked in safety, save in very exceptional cases, for many years, does not seem to me to carry the argument any further. In my view, its successful history and good record as regards accidents is not due to the fact that there is an efficient guard for the cutter; it is due to the fact that it is a well-designed machine, so arranged that a properly instructed person, using reasonable skill and care and adhering to the proper routine, F can use it without any serious risk of his hand coming in contact with the cutter. That is a different matter from the question whether there is an efficient guard for the cutter, and in my view there is not such a guard within the meaning of reg. 18.

It follows, therefore, that this second argument affords, to my mind, no ground for disagreeing with the learned judge's conclusion. It is not in dispute that G it is practicable to use a jig or holder in this case. In fact, like good employers, the defendants introduced the use of a jig very shortly after the accident, but it is not in dispute none was provided before the accident.

For these reasons I am of opinion that the appeal fails.

[HIS LORDSHIP then considered the plaintiff's cross-appeal and concluded H that the court ought not to interfere with the finding of the judge of first instance that the plaintiff had made such a radical departure from proper routine as amounted to negligence. On the question of contribution HIS LORDSHIP, after referring to authority*, said that it was sufficient for the purposes of the present case to accept, without decisively adopting, the proposition that "as the law now stands, the cases in which an appellate court can properly interfere with I an apportionment of damages are comparable to the cases in which such a court can properly interfere with the quantum of damages awarded, so as to include as a legitimate instance of such cases a case in which the appellate court finds

* *Stapley v. Gypsum Mines, Ltd.* (1) ([1953] 2 All E.R. 478); *National Coal Board v. England* (2) ([1954] 1 All E.R. 546); *Williams v. Sykes & Harrison, Ltd.* (3) ([1955] 3 All E.R. 225); *John Summers & Sons, Ltd. v. Frost* (4) ([1955] 1 All E.R. 870); and, for the former stricter rule, *British Fame (Owners) v. MacGregor (Owners), The MacGregor* (5) ([1943] 1 All E.R. 33 at p. 34, per VISCOUNT SIMON).

A that the apportionment of damages made in respect of contributory negligence is, on its face, so palpably wide of the mark that the judge of first instance cannot have been right in adopting it". Applying that test it was impossible to disturb the apportionment in the present case. HIS LORDSHIP continued:] It follows that, in my judgment, both the appeal and the cross-appeal should be dismissed.

B **MORRIS, L.J.:** I have reached the same conclusions. The construction of reg. 18 of the Woodworking Machinery Regulations, 1922, raises questions of some difficulty. The aim of the regulations is clearly the securing of the maximum of safety. There is an emphasis on the obviating of all unnecessary risks. Regulation 3, for example, provides:

C "Sufficient clear and unobstructed space shall be maintained at every woodworking machine while in motion to enable the work to be carried on without unnecessary risk."

Regulation 11 provides:

D "A suitable push-stick shall be kept available for use at the bench of every circular saw which is fed by hand, to enable the work to be carried on without unnecessary risk."

Regulation 21, which is dealing with the guards and appliances required by the regulations, concludes with the sentence:

E "The guards shall be so adjusted as to enable the work to be carried on without unnecessary risk."

Regulation 22, which I need not pause to read, has an emphasis on safety.

There is in the regulations, however, a recognition of practical difficulties: the relentlessness of positive obligation is relaxed at times when safety measures are not practicable. I hope that I am not being unduly critical of the language of reg. 17 if I say that the wording of it is not without a certain literary blemish. But, in my view, its meaning does emerge. The phrase "the most efficient guard" is to be construed in its context. It is followed by the words "having regard to the nature of the work which is being performed". The nature of the work will vary from time to time, but the nature of the work will point to and denote the measure of the obligation to guard. Having regard to what is being done there must, always when practicable, be the most efficient guard. This means the guard that most nearly approaches to being an efficient guard. There is a recognition that the performing of certain work will not be possible if there is an efficient guard, but, if some kind of guard can be provided while particular work is being done, then that kind of guard must be provided, and it must guard to the greatest extent possible. I read reg. 17 as meaning that, when practicable, the cutter of any vertical spindle moulding machine must be provided with as good a guard as can be provided having regard to the work being done. As the work being done may render it impossible to have the protection that a guard properly so called would afford, then as much protection as is possible must be given.

I If that is the correct view of reg. 17, the question arises whether reg. 18 follows on it or whether, as the defendants submit, it is alternative. They submit that, if reg. 17 is complied with, reg. 18 does not apply. This raises the question as to the meaning of the phrase in reg. 18 "an efficient guard". It seems to me that it would be surprising if the words "the most efficient guard" in their context in reg. 17 mean just the same as the words "an efficient guard" in reg. 18. If they mean the same, and if reg. 17 denotes the best guard that can be used having regard to the work being performed, then the opening of reg. 18 would read: "For such work as cannot be performed with the best guard that can be

used having regard to the work being performed . . ." Such a construction obviously leads to an absurd result. A

It is submitted by the defendants that reg. 18 is providing for a situation where work cannot be performed when there is a guard of any kind for the cutter. In my judgment, this is not what reg. 18 says. Such a view of the matter gives no meaning to the word "efficient". If reg. 18 had been intended to provide for a situation where work could not be performed if there were even some modified or partial form of guard (if such a situation were possible) then the regulation could have begun with the words: "For such work as cannot be performed with a guard for the cutter . . ." or "For such work as cannot be performed with any kind of guard for the cutter . . ." B

It was further submitted by the defendants that, if "an efficient guard for the cutter" denotes one that will so guard the cutter as to prevent a person who is working from getting into contact with it, then no such guard is possible. It was submitted that, if the words "an efficient guard" were so understood, the opening words of reg. 18, viz., "For such work as cannot be performed with an efficient guard for the cutter", would be otiose: since no work could be performed with an efficient guard for the cutter, if by that were meant a guard which would be effective to protect people from the peril of getting a hand in contact with the cutter. So it was submitted that, if the words "an efficient guard" are so interpreted, then reg. 18 could simply have been worded so as to impose an obligation to use a jig or holder whenever practicable. C D

I do not feel able to accept this submission and, furthermore, I see no reason to assume, for the purposes of construction, that it was thought to be beyond the wit of man to devise some guards which, at all events for some processes or for some situations, could be used while work was being performed, and which would be efficient in the sense of achieving the purpose of the guard by preventing an employee from making contact with the cutter or being affected by the dangerous attributes of cutters revolving at the rate of many thousands of revolutions a minute. In my judgment "an efficient guard" is a guard that properly or effectively guards. That means one that guards an employee from the perils to which he is exposed from cutters. E F

Counsel for the defendants submitted that the word "efficient" introduced a question of degree. There may be a context in which there is a question of degree, but, in my judgment, this is not so in the case of the words "efficient guard". It is recognised, however, that efficient guarding of cutters may not be possible when certain work is being done with vertical spindle moulding machines. However, there is no general exemption from guarding. As it seems to me, it works out in this way. Under reg. 17 the test of what is practicable is introduced, and there is an obligation to advance as far as possible towards achieving efficient guarding. If work is being performed at a time when efficient guarding can be achieved, then there is no obligation to use a jig or holder under reg. 18; but when work is being performed which does not permit of having cutters efficiently guarded, then under reg. 18, provided that it is practicable so to do, the wood being moulded must be held in a jig or holder and the jig or holder must be of such construction as will achieve the object of the safety regulations, i.e., the object of reducing as far as is possible the risk of accidents to the worker. G H

If these conclusions are correct, then the second point taken by counsel for the defendants does not arise. He submitted that there was an efficient guard in this case within the meaning of reg. 18. If the construction that I have put on those words is correct, then it is clear that there was no efficient guard in this case. I think, therefore, that the appeal fails. I

[HIS LORDSHIP then considered the plaintiff's cross-appeal and concluded that the finding of negligence by the trial judge and his apportionment of responsibility should not be disturbed.]

A **SELLERS, L.J.:** I agree with both my Lords in the construction that they have given to reg. 18. In the course of the argument I have had doubt whether that construction was the interpretation which the regulations intended. Regulation 17 would seem to recognise that the conditions of work may not permit (and perhaps they very rarely would permit in fact) a wholly effective guard to be used. Having regard to the work in hand, it might be that the best guard possible (which I think is what "most efficient guard" means) in the circumstances would leave a negligible risk and would afford almost complete safety. On the other hand, the best guard possible (the most efficient guard) might be of very little safety value at all.

B The construction which is put on reg. 18, as the court thinks it should be put, involves this: over that range, starting from almost complete security, from the minimum degree of danger up to a high degree of danger, with the use of differing kinds of guards under reg. 17, the two regulations read together would in every such case further require that a jig or holder should be used. If that is so, one might have contemplated that reg. 17 itself would have incorporated the obligation to use a jig or a holder as an additional protection to be used in conjunction with the most efficient guard. Regulation 17 as it stands still leaves the question as to what is to be done where no guard at all could be used, where the task in hand was of such a nature that it was not possible to have any sort of guard and, therefore, the "most efficient guard" could not be applied. A regulation was necessary to deal with that position and it might be envisaged that reg. 18 came into force in order to provide that, where no guard could be used, then a jig or holder must be used so as to reduce as far as possible the risk of accident to the worker.

E There is reason to think that an interpretation such as that has been followed in practice from as far back as 1922. But when one comes to read reg. 18 strictly, as we have had to do in this case, it seems impossible to me to ignore the word "efficient" in reg. 18 and to treat it as if reg. 18 was only dealing with the circumstance where no guard of any sort could be used. I agree with the court in thinking that "efficient guard" in reg. 18 means a guard which gives complete safety. The regulation so read in conjunction with reg. 17, involves that, notwithstanding that the most efficient guard has been used, if an element of danger still exists, a jig or holder must be used. There is no term in reg. 18 referring to reg. 17 and there is nothing expressly which links them up, but I have come to the conclusion that reg. 18 should be read in that way.

F As my Lord has pointed out, if it appears that it is impracticable for a jig or holder to be used, that will excuse the employer under reg. 18. If, having regard to the minimal amount of risk that there may be in many cases where, under reg. 17, a machine is provided with the "most efficient guard" (which may be in fact a very efficient but not completely efficient guard), and it is found that it is really unnecessary for safety to go to the added trouble of using a jig or holder, then I apprehend that the regulations could by the appropriate machinery of the Act be modified to meet that situation. On those grounds I hold that the appeal must be dismissed. The learned county court judge came to the correct view on the interpretation of reg. 18.

H [HIS LORDSHIP considered the plaintiff's cross-appeal and concluded that the trial judge was amply justified in his finding that the plaintiff had been negligent.]

I *Appeal and cross-appeal dismissed. Leave to appeal to the House of Lords granted.*

Solicitors: *Gregory, Rowcliffe & Co.* (for the defendants); *Shaen, Roscoe & Co.* (for the plaintiff).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

A

UNIVERSAL CARGO CARRIERS CORPORATION v. CITATI.

[QUEEN'S BENCH DIVISION (Devlin, J.), February 14, 15, 18, 19, 20, 21, 22, March 12, 1957.]

Shipping—Charterparty—Warranty—Obligation to provide cargo—Obligation to nominate berth—Obligation to load—Time in which to be performed—Whether warranties or conditions.

B

Shipping—Charterparty—Delay—Charterer unable to load within lay days—Length of delay entitling owner to rescind—Delay must be long enough to frustrate charterparty—Assessment of length of delay question of fact.

C

Contract—Breach—Anticipatory breach—Renunciation and impossibility—What measure of delay in loading under a charterparty entitles shipowner to rescind—Whether events other than those known at date of rescission may be taken into consideration.

Contract—Rescission—Rescission for wrong reason—Whether rescission can be justified by reliance on events occurring after rescission.

D

To entitle a shipowner to rescind a charterparty for the charterer's delay in providing a cargo, where time is not made the essence of the contract, the delay must be such as to frustrate the object of the charterparty (*Cliphsham v. Vertue* (1843), 5 Q.B. 265; *Tarrabochia v. Hickie* (1856), 1 H. & N. 183; and *Stanton v. Richardson* (1872), L.R. 7 C.P. 421, followed; see p. 80, letter G, post). The assessment of what period is sufficient for this purpose is a question of fact (see p. 83, letter G, post).

E

By a charterparty in Gencon form, dated June 30, 1951, the Catherine D. Goulandris was chartered to carry 6,000 tons of scrap iron from Basrah to Buenos Aires. The charterer, who carried on business in Argentina, had bought the scrap iron from H., a merchant in Baghdad, who had bought it from C., who carried on business in Beirut and had in turn bought the goods from V., another Baghdad merchant. The shipowners were an American company, whose agent at Basrah was G. The charterer nominated H. as the shipper of the cargo. Before the Goulandris reached Basrah G., having been unable to get in touch with H. or C. or V., ordered her to buoys to await orders. She reached the buoys at Basrah on July 12, 1951. Under the charterparty lay days, if treated as running from July 12, would expire on July 21. G., acting on the instructions of H. and the charterer to accept V. or his nominees as shipper, cabled V., who, on July 15, replied that he had no connexion with the ship. V. confirmed to G., on or before July 17, that he, V., had no interest in the Goulandris. On July 18, it being then impossible to load 6,000 tons of scrap iron by July 21, the owners chartered the ship to load another cargo at an Indian port and thus treated the charterparty of June 30, 1951, as at an end. At this time G. knew that there were about 6,000 tons of scrap iron owned or controlled by V. in the Basrah area, but neither G. nor the owners nor the charterer knew that, as the fact was, V. was seeking to free himself from the bargain, as the price of scrap iron was rising rapidly. On July 19 the charterer required G. to detain the ship and to get loading instructions from C., but the owners refused to detain the ship and, on July 23, she sailed for another port. The owners claimed damages for breach of the charterparty by the charterer. The claim having been referred to arbitration, the arbitrator found that the charterer had evinced an intention not to perform the charterparty and had committed an anticipatory breach of the contract which the

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A owners were entitled to treat and did treat as a repudiation of the charter-party. The question, stated by the arbitrator for the decision of the court, was whether the owners were entitled, on July 18, 1951, to treat the charter-party as discharged by the charterer's breach.

B **Held:** (i) anticipatory breach of the charterparty by the charterer would be established only if the owners showed that on July 18, 1951, the charterer was not willing and able to perform his part of the contract (unwilling meaning for this purpose, not intending, whether owing to inability or other reasons; see p. 84, letter B, to p. 85, letter F, post); this the owners might show by establishing either renunciation by the charterer or impossibility created by him (dictum of LORD PORTER in *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. at p. 359, applied; see p. 84, letter E, post), and in regard to these alternatives—

(a) anticipatory breach by renunciation by the charterer of the charter-party (as the arbitrator had found), had not been established since the arbitrator had not applied the correct legal test (that being the test stated at p. 70, letter D, ante) in determining whether the delay at Basrah was sufficient to entitle the owners to rescind (see p. 87, letter E, post), and

D (b) to constitute anticipatory breach of the charterparty by frustration of its object the impossibility did not have to be shown to have been deliberately created by the charterer (see p. 87, letter I, to p. 88, letter B, post); but, though the person rescinding a contract could, if he had rescinded for a wrong reason, justify his action by proving a different and good reason at the trial, yet it was not open to the court to hold that there had been an anticipatory breach of the charterparty by impossibility, since the facts found by the arbitrator did not point so strongly to frustration having occurred as to render that the only inference that could properly be drawn from the facts (see p. 84, letter A, post).

F Dictum of LORD SUMNER in *British & Beningtons v. North Western Cachar Tea Co. etc.* ([1923] A.C. at p. 71) applied.

(c) in the circumstances the case would be remitted to the arbitrator to make a further finding of fact whether on July 18, 1951, the charterer had become disabled from performing his part of the contract.

G (ii) the charterer was in breach of contract in not nominating a berth or providing a cargo within such reasonable time as would enable the ship to load in accordance with the charterparty (reasoning of GREER, J., in *Vergottis v. William Cory & Son, Ltd.*, [1926] 2 K.B. at p. 354, applied; see p. 79, letters E to I, post); but this breach was a breach of warranty, not of condition, and did not entitle the owners to treat the charterparty as at an end (dictum of DEVLIN, J., in *Chandris v. Isbrandtsen-Moller Co., Inc.*, [1950] 1 All E.R. at p. 777 adopted; see p. 80, letter E, post).

H (iii) in determining whether there had been a renunciation of a contract by the conduct of one party regard should be had only to the facts known at the time, though subsequent events proved to the court might help the court to decide which of two forecasts seemed at the time to be the better (see p. 87, letter B, post); and in determining whether there had been an anticipatory breach due to impossibility of performance by one party all events put in evidence at the trial should be taken into account (see p. 91, letter D, post).

I Dictum of LORD SUMNER in *Bank Line, Ltd. v. Arthur Capel & Co.* ([1919] A.C. at p. 454) explained; dictum of BLACKBURN, J., in *Geipel v. Smith* ((1872), L.R. 7 Q.B. at p. 413) and of DEVLIN, J., in *Etablissements Chainbaux S.A.R.L. v. Harbormaster, Ltd.* ([1955] 1 Lloyd's Rep. at p. 303) applied,

Observations on the time for applying to remit, and on the remission and on the form of, a case stated (see p. 94, letter B, to p. 95, letter H, post). A

[As to the effect of delay as frustrating the adventure, see 30 HALSBURY'S LAWS (2nd Edn.) 239, paras. 483, 484; and for cases on the subject, see 41 DIGEST 329-331, 1854-1867. B

As to the charterer's duty to nominate a berth, to provide a cargo and to load it, see 30 HALSBURY'S LAWS (2nd Edn.) 426, para. 592, 434, 435, para. 602; and for cases as to the time for loading and the provision of cargo, see 41 DIGEST 452, 2835-2839, 453, 2841-2867.

As to breach of contract by anticipation, see 8 HALSBURY'S LAWS (3rd Edn.) 202-205, paras. 342-345; and for cases on the subject, see 12 DIGEST (Repl.) 377, 378, 2960-2967.] C

Cases referred to:

- (1) *North River Freighters, Ltd. v. President of India*, [1956] 1 All E.R. 50; [1956] 1 Q.B. 333.
- (2) *Grant & Co. v. Coverdale, Todd & Co.*, (1884), 9 App. Cas. 470; 53 L.J.Q.B. 462; 51 L.T. 472; 41 Digest 457, 2877. D
- (3) *Vergottis v. Cory (William) & Son, Ltd.*, [1926] 2 K.B. 344; 95 L.J.K.B. 1002; 135 L.T. 254; 41 Digest 565, 3899.
- (4) *Chandris v. Isbrandtsen-Moller Co., Inc.*, [1950] 1 All E.R. 768; on appeal C.A., [1950] 2 All E.R. 618; [1951] 1 K.B. 240; 2nd Digest Supp. E
- (5) *Davidson v. Gwynne*, (1810), 12 East, 381; 104 E.R. 149; 41 Digest 334, 1882.
- (6) *Tarrabochia v. Hickie*, (1856), 1 H. & N. 183; 26 L.J.Ex. 26; 156 E.R. 1168; 41 Digest 326, 1836.
- (7) *Freeman v. Taylor*, (1831), 8 Bing. 124; 1 Moo. & S. 182; 1 L.J.C.P. 26; 131 E.R. 348; 41 Digest 329, 1856.
- (8) *Clipsham v. Vertue*, (1843), 5 Q.B. 265; Dav. & Mer. 343; 13 L.J.Q.B. 2; 2 L.T.O.S. 120; 114 E.R. 1249; 41 Digest 488, 3184. F
- (9) *MacAndrew v. Chapple*, (1866), L.R. 1 C.P. 643; 35 L.J.C.P. 281; 14 L.T. 556; 41 Digest 487, 3183.
- (10) *Stanton v. Richardson, Richardson v. Stanton*, (1872), L.R. 7 C.P. 421; 41 L.J.C.P. 180; 27 L.T. 513; *affd.* (1874), L.R. 9 C.P. 390; (1875), 45 L.J.Q.B. 78; 41 Digest 303, 1651. G
- (11) *Inverkip S.S. Co., Ltd. v. Bunge & Co.*, [1917] 2 K.B. 193; 86 L.J.K.B. 1042; 117 L.T. 102; 41 Digest 580, 4037.
- (12) *Havelock v. Geddes*, (1809), 10 East, 555; 103 E.R. 886; 41 Digest 325, 1834.
- (13) *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.*, [1935] A.C. 524; 104 L.J.P.C. 88; 153 L.T. 425; Digest Supp. H
- (14) *Geipel v. Smith*, (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 41 Digest 411, 2558.
- (15) *British & Beningtons v. North Western Cachar Tea Co., etc.*, [1923] A.C. 48; 92 L.J.K.B. 62; 128 L.T. 422; 13 Lloyd's Rep. 67; *affg.* S.C. sub nom. *North Western Cachar Tea Co., etc. v. British & Beningtons*, (1921), 10 Lloyd's Rep. 381; 12 Digest (Repl.) 400, 3101. I
- (16) *Heyman v. Darwins, Ltd.*, [1942] 1 All E.R. 337; [1942] A.C. 356; 111 L.J.K.B. 241; 166 L.T. 306; 2nd Digest Supp.
- (17) *Forslind v. Bechely-Crundall*, 1922 S.C. (H.L.) 173.
- (18) *Hochster v. De la Tour*, (1853), 2 E. & B. 678; 22 L.J.Q.B. 455; 22 L.T.O.S. 171; 118 E.R. 922; 12 Digest (Repl.) 377, 2960.

- A (19) *Thorpe v. Fasey*, [1949] 2 All E.R. 393; [1949] Ch. 649; [1949] L.J.R. 1613; 2nd Digest Supp.
- (20) *The Savona*, [1900] P. 252; 69 L.J.P. 95; 41 Digest 481, 3140.
- (21) *Embiricos v. Reid (Sydney) & Co.*, [1914] 3 K.B. 45; 83 L.J.K.B. 1348; 111 L.T. 291; 41 Digest 409, 2548.
- B (22) *Bank Line, Ltd. v. Capel (Arthur) & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 41 Digest 366, 2136.
- (23) *Keys v. Harwood*, (1846), 2 C.B. 905; 15 L.J.C.P. 207; 7 L.T.O.S. 161; 135 E.R. 1201; 34 Digest 109, 817.
- (24) *Re Agra Bank, Ex p. Tondeur*, (1867), L.R. 5 Eq. 160; 37 L.J.Ch. 121; 3 Digest 251, 743.
- C (25) *Re Phoenix Bessemer Steel Co., Ex p. Carnforth Haematite Iron Co.*, (1876), 4 Ch.D. 108; 46 L.J.Ch. 115; 35 L.T. 776; 5 Digest 933, 7630.
- (26) *Braithwaite v. Foreign Hardwood Co.*, [1905] 2 K.B. 543; 74 L.J.K.B. 688; 92 L.T. 637; 12 Digest (Repl.) 491, 3695.
- (27) *Etablissements Chainbaux S.A.R.L. v. Harbormaster, Ltd.*, [1955] 1 Lloyd's Rep. 303.
- D (28) *Grace (G. W.) & Co., Ltd. v. General Steam Navigation Co., Ltd.*, [1950] 1 All E.R. 201; [1950] 2 K.B. 383; 2nd Digest Supp.
- (29) *Temple Steamship Co., Ltd. v. V/O Sovfracht*, (1943), 76 Lloyd's Rep. 35.
- (30) *Hudson Bay Co. v. Dominga*, (1922), 10 Lloyd's Rep. 476.

Special Case.

- E This was an interim award in the form of a Special Case stated by a sole arbitrator under the Arbitration Act, 1950. s. 21 (1) (b). The hearing of the arbitration took place in London on Feb. 27, 28, 29, and Mar. 1, 1956, and the issue raised before the arbitrator was whether Universal Cargo Carriers Corporation (referred to hereinafter as the owners), of 80, Broad Street, New York, the owners of the vessel Catherine D. Goulandris, were justified in treating as at an end on July 18, 1951, a charterparty in Gencon form made between the owners and Pedro Citati (referred to hereinafter as the charterer), of Arellaneda, Argentina, on which date the owners re-chartered the Catherine D. Goulandris to another charterer. The owners claimed that they were justified in so acting by reason of the charterer's breach of the charterparty, and that they were entitled to damages for that breach.
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The following are the principal facts found by the arbitrator. On June 30, 1951, the charterer entered into a charterparty with the owners whereunder the Catherine D. Goulandris, expected ready to load at Basrah on about July 6, 1951, was to proceed to Basrah and there load 6,000 tons of scrap iron which she was to carry to Buenos Aires. The charterparty provided inter alia:

- H "5. Cargo to be brought alongside in such a manner as to enable vessel to take the goods with her own tackle and to load and stow the goods free of expense to vessel the cargo at the rate of one thousand tons per weather working day, Sundays and holidays excepted unless used . . . Time to commence 1 p.m. if notice of readiness is given during office hours after noon.
- I The notice to be given to the shippers . . . Time lost in waiting for berth to count as loading time.

"7. Demurrage to be at the rate of one thousand dollars per day or pro rata for any part of a day, payable day by day at ports of loading and discharging.

"11. Lay days not to commence before July 5, 1951, and should the vessel not be ready to load (whether in berth or not) on or before July 25, 1951, charterers have the option of cancelling the contract . . ."

The owners' agents in Basrah were Gray MacKenzie & Co., Ltd. (referred to hereinafter as Gray). The charterer intended to use the vessel to import from Basrah into Argentina the 6,000 tons of scrap iron which he had bought from a merchant called Haddad, who carried on business at Baghdad. Haddad had bought the goods from a merchant called Chbib, who carried on business in Beirut, Lebanon, and Chbib had bought them from one Vassos, who carried on business in Baghdad and who was known to be the main shipper of the occasional cargoes of scrap iron that were exported from Basrah. At or shortly after the time that the charterparty was executed, the charterer nominated Haddad as the shipper, to whom notice of readiness was to be given under the charterparty, but gave his address as Basrah and not as Baghdad. Gray ascertained that there was no such person as Haddad in Basrah, and having got his address in Baghdad, cabled to him there on July 4, 1951, asking for the name of his agent at Basrah; he did not receive a reply. Gray heard privately at this date that a cargo of scrap iron did exist in Basrah, but that it was located some distance from the loading wharf, and that it would be ready for shipment about July 15. On July 7 Gray cabled again to Haddad in Baghdad, and on July 8 sent him a registered letter. Again Gray received no reply, and the inquiries he made himself did not enable him to find out whether Haddad had any local agent in Basrah or whether he had begun to make local arrangements. Gray kept his principals informed of the position, and they passed the information on to the charterer, pointing out the urgency of the matter.

During this time Haddad was in Washington, and on his instructions, the owners' New York agents, on July 10, sent a cable to Gray saying that instructions would be "transmitted to shippers" through Beirut who would contact Gray. Before Gray received this cable, he cabled, on July 11, to the owners' New York and London agents saying that as he was still without "contact" with the shipper, he would order the vessel to the buoys at Basrah to await orders. On the same date Gray received another cable from the owners' New York agents, as the result of a further conversation with Haddad, instructing him to contact Vassos. Also on July 11, the charterer's agents cabled Gray instructing him to contact Chbib for the cargo. On July 12 Gray cabled Vassos in Baghdad, "Vessel . . . due this morning essential you contact us immediately regarding loading arrangements", but he received no reply to this cable. The vessel arrived at Basrah on the afternoon of July 12, 1951, reaching the buoys at 2.34 p.m.; the buoys were within the commercial limits of the port, and the arbitrator was satisfied that the only reason why the vessel went to the buoys was because of the absence of any shipper to whom notice of readiness could be given, and of any cargo ready for loading, and that the vessel was ready and able to load a cargo at that date and time. Gray, who was uncertain with whom he was authorised to deal as shipper cabled for clarification to the owners' New York agents; he received an answer on July 14 that, on the instruction of the charterer, he was to accept Vassos or his nominees as shipper. Gray thereupon sent Vassos a registered letter asking for information, and on July 15 Vassos cabled back: "Regret I have no connexion with steamer in question".

The reason for this situation was not known to Gray or the owners. The facts were that the price of scrap iron had risen very rapidly, and Vassos, who was the ultimate seller of the cargo and who alone controlled sufficient scrap iron in Iraq to supply the charterer's needs, was seeking to free himself from the bargain by claiming that the credit under which he was to receive payment from Chbib had not been opened in time. However, on July 17, Gray did know and cabled to the owners' agents, that Vassos had again confirmed emphatically that he had no interest in the vessel, and, that there were 6,000 tons of scrap iron in the Basrah area for which no shipping arrangements had yet been made,

A but that shippers associated with Vassos were believed to be interested in shipping 6,000 tons of scrap iron to the United Kingdom, which was probably the same cargo as might have been used to load on the vessel.

The vessel had now been in Basrah, at the buoys, for five days. On the following day, July 18, 1951, the owners rechartered the vessel to load another cargo from a port in India, and to carry it to Mobile, Alabama, and at noon on that day the owners' New York agents cabled Gray to instruct the master of the vessel to proceed immediately to the Indian port in order to load under the substitute charterparty. The charterer, who had been told that the owners were ordering the vessel away from Basrah, continued with his endeavours to arrange a shipment before the vessel sailed, and on July 19 cabled Gray demanding that he should hold the vessel and contact Chbib in Beirut for loading instructions. On July 20 the charterer, through attorneys in New York, wrote to the owners threatening action to protect his interests. In the meantime, cables continued to pass between the charterer's New York agents and Chbib regarding the possibility of loading the vessel provided that Vassos received the credit quickly, and that the vessel did not leave Basrah. The owners, however, refused to detain the vessel and she left Basrah on July 23, 1951. On July 24 the charterer obtained from the United States District Court for the Southern District of New York, an interim order restraining the owners from operating the vessel otherwise than under the charterparty dated June 30, 1951, until the dispute between the owners and the charterer had been determined by arbitration thereunder. On July 27 that order was discharged by consent, the owners and the charterer agreeing, without prejudice to their respective contentions, that the owners would give the charterer an option, to be exercised by midnight on Aug. 15, 1951, to charter a substitute vessel to load scrap iron at Basrah on the same terms as the charterparty dated June 30, 1951, provided that the charterer first satisfied Gray that he had a cargo ready for loading at Basrah. The charterer never exercised this option and, if and so far as he made any further efforts to procure a cargo, they were unsuccessful.

F On these facts the owners claimed that they were entitled to recharter the vessel, as they did, on July 18, 1951, and were entitled to recover damages for the charterer's alleged breach of the charterparty because, they contended:—
(i) the charterer was guilty of a breach of condition or fundamental term of the charterparty in failing to nominate a shipper ready, willing and able to accept notice of readiness under the charterparty, and (ii) the charterer, either by failing to nominate a shipper or by his nomination of alleged shippers who were in fact unwilling and unable to accept notice of readiness, had evinced an intention not to perform the charterparty, or not to perform it in accordance with its terms, and had therefore committed an anticipatory breach of contract which the owners were entitled to accept as a repudiation of the charterparty.

H While the owners relied primarily on the charterer's failure to nominate a shipper, they also relied on his failure to provide a cargo at Basrah or to nominate a berth there with regard to both the allegation of breach of condition and that of repudiation of the charterparty.

The charterer contended:—(a) he was not in breach of the charterparty by failing to nominate a shipper, or to provide a cargo, or to nominate a berth;
I (b) that any contractual requirement to nominate a shipper was waived; (c) that if, however, a breach of the charterparty was committed, and there was no waiver as in (b), such breach was not a breach of a condition or fundamental term of the charterparty but was merely a breach of warranty giving rise to a claim for damages, and that, therefore, the owners were not entitled on July 18, 1951, to treat the charterparty as at an end; and (d) that the charterer had never been unwilling to perform the contract but, at the worst, had only been unable to do so, on July 18, 1951, and that mere inability to perform was never

sufficient to bring about an anticipatory breach of contract. If, however, that contention was wrong in law, the charterer contended that the necessary inability to perform the contract had to be of an "irretrievable" nature which was not the position in the present case; further the lay days had not expired by July 18, 1951. A

With regard to the owners' first contention, the arbitrator found that the charterer had at no time nominated a shipper at, or with a representative at Basrah, who was able, ready and willing to accept notice of readiness at Basrah in accordance with the charterparty; that although Haddad, Chbib and Vassos each knew that the vessel was at Basrah on or after July 12, 1951, none of them was a "shipper" for the purposes of the charterparty; and that although the charterer knew that the vessel was at Basrah on or after that date, he also was not a "shipper". The arbitrator further found, that a reasonable time for providing a cargo, and for nominating a berth had not expired by July 18, 1951, and that in these respects there was no breach of the charterparty. B C

The arbitrator held:—(i) that there was no waiver, by or on behalf of the [owners], of the obligation under the charterparty to nominate a shipper; (ii) that the charterer committed a breach of the charterparty by not nominating a shipper at Basrah, able, ready and willing to accept notice of readiness; (iii) that such a nomination ought to have been made, but was not, at the latest, by the time the vessel arrived at the buoys at Basrah, viz., by 2.34 p.m. on July 12, 1951; (iv) that a reasonable time for making the nomination had expired at 2.34 p.m. on July 12, 1951; and (v) that if, however, the charterer was not obliged to nominate a shipper at Basrah until after the vessel had arrived there, a reasonable time for making the nomination had expired by the time the vessel was rechartered, viz., by July 18, 1951. D E

The arbitrator further held, that the charterer's failure to nominate a shipper within the proper time did not amount to a breach of a condition or fundamental term of the charterparty and that, therefore, the owners were not entitled to rely on that failure to justify their treatment of the charterparty as being at an end on July 18, 1951. The owners therefore failed in their first contention, viz., that the charterer was in breach of a condition or fundamental term of the charterparty in failing to nominate a shipper ready willing and able to accept notice of readiness, or in failing to provide a cargo or to nominate a berth by July 18, 1951. F G

With regard to the date on which the lay days began to run, the arbitrator held that as the charterparty was a berth charterparty the lay days had not begun by July 18, 1951, the date on which the vessel was rechartered; if he was wrong, and the charterparty was a port charterparty, the arbitrator held that the lay days would still not have begun to run at that date because no notice of readiness had been given. However, assuming that the lay days did begin to run before July 18, 1951, the arbitrator found that under the terms of the charterparty, which entitled the charterer to six weather working days (Sundays and holidays excepted) in which to load the cargo, the lay days would have begun on July 14, and would have expired on July 21, viz., after July 18. But he further found:—(i) no cargo had been brought to the loading wharf by July 18; (ii) if the owners had waited until July 21, or even until July 24, before rechartering the vessel, no cargo would have been brought to the loading wharf by either of those dates; (iii) the loading rate of 1,000 metric tons per working day would not have been maintained; (iv) the cargo could and would not have been loaded within the lay days; and (v) if the lay days had been running on July 18, 6,000 metric tons of scrap iron could not have been loaded within the remaining lay days, viz., before July 21. H I

- A With regard to the owners' second contention, viz., that the charterer evinced an intention not to perform the charterparty and thereby committed an anticipatory breach of it, the arbitrator, having decided to exclude from his consideration in deciding this point events which occurred before July 18, 1951, but which were unknown to the owners on that date, and all events which occurred after July 18, 1951, found the following facts: On July 18 there was no one in
- B Iraq who was prepared to ship scrap iron on board the vessel; the charterer did not then know this, although he did know that Vassos, who was the only person who had scrap iron available for shipment, was not prepared to ship it, but the charterer still hoped that he would agree to do so. After July 18, Vassos was not willing to sell scrap iron to the charterer, Haddad or Chbib, but the charterer, until July 24, hoped, and was encouraged by Chbib to hope, that Vassos would
- C relent. However, if Vassos had agreed to ship the scrap iron, this could only have been done, by then, if the owners were prepared to break the new charterparty which they had entered into on July 18, and there was no evidence to show that they would have done this. Further, Vassos would probably have asked a price exceeding the amount for which the charterer had permission to open credit, and it would have taken some time for him to make new arrangements.
- D In the result, the charterer was not able to perform the charterparty on July 18, 1951, although he was willing to do so on that date if and when a cargo was available to load.

The arbitrator found the following further facts: A reasonable shipowner on the facts known to the owners on July 18, 1951, would have inferred:—(a) that the charterer was willing to perform his obligations under the charterparty if

E able to do so, but that he was unable; and (b) that the charterer was willing to perform within a reasonable time if able to do so, but that he was unable. Such a reasonable shipowner would not have inferred:—(i) that the charterer would always be unable or unwilling to perform his obligations; or (ii) that the charterer would be unable or unwilling to perform them before a period sufficient to frustrate the charterparty had expired.

- F A reasonable shipowner on the facts known to the owners by July 18, 1951, as interpreted in the light of later events, would have inferred:—(a) that the charterer was willing to perform his obligations if able to do so, but that he was unable; (b) that the charterer was willing but unable to perform his obligations within a reasonable time; (c) that the charterer would never be able to perform his obligations, but that he would always be willing if he became able to do so;
- G and (d) that the charterer would be unable to perform before a period sufficient to frustrate the charterparty had expired, but that he would be willing to perform before the expiry of that period if he became able.

The arbitrator found so far as it was a question of fact, and held so far as it was a question of law, that the charterer had evinced an intention not to perform the charterparty and had thereby committed an anticipatory breach of it

H which the owners were entitled to treat and accept as a repudiation of the charterparty, which in fact they did by rechartering the vessel on July 18, 1951.

The question of law raised on the Special Case was whether on the facts found and on the true construction of the charterparty the owners were entitled on July 18, 1951, to treat the charterparty as discharged by the charterer's breach, and to claim damages.

- I If the court answered that question in the affirmative, the arbitrator awarded that the charterer broke the charterparty and was liable in damages to the owners; if the court answered the question in the negative, the arbitrator awarded that the charterer did not break the charterparty and was not liable in damages to the owners.

Ashton Roskill, Q.C., and H. V. Brandon for the owners, the claimants.

A. A. Mocatta, Q.C., and M. R. E. Kerr for the charterer, the respondent.

Cour. adv. vult.

Mar. 12. **DEVLIN, J.**, read the following judgment: This case gives rise to a difficult question. How long is a ship obliged to remain on demurrage, and what are the rights of the owner if the charterer detains her too long? Translated into the terms of general contract law, the question is: Where time is not of the essence of the contract—in other words, when delay is only a breach of warranty—how long must the delay last before the aggrieved party is entitled to throw up the contract? The theoretical answer is not in doubt. The aggrieved party is relieved from his obligations when the delay becomes so long as to go to the root of the contract and amount to a repudiation of it. The difficulty lies in the application, for it is hard to say where fact ends and law begins. The best solution will be found, I think, by a judge who does not try to draw too many nice distinctions between fact and law, but who, having some familiarity both with the legal principle and with commercial matters and the extent to which delay affects maritime business, exercises them both in a common-sense way. This is the sort of solution which, on the supposition that it was acceptable to business men, the Commercial Court was created to provide.

It is not a solution which can be easily found by the process of arbitration, which requires the rigid separation of fact and law. The case was tried on documentary evidence and there does not appear to have been any serious dispute about the primary facts, but there was a great deal of dispute about the inferences of fact to be drawn from them. I venture to think that either a judge or an arbitrator, given full jurisdiction over fact and law, could have disposed of the whole case in much less time than it would take the arbitrator separately to settle the facts and the judge separately to settle the law. The central question being, it was thought, what was the meaning to be attached by a reasonable shipowner to the conduct of the charterer, the arbitrator has found sixteen different shades of meaning, so that the law may be fully argued. Counsel for the owner has submitted, however, that the sixteen are not enough and that the arbitrator ought to have found what the true meaning would be in the light of earlier events as well as of later ones. Much of my time (not all, for there are difficult questions of law, which have been fully and most helpfully argued) has been occupied with the sort of questions that troubled the courts so much before the procedural reforms of the last century: What precisely are the facts found; what inferences of fact can be implied; what points are open to each side; and in what circumstances ought the Special Case to be remitted for further findings? In the end I have had to accede to an application to remit. Much of this might have been shortened if I were permitted to draw inferences of fact, but it is well settled that I am not. The process of arbitration in this case has certainly increased greatly the expense of arriving at a just decision, and perhaps diminished the likelihood of a satisfactory one.

I am well aware that commercial men—particularly when, as in this case, they are foreigners—often have good reasons for preferring arbitration to litigation, which in their minds override the expense and the delay. But I do not think I do any disservice to the business community by reminding them how much extra in a case of this sort they do have to pay; and when in the end the bill comes in, I should not like either of the two foreign concerns which will have to pay it to suppose that it resembles, even remotely, the cost of obtaining judgment in England on a commercial matter.

[His LORDSHIP stated the principal facts, taking them from the narrative at the beginning of the Case Stated*, and continued:] If the lay days are treated as running from July 12 at 2.34 p.m. when the vessel arrived at the buoys, they would have expired on July 21. So, when the charter was cancelled on July 18, the lay days had only run for two-thirds of the time. The owners justify their action in cancelling before the lay days had expired by saying that on or

* See pp. 73 to 75, ante.

- A before July 18 the charterer had committed an actual or anticipatory breach of his obligation under the charter. The obligations which for this purpose fall to be considered are four:
- (1) To nominate a shipper.
 - (2) To nominate a berth.
 - (3) To provide a cargo.
- B (4) To finish loading before the expiry of the lay days.
- The charterer submits that there was no obligation on him to nominate a shipper; he claims that the only consequence of his failure to do so would be that the owners were dispensed from the duty of giving notice of readiness. It might perhaps be otherwise, it was submitted, if the lay days did not begin to run until after notice of readiness was given, for then the operation of the charter might
- C be held up. But the decision of the Court of Appeal in *North River Freighters, Ltd. v. President of India* (1) ([1956] 1 All E.R. 50), shows that under a charterparty in this form the lay days begin to run in effect from the time the vessel is ready to proceed to her berth, irrespective of whether or not a berth has then been nominated or whether notice of readiness has been given. The result, the charterer submits, is that the only person who can suffer from there being no notice of
- D readiness is himself. This is a plausible contention; but I need not determine it one way or the other, for it is clear that the same sort of reasoning does not apply to the next two obligations. The charterer admits that he was under an obligation to nominate a berth and also to provide cargo, the latter being a separate and distinct obligation from the obligation to load; see *Grant & Co. v. Coverdale, Todd & Co.* (2) ((1884), 9 App. Cas. 470). But he submits that he
- E would not be in breach of either of these obligations until after the expiry of the lay days. In my judgment this submission is not good. Since no time is mentioned in the contract within which these obligations have to be fulfilled, the law implies a reasonable time. All these obligations, i.e., the obligation to nominate a berth (and a shipper, if it be a term) and to provide a cargo, are obligations preliminary to loading the cargo. The obligation to load has a time
- F prescribed for it in the charterparty; loading must be completed within the lay days and the charterer is in breach of contract if he fails so to do. The time therefore within which the preliminary duties are to be performed is to be calculated by relation to the time prescribed for the main duty; they need not be performed any earlier than is necessary to enable the main duty to be performed timeously, but they may not be performed any later. The result is that the
- G nomination of the berth and the provision of the cargo must be made in sufficient time to enable the vessel to be completely loaded within the lay days. In *Vergottis v. William Cory & Son, Ltd.* (3) ([1926] 2 K.B. 344), GREER, J. (ibid., at p. 354), so decided in relation to the obligation to provide a cargo, and in my judgment the same reasoning applies to the obligation to nominate a
- H berth. The arbitrator has found, in para. 29 (c) (v) of the Special Case, that on July 18, 6,000 tons could not possibly have been loaded in the lay time remaining. It must follow therefore that by July 18, the time for providing a cargo and nominating a berth had expired. In para. 27 of the Special Case the arbitrator finds that a reasonable time for providing cargo and for nominating a berth had not expired by July 18. I can account for this alternative finding only on the
- I hypothesis that the arbitrator has not measured the reasonable time in the way in which as a matter of law I think it ought to be measured. Accordingly this finding cannot stand, and I hold, contrary to the view of the arbitrator*, that the charterer broke both these terms.

What of the obligation to load? On July 18 the lay days had not expired, but the charterer had by his dilatoriness put it out of his power to comply with the term that he must complete the loading by July 21. There cannot be an actual

* This finding is at p. 76, letter C, ante.

breach of the express term to complete loading by July 21, but counsel for the owners was at one point of his argument disposed to submit that there was an implied term that a party should not do any act (and I should add, though this goes beyond counsel for the owners' submission, be guilty of any omission) which would put it out of his power to perform his obligations. If this is right, the charterer had by July 18 committed an actual breach of that implied term. But whether the breach is said to be an actual breach of an implied term or an anticipatory breach of an express term is not to my mind at all important; and it must be one or the other. A B

The next point to be determined is whether any of the breaches was of a condition of the charterparty as distinct from a warranty. If so, then the owners were ipso facto entitled to rescind on July 18. In my judgment none of them is a condition. It is well settled, and not in this case disputed, that the obligation to load within the lay days is a warranty only and not a condition. Its breach does not entitle the owner to rescind but gives rise to a claim for damages only; and in this charterparty, as in most others, those damages are liquidated damages paid in the form of demurrage. It would be strange if, when the main obligation to load is only a warranty, preliminary obligations should be given the status of a condition. It would be strange if, for example, the charterer were to be legally advised that he must not keep the vessel waiting idly at the buoys on pain of cancellation, but that if he nominated a berth he could keep her waiting idly at the berth by payment of demurrage. As to the obligation to provide a cargo, I am satisfied that it is concluded as a matter of authority that this obligation is a warranty only. I cited the authorities* in *Chandris v. Isbrandtsen-Moller Co., Inc.* (4) ([1950] 1 All E.R. 768 at p. 777). I have in the light of counsel for the owners' argument examined them again, but I am still of the opinion that in the above case I drew the right conclusion from them and I need not therefore repeat in detail the reasoning which is there set out. I think that the same reasoning must apply in principle to the obligation to nominate a berth. C D E

It follows that the owners were not entitled ipso facto to rescind on July 18. But a party to a contract may not purchase indefinite delay by paying damages and a charterer may not keep a ship indefinitely on demurrage. When the delay becomes so prolonged that the breach assumes a character so grave as to go to the root of the contract, the aggrieved party is entitled to rescind. What is the yardstick by which this length of delay is to be measured? Those considered in the arbitration can now be reduced to two: first, the conception of a reasonable time, and secondly, such delay as would frustrate the charterparty. The arbitrator, it is clear, preferred the first; but in my opinion the second has been settled as the correct one by a long line of authorities. F G

Before I refer to them, I must enlarge a little on what is meant in this connexion by frustration. The doctrine that a commercial contract is dissolved on the happening of a supervening event which frustrates the object of the venture now plays so important a part in the law that a reference to frustration is likely to be taken as a reference to that doctrine. But the term was in use in relation to breach of contract well before the doctrine was declared in 1870 or thereabouts. For some time before that the courts had been using the yardstick of frustration for the measurement of delay caused by breach of contract. It was because the same yardstick was used for the measurement of delay caused by the supervening event that the new doctrine got its name of frustration. The history is most conveniently and concisely set out in *McELROY and GLANVILLE WILLIAMS' IMPOSSIBILITY OF PERFORMANCE* (1941), p. 121. To bring a contract to an end by breach of warranty there had to be a failure of consideration, that is to say, the breach had to be such as to deprive the plaintiff in effect of the benefit of his contract. Various metaphors came into use for describing the character of H I

* The authorities cited were: *Grant & Co. v. Coverdale, Todd & Co.* (1884), 9 App. Cas. 470; *Ardan S.S. Co. v. Andrew Weir & Co.*, [1905] A.C. 501.

A such a breach, such as "going to the whole root and consideration of" the contract and "frustrating the object of the voyage". The former phrase was used by LORD ELLENBOROUGH, C.J., in *Davidson v. Gwynne* (5) ((1810), 12 East, 381 at p. 389), and the second appears to have been used first in *Tarrabochia v. Hickie* (6) ((1856), 1 H. & N. 183).

The authorities cited by counsel for the charterer are *Freeman v. Taylor* (7) ((1831), 8 Bing. 124); *Clipsham v. Vertue* (8) ((1843), 5 Q.B. 265); *Tarrabochia v. Hickie* (6); *MacAndrew v. Chapple* (9) ((1866), L.R. 1 C.P. 643 per WILLES, J., at p. 648); and *Stanton v. Richardson* (10) ((1872), L.R. 7 C.P. 421). There is then a gap until in modern times there is a dictum of SCRUTTON, L.J., in *Inverkip S.S. Co., Ltd. v. Bunge & Co.* (11) ([1917] 2 K.B. 193 at p. 201). The point is also dealt with in SCRUTTON ON CHARTERPARTIES (16th Edn.) at p. 350, where it is stated
 C that the shipowner cannot say that demurrage provisions apply only for a reasonable time; the shipowner "may not take his ship away unless the delay is so long as to amount to a repudiation or the frustration of the contract". In the earlier editions* of SCRUTTON this read differently and ended in the sense for which counsel for the owners contends: "after the lapse of a reasonable time he may take his ship away". Curiously enough, notwithstanding the dictum
 D of SCRUTTON, L.J., in *Inverkip S.S. Co. v. Bunge & Co.* (11), the text remained in this form until it was altered in 1931 in the 13th Edition, at p. 358, for which Mr. PORTER and Mr. MCNAIR were responsible. At p. 93 in the 16th Edition of SCRUTTON, the text deals with the right of the charterer to cancel in respect of delay in arrival at the port of loading and states that (apart from the common cancelling clause) it is not a condition but "the delay may be such as to frustrate
 E the commercial purpose of the voyage". This statement is also to be found in the 11th Edition, at p. 93, the last for which SCRUTTON, L.J., was himself responsible, where it has also the authority of LORD PORTER. I can see no ground for drawing any distinction on this point between delay in loading and delay in proceeding on a voyage, since time is not of the essence in either case.

It appears that in the arbitration only the dictum of SCRUTTON, L.J., in
 F *Inverkip S.S. Co. v. Bunge & Co.* (11) was cited to the arbitrator—there is of course no obligation on the parties to go exhaustively into the law—and no doubt the arbitrator felt himself free to disregard it on the ground that it was obiter. If the earlier authorities had been cited to him I think he would inevitably have reached the same conclusion as I do.

G In *Clipsham v. Vertue* (8) (5 Q.B. 265), the charterer refused to load and (ibid., at p. 269), pleaded that the vessel did not arrive at the port of loading "within a reasonable and proper time . . . after the making of the said charterparty; but, on the contrary . . . arrived . . . a long and unreasonable time, to wit thirty-eight days, after the said vessel would have arrived . . ." There was a demurrer to the defendant's plea on the ground that it did not show that by
 H the supposed delay the object of the voyage was lost. The demurrer was upheld. LORD DENMAN, C.J., said (ibid., at p. 272):

"If issue had been taken on the term 'unreasonable', we should have been required to put a construction upon it; and that, without further explanation, we have not the means of doing. It is quite possible that a vessel
 I may arrive in a time which, in some sense of the word, is unreasonable, and yet that the freighter may derive benefit from the voyage."

WILLIAMS, J., said (ibid.):

"The real question is, whether a plea, using only such expressions as this plea contains, can be supported. I find no authority in its favour: what is an 'unreasonable' time is left matter of speculation. To what extent the

*See e.g., the 12th Edn., p. 348.

unreasonableness went, whether so far as that the voyage was lost, or the cargo could not be put on board, we are not told." A

In *Tarrabochia v. Hickie* (6) (1 H. & N. 183), the jury found that the vessel did not proceed to the port of loading within a reasonable time, but that the object of the voyage was not thereby frustrated. The charterer who had refused to load lost his case.

Stanton v. Richardson (10) (L.R. 7 C.P. 421), was one of the early cases in which it was decided that a ship which was unfit for the cargo which she had contracted to load was unseaworthy. The question, however, also arose as to the length of time which would be necessary to make her fit, and the evidence appears to have been that it would be probably seven or eight months. On this the jury were asked two question (*ibid.*, at p. 425): B

" 11. If the ship was defective, was the captain willing and able to make her fit within a reasonable time ?

" 12. Was he willing and able to make her fit within such a time as would not have frustrated the object of the [voyage] ? " C

To each of these questions the jury answered: " Willing, but not able ". At p. 432 BOVILL, C.J., said that the jury, having found that what occurred did wholly frustrate the objects of the voyage, the case came distinctly within the dictum of LORD ELLENBOROUGH in *Havelock v. Geddes* (12) ((1809), 10 East, 555 at p. 564), that a neglect which precluded the defendants from making any use of the vessel would go to the whole consideration and might be insisted on as an entire bar; and he added (*ibid.*, at p. 433), that " the object of the voyage being frustrated, the charterer was not bound to load a cargo ". BRETT, J., who had tried the case and given the directions to the jury, said (*ibid.*, at p. 437): D

" . . . the conclusion to be drawn from all the cases analogous to this is, that if the breach of contract by the shipowner be such as to justify the charterer in not putting the cargo on board at the moment of the breach, and it cannot be remedied within such a time as not to frustrate the object of the voyage, this absolves the charterer altogether." E

While these authorities are in my judgment conclusive, I must not refrain from dealing with arguments on general principle that were advanced by counsel for the owners. On a repudiation by one party, the other has the right to elect to keep the contract alive. So counsel for the owners argued that the period of delay allowed must not be so long as the life of the contract; otherwise the election would be rendered valueless. This consideration, he submitted, showed that the " frustration " yardstick was inapplicable for two reasons. The first was that, as by the doctrine of frustration a contract is dissolved automatically, whether the parties wish it to end or not, the aggrieved party could not then elect to keep the contract alive. The second was that, even if he could elect, since *ex hypothesi* the object of the parties would have been frustrated, there could be no point in keeping the contract alive. F

In my judgment neither of these considerations is valid. The first, I think, confuses the occurrence of a frustrating event with the doctrine of dissolution by frustration. Not every frustrating event brings the contract to an end. The event must have other characteristics, and one of them is that it must not have arisen by the fault of either party. This is clearly shown by *Maritime National Fish, Ltd. v. Ocean Trawlers, Ltd.* (13) ([1935] A.C. 524). In that case the charterers claimed that the refusal of a fishing licence in respect of the trawler which they had chartered frustrated the object of the charterparty and put an end to it. The plea failed because the refusal of the licence had been brought about by the charterers' own fault. The charterparty remained alive and the owners succeeded in their claim for hire. G

I

- A As to the second consideration, it does not follow automatically that because the object of the venture is destroyed, there is no value left in the charterparty. Usually that would be so, and therefore usually no doubt the aggrieved party would wish to rescind. But the rights given to a party under a contract may be wider than the object of the venture requires them to be. It may then be worth a party's while to keep the contract alive for an ancillary purpose and compensate
- B himself by damages for the loss of his main object.

Counsel for the owners next argued that there were ambiguities in the arbitrator's finding which made it unacceptable, at least unless remitted for clarification. He pointed out that the phrase used in the Special Case is: "before the expiry of such time as would frustrate the charterparty"; and said that the arbitrator must therefore have had in mind the application of the doctrine of discharge by frustration since he referred to the charterparty and not the object of the venture. I do not think that for this purpose it matters if he had. For the purpose of measuring the period of delay, the yardstick is the same whether what is involved is a dissolution or a repudiation.

- Counsel for the owners also pointed out that in some of the authorities the "reasonable time" yardstick is used as well as the "frustration" yardstick.
- D This shows, he submits, that the two are to be regarded in law as one and the same thing, and therefore the arbitrator's findings are contradictory. It is true that in some of the cases, for example, *Geipel v. Smith* (14) ((1872), L.R. 7 Q.B. 404), to which I shall later refer, a reasonable time is equated with the frustration period. The truth is that there is nothing wrong in using a reasonable time as a yardstick provided you determine what is reasonable by considering whether or
- E not there has been unreasonable delay in the light of the object which the parties had in mind. It is only when the two yardsticks have in effect been shown to be the same that the courts have accepted the test of reasonableness. Where they have been contrasted, as in *Clipsham v. Vertue* (8) and *Tarrabochia v. Hickie* (6), the test of reasonable time has been rejected. In the arbitrator's findings the two periods are contrasted and it is clear that whatever he understood
- F to be meant by a reasonable time, it was something less than the period required for frustration, and therefore does not amount to a delay long enough to justify rescission.

- Counsel for the owners next argued on this topic that the finding by the arbitrator based on the frustration of the charterparty involved a point of law, because frustration is a question of law, and that in its application the arbitrator
- G must have misdirected himself on the true meaning of frustration and have considered the period to have been longer than the law requires. I think that, while the application of the doctrine of frustration is a matter of law, the assessment of a period of delay sufficient to constitute frustration is a question of fact. The period has to be measured, no doubt, in the light of the principles that have
- H been laid down in cases as to the sort of thing that amounts to frustration, but it is in the end a finding of fact. As such it can be successfully attacked only if I am satisfied that the arbitrator could only have reached his conclusion of fact by applying some wrong principle of law. Counsel for the owners does go so far as to submit that the arbitrator, if he had applied the right test, must inevitably have found frustration. On the facts, it seems plain that by July 18
- I the charterer had got no cargo to ship, and indeed no shipper, and that he was in the position of having within three days of the expiry of the lay days to begin a search for a shipper of a cargo of a commodity which was not easy to find. It can be argued that a contract under which a ship is expected to go and hang about while the charterer negotiates for a cargo is, commercially speaking, a quite different venture from that which the ordinary charterparty contemplates. I think that a strong case could be, and doubtless was, made out by the owners on these lines. The arbitrator may have thought that it was a strong case too;

but, if so, he did not think it quite strong enough. I do not find it possible to say that the facts are so strong that the inference of frustration is the only one that can properly be drawn from them. *British & Beningtons v. North Western Cachar Tea Co., etc.* (15) ([1923] A.C. 48), which I cite later on in another connexion, affords an illustration of how a judge can go wrong by interfering with an arbitrator's conclusions on this point unless there is no evidence to support them. A

Having settled the proper yardstick, the next question that arises for determination could, I think, have been put very conveniently in the form adopted in *Stanton v. Richardson* (10) (L.R. 7 C.P. 421), namely, was the charterer on July 18, 1951, willing and able to load a cargo within such time as would not have frustrated the object of the venture; and the answer to that question would have determined the case. But in the arbitration the main argument was on anticipatory breach, and the emphasis on one mode of it, namely, renunciation. The chief findings of the arbitrator relate entirely to renunciation. I must therefore consider the nature of anticipatory breach and the findings thereon which the arbitrator has made. B

The law on the right to rescind is succinctly stated by LORD PORTER in *Heyman v. Darwins, Ltd.* (16) ([1942] 1 All E.R. 337 at p. 359), as follows: D

"The three sets of circumstances giving rise to a discharge of contract are tabulated by ANSON* as: (i) renunciation by a party of his liabilities under it; (ii) impossibility created by his own act; and (iii) total or partial failure of performance. In the case of the first two the renunciation may occur or impossibility be created either before or at the time for performance. In the case of the third it can occur only at the time or during the course of performance." E

The third of these is the ordinary case of actual breach and the first two state the two modes of anticipatory breach. In order that the arguments which I have heard from either side can be rightly considered, it is necessary that I should develop rather more fully what is meant by each of these two modes. F

A renunciation can be made either by words or by conduct, provided it is clearly made. It is often put that the party renouncing must "evinced an intention" not to go on with the contract. The intention can be evinced either by words or by conduct. The test of whether an intention is sufficiently evinced by conduct is whether the party renouncing has acted in such a way as to lead a reasonable person to the conclusion that he does not intend to fulfil his part of the contract. This application is fully discussed in *Forslind v. Bechely-Crundall* (17) (1922 S.C. (H.L.) 173), and forms the basis for the arbitrator's findings. G

Of the two modes, renunciation has since the decision in *Hochster v. De la Tour* (18) ((1853), 2 E. & B. 678), established itself as the favourite. The disadvantage of the other is that the party who elects to treat impossibility as an anticipatory breach may be running a serious risk. Suppose, for example, that a man promises to marry a woman on a future date, or to execute a lease, or to deliver goods; and that before the day arrives he marries another, or executes the lease in favour of another, or delivers the goods to a third party. The aggrieved party may sue at once. LORD CAMPBELL, C.J., observed in *Hochster v. De la Tour* (18) (*ibid.*, at p. 688): H

"One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day: but this does not necessarily follow; for, prior to the day fixed I

* See ANSON'S LAW OF CONTRACT (20th Edn.), p. 319.

A for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff."

But if the plaintiff treats the defendant's conduct as amounting to renunciation and justifies his rescission on that ground, the defendant could not avail himself of this defence.

B I said that it was after *Hochster v. De la Tour* (18) that renunciation established itself as the favourite, because until then it was not certain that a man who said "I will not perform" would be held to his word. In *Hochster v. De la Tour* (18) it was argued that he could change his mind, and that the fact that at one time he said he was not ready and willing did not necessarily mean that he would be C unwilling when the time for performance came. *Hochster v. De la Tour* (18) established that a renunciation, when acted on, became final. Thus if a man proclaimed by words or conduct an inability to perform, the other party could safely act on it without having to prove that when the time for performance came the inability was still effective.

Since a man must be both ready and willing to perform, a profession by words D or conduct of inability is by itself enough to constitute renunciation. But unwillingness and inability are often difficult to disentangle, and it is rarely necessary to make the attempt. Inability often lies at the root of unwillingness to perform. Willingness in this context does not mean cheerfulness; it means simply an intent to perform. To say "I would like to but I cannot" negatives E intent just as much as "I will not". In the earlier part of his argument counsel for the charterer contended that a statement of inability without unwillingness did not amount to a renunciation, but in the end he abandoned the point. He F concedes that the arbitrator's conclusion that the charterer evinced an intention not to perform is sufficiently supported by the finding that his attitude was that he was willing to perform if he could, but that he could not. In the other form of anticipatory breach, counsel for the charterer, as will be seen, contends that the disablement must be deliberate and not negligent or accidental. But to the extent that inability enters into renunciation, counsel for the charterer is not G concerned with the character of the inability. If a man says "I cannot perform", he renounces his contract by that statement, and the cause of the inability is immaterial.

The two forms of anticipatory breach have a common characteristic that is H essential to the concept, namely, that the injured party is allowed to anticipate an inevitable breach. If a man renounces his right to perform and is held to his renunciation, the breach will be legally inevitable; if a man puts it out of his power to perform, the breach will be inevitable in fact—or practically inevitable, for the law never requires absolute certainty and does not take account of bare possibilities. So anticipatory breach means simply that a party is in breach I from the moment that his actual breach becomes inevitable. Since the reason for the rule is that a party is allowed to anticipate an inevitable event and is not obliged to wait till it happens, it must follow that the breach which he anticipates is of just the same character as the breach which would actually have occurred if he had waited. In *Thorpe v. Fasey* (19) ([1949] 2 All E.R. 393), WYNN-PARRY, J., said (*ibid.*, at p. 398):

"In my judgment, when one considers these cases there is no good reason for a distinction, nor, in my view, does there exist any distinction, between the nature of the repudiation which is required to constitute an anticipatory breach and that which is required where the alleged breach occurs after the time for performance has arisen."

If this is right, it seems to me to dispose in principle of counsel for the charterer's submission that the disablement must be deliberate. If when the day comes

for performance a party cannot perform, he is in breach, quite irrespective of how he became disabled. The inability which justifies the assumption of an anticipatory breach cannot be of any different character. Anticipatory breach was not devised as a whip to be used for the chastisement of deliberate contract-breakers, but from which the shiftless, the dilatory, or the unfortunate are to be spared. It is not confined to any particular class of breach, deliberate or blameworthy or otherwise; it covers all breaches that are bound to happen. A

I turn now to the findings in the Special Case. In para. 35 the arbitrator finds as a fact, in so far as it be a question of fact, and holds in law, in so far as it be a question of law, that the charterer evinced an intention not to perform the charterparty and committed an anticipatory breach of it. This finding or conclusion is based on sixteen findings in para. 34 in which the arbitrator states his view of the effect of the charterer's conduct on a reasonable shipowner. I think that I can, sufficiently for the purposes of this judgment, summarise the effect of these findings without setting out all sixteen. In the arbitrator's judgment, the owners should on July 18 have inferred from the charterer's conduct: (1) that he was always willing to perform if he could; (2) that he could not have performed by the end of the lay days or within a reasonable time thereafter; and (3) that he could have performed before the delay became so long as to frustrate. B

This third finding is, however, to be qualified by a fourth, which is that if the owners were entitled to interpret what they knew of the charterer's conduct on July 18 in the light of later events, they would then have concluded that the charterer would not be able to perform before the delay had become so long as to frustrate. C

For the arbitrator to have awarded as he did in favour of the owners, he must have adopted as correct and relevant either the second or the fourth of these findings. In fact, he states that he rejected the fourth finding as irrelevant, and so must have found for the owners on the second finding. As I have held that the second finding is irrelevant in law, the owners can succeed before me on renunciation only if they satisfy me that the arbitrator was wrong in rejecting the fourth finding. D

In my opinion the arbitrator was right. Indeed, I do not really know what is meant by interpreting conduct in the light of later events. I think that the question or the finding embodies a confusion between the principle illustrated by *Forslind v. Bechely-Crundall* (17) and that laid down in *The Savona* (20) ([1900] P. 252), and *Embiricos v. Sydney Reid & Co.* (21) ([1914] 3 K.B. 45); and which is most fully formulated by LORD SUMNER in *Bank Line, Ltd. v. Arthur Capel & Co.* (22) ([1919] A.C. 435 at p. 454) as follows: E

"The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do. On this the judgments in the above cases substantially agree*. Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided." F

* The cases referred to are: *Scottish Navigation Co. v. Souter & Co.*, [1916] 1 K.B. 675; *Admiral Shipping Co. v. Weidner, Hopkins & Co.*, [1917] 1 K.B. 222; *Anglo-Northern Trading Co. v. Emlyn Jones & Williams*, [1917] 2 K.B. 78; *Countess of Warwick S.S. Co. v. Le Nickel Société Anonyme*, [1918] 1 K.B. 372; *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A.C. 119. G

- A *Forslind v. Bechely-Crundall* (17) is based on the simple and well-known principle that a man may speak by his deeds as well as his words. It is not peculiar to anticipatory breach; a contract can, for example, be made by conduct as well as be broken by it. LORD SUMNER's principle is a device by which for commercial purposes a man may be entitled to act on information which he has and be protected even if it turns out to be unreliable or untrue. It depends on
- B likelihood and a forecast of future events. But conduct, it seems to me, can only be interpreted in the light of the events that are known to the interpreter at the time.

Even if LORD SUMNER's principle applied, counsel for the owners rests too much on the words "what happens afterwards may assist". This does not, in my judgment, mean that a forecast, which appeared to be the most reasonable one at the time, may be revised in the light of after events and the revised version prevail. It means simply that if there is a question as to which of two forecasts seemed at the time to be the better one, the knowledge of what happened afterwards may assist the judge in making his choice between them.

- C Finally on this point counsel for the owners submitted that he had got a finding of anticipatory breach, that there was evidence to support it, and that that ended the matter. He too claimed that he was in a better position with a finding of anticipatory breach than he would have been with a similar finding of actual breach, and with that argument I have already dealt. It is true that the finding in para. 35 of the Special Case* is in favour of counsel for the owners and that the evincing of an intention is a question of fact. But counsel for the charterer successfully attacks that finding if he can show that there is necessarily involved in it an error of law. In the light of the findings in para. 34† and for the reasons which I have given, I think that counsel for the charterer can show that that finding must be based on an erroneous concept of the length of delay necessary to amount to a repudiation; and so the finding cannot stand. This means that counsel for the owners' case on renunciation fails and that he must rely on the other side of anticipatory breach. That brings one back to the
- F question: Was the charterer, whatever interpretation be put on his conduct, in fact willing and able to perform?

- The arbitrator has not found facts which constitute a direct answer to this question. But counsel for the owners submits that he has found facts which, taken together, amount to an answer, and that the answer is "Willing but not able". This alleged finding, which is crucial to counsel for the owners' case on the point,
- G is disputed by counsel for the charterer; he says it is not to be found in the Special Case. This dispute has led to a lot of argument and detailed examination of various parts of the Special Case and also to a motion to remit made by counsel for the owners in case he was wrong and counsel for the charterer right. It is inconvenient to interrupt the argument to deal with these points now. I
- H shall continue it on the assumption that counsel for the owners has got or gets the finding he wants. Counsel for the charterer, as I have already indicated, submits that this finding, if counsel for the owners has it, is irrelevant. He submits that the only sort of inability that would, standing by itself, be of use to counsel for the owners is inability deliberately created by the charterer, i.e., by the doing of an act which he knew at the time would disable him from performing
- I his contract. There is no suggestion of an act of this character, and it would of course be inconsistent with the finding of willingness.

I have already given reasons for thinking that if I have rightly understood the nature of anticipatory breach, counsel for the charterer's argument is unsound in principle. I turn now to consider how it stands on the authorities. LORD PORTER's statement of the law in *Heyman v. Darwins, Ltd.* (16) ([1942] 1 All E.R. 337

* This finding is stated at p. 77, letter G, ante.

† See p. 77, letters D to G, ante.

at p. 359), to which I have referred, uses the term "created by his own act". A
 I see no reason for reading any limitation into those words. I think that the
 law on this point is correctly stated by the learned editors of SMITH'S LEADING
 CASES (13th Edn., 1929), Vol. 2, at p. 40, in the following terms:

"A party is deemed to have incapacitated himself from performing his
 side of the contract, not only when he deliberately puts it out of his power B
 to perform the contract, but also when by his own act or default circum-
 stances arise which render him unable to perform his side of the contract
 or some essential part thereof."

The first authority cited for this proposition is *Keys v. Harwood* (23) ((1846),
 2 C.B. 905). In this case the defendant had undertaken to deliver certain C
 furniture, but before he could do so a judgment creditor took the furniture in
 execution. The defendant's inability to perform was clearly not due to his
 own deliberate act, but nevertheless he was in default. TINDAL, C.J., said that
 the case was to be considered as if the defendant had himself taken away the
 furniture and sold it. Other examples can be found in the insolvency cases,
 since insolvency which renders a man unable to meet his commitments can D
 hardly be created by a deliberate act; but the cases on insolvency are not clear
 cut. The way in which a party learns about insolvency is usually by the conduct
 of the other party and this necessarily introduces the question of whether that
 conduct amounts to renunciation. I must deal with two insolvency cases on
 which counsel for the charterer much relied: *Re Agra Bank, Ex p. Tondeur* (24)
 ((1867), L.R. 5 Eq. 160), and *Re Phoenix Bessemer Steel Co., Ex p. Carnforth*
Haematite Iron Co. (25) ((1876), 4 Ch.D. 108). In the former case it was held that the E
 suspension of payment by a bank was not an anticipatory breach of its obliga-
 tions under a letter of credit which the bank had issued. The case is simply a
 decision on the facts that the suspension of payment was not sufficient proof
 that the bank would not accept the bills or that they would not be able to do so.
 PAGE WOOD, V.-C., states the relevant principle in terms which I respectfully
 adopt and which appear to me to be contrary to counsel for the charterer's F
 argument. He says (L.R. 5 Eq. at p. 164):

"I consider the principle of those cases to be simply this—that if a man
 by his own act renders it impossible for him to perform the contract, or if
 he distinctly and decidedly repudiates and rejects the contract, even though
 the time of its performance has not arrived, and it may be said, as was said G
 in the courier's case, [i.e., in *Hochster v. De la Tour* (18)] that there is still
 time for repentance, then the contract is broken, and a remedy may be had
 in damages."

And again (*ibid.*, at p. 166) he says:

"The only question is, have the bank refused to complete the contract, H
 or disabled themselves from completing it?"

In the later case a company which had an obligation to accept and pay for
 goods in monthly instalments called a meeting of its principal creditors to ask
 for an extension of credit on existing contracts. The principle was put by
 JESSEL, M.R. (4 Ch.D. at p. 112) as follows: I

"As I understand the decisions, where there has been actual insolvency,
 or a declaration that the purchaser does not choose to pay, the vendor is
 not bound to deliver without the cash."

The Master of the Rolls and the Court of Appeal held that on the facts there
 was no repudiation. I cannot find anything in the judgments which says that
 insolvency by itself without the declaration of it would not have been enough.

A In the circumstances of the case the judgments were not concerned to distinguish between the two; and where the point is not in issue, it is not in my opinion legitimate to pick out references, such as that of BRAMWELL, J.A. (*ibid.*, at p. 122) to "avowed inability", and to submit that "inability" is no use unless "avowed".

B The truth is that there is little or no authority directly in point because it is very difficult to find a case in which the point is clearly raised. Whenever the inability is manifested by something that a party does, the other party will rely on renunciation by conduct rather than on impossibility, because renunciation is so much easier to establish. If he does not rely solely on renunciation, at least he will not exclude it, and it is then unnecessary in the judgment to distinguish between renunciation and impossibility. Even in a case like *Stanton v. Richardson* (10) (L.R. 7 C.P. 421), where renunciation is not mentioned at all and where the inability was clearly not caused by a deliberate act, it is possible for counsel for the charterer to argue, as he does (though not, I think, very convincingly), that the conduct of the owner in failing to provide a ship that could be made seaworthy before frustration amounted to a renunciation. In short, it is impossible to get a clear case unless inability is concealed or for some reason not appreciated by the rescinding party at the time when he acts. In that event can the rescinder, having rescinded for the wrong reason, perhaps because he misinterpreted the conduct of the other side, justify his action by relying on facts which come to his knowledge thereafter and with the aid of which he can prove inability? It is now well settled that a rescission or repudiation, if given for a wrong reason or for no reason at all, can be supported if there are at the time facts in existence which would have provided a good reason. It so happens that one of the leading authorities which established this principle is also on the point which I am now considering. In *British & Beningtons v. North Western Cachar Tea Co., etc.* (15) ([1923] A.C. 48), a contract was made in September, 1919, for the sale of a quantity of 1919-20 crop of Indian tea. It was agreed between the parties at the arbitration (see the report in the Court of Appeal (1921), 10 Lloyd's Rep. 381) that the contract required delivery in bonded warehouse in London. No time for delivery being prescribed, it followed that the contract required delivery within a reasonable time. Shipment was made in good time, but, owing to congestion in the Port of London, the ships were diverted by the shipping controller to various other ports, and the cargoes were discharged there in February and March, 1920. Negotiations took place between the parties for delivery to be taken at these other ports, but they resulted only in an unenforceable agreement. In July, 1920, the buyers wrote (see (1921), 8 Lloyd's Rep. at p. 220) saying that, as the goods were not yet delivered in London as promised by the contracts, the latter were null and void. At the arbitration the buyers argued that they were entitled to cancel the contract because by July, 1920, a reasonable time for the delivery of the tea had expired. The arbitrator held that a reasonable time had not then expired and awarded damages to the sellers.

H When the award was considered by McCARDIE, J. ((1921), 8 Lloyd's Rep. 219), the buyers argued that the contract was frustrated on the ground that the action of the shipping controller had imposed a delay which made it impossible for the sellers to deliver within a reasonable time. Since the arbitrator had found that, notwithstanding the delay imposed by the diversion, a reasonable time had not expired, it could not be contended, if that finding stood, that the contract had been discharged by frustration. McCARDIE, J., in effect disregarded that finding and held that the doctrine of frustration applied and that the award should be set aside. His judgment was reversed in the Court of Appeal ((1921), 10 Lloyd's Rep. 381), which held that he had no power to interfere with the arbitrator's decision on what amounted to a reasonable time.

In the Court of Appeal the buyers also argued frustration on a different ground; they argued that the contract on its true construction required that the tea must be shipped direct to London and be there delivered ex bonded warehouse. Since the goods had before the date of cancellation been discharged in other ports, this term could not in any event have been fulfilled. BANKES, L.J. (*ibid.*, at p. 383), dealt with the point by holding that that was not the right construction of the contract. SCRUTTON, L.J., dealt with it (*ibid.*, at p. 387) by holding that the buyers, having refused to take delivery on a wrong ground might not at the hearing put it on the right ground. He said that the effect of *Braithwaite v. Foreign Hardwood Co.* (26) ([1905] 2 K.B. 543), was that the sellers were relieved, by the acceptance of repudiation on a wrong ground, from any further performance of the contract.

In the House of Lords ([1923] A.C. at p. 70), LORD SUMNER rejected the reasoning of SCRUTTON, L.J., holding that *Braithwaite v. Foreign Hardwood Co.* (26) either did not lay down that proposition, or, if it did, was wrong. He said (*ibid.*, at p. 71):

"I do not think that the case, as reported, lays it down that a buyer, who has repudiated a contract for a given reason which fails him, has, therefore, no other opportunity of defence either as to the whole or as to part, but must fail utterly. If he had repudiated, giving no reason at all, I suppose all reasons and all defences in the action, partial or complete, would be open to him. His motives certainly are immaterial, and I do not see why his reasons should be crucial. What he says is of course very material upon the question whether he means to repudiate at all, and, if so, how far, and how much, and on the question in what respects he waives the performance of conditions still performable in futuro or dispenses the opposite party from performing his own obligations any further; but I do not see how the fact, that the buyers have wrongly said 'we treat this contract as being at an end, owing to your unreasonable delay in the performance of it' obliges them, when that reason fails, to pay in full, if, at the very time of this repudiation, the sellers had become wholly and finally disabled from performing essential terms of the contract altogether. *Braithwaite's* case (26) says nothing, which affects the regular consequences, when it appears that at the time of breach the plaintiff is already completely disabled from doing his part at all."

LORD SUMNER then proceeded to examine the point and held that there was not in fact an obligation to ship direct to London and therefore that the argument did not prevail. It is plain that the inability to deliver was due to circumstances beyond the sellers' control and could not possibly be described as a deliberate act of disablement. But no point of that sort occurred to LORD SUMNER, and it is clear that if he had found that there was a disablement of the character he was examining, he would have regarded it as a good defence. This part of his speech was obiter, but the speech received the general concurrence of three others of their Lordships and has always been followed as an illuminating statement of the law.

I think therefore both principle and authority, so far as it goes, are against counsel for the charterer's argument. The argument is worth testing also in the light of what is just and reasonable. Suppose, for example, that in this case the time allowed for the lay days had been of the essence of the contract. The owners sail away three days before the expiry of the lay days relying on an anticipatory breach. It is manifest that the loading could not have been completed by the end of the lay days. I do not see why the owners should not succeed simply by proving that fact, without having to go into questions of how the charterer conducted himself and what the effect of that conduct would be on the mind of a reasonable shipowner. If the charterer was continuing to

A assert, wildly and optimistically, that he could and would complete the loading, although everyone else knew it to be impossible, would that amount to renunciation? If not, would the owners be obliged to wait? I can see no good reason why a party's right to claim an anticipatory breach should depend simply on whether his adversary is artful enough to conceal his state of mind or obstinate enough not to admit his inability. Take another example from the facts of
 B this case. The owners might say that it was plain to them on July 18 that the charterer could not get a cargo for at least a fortnight and that so long a delay defeated the charterparty. The arbitrator might say that he quite agreed that it was plain on July 18 that the charterer could not get a cargo for at least a fortnight, but that he could not agree that such a delay would defeat the charter; the charterer in his opinion ought to have been given a month. Surely the
 C owners are entitled to say: "As it has turned out, he could not have got a cargo even in a month, so the difference between us does not matter."

In my judgment, therefore, if the owners can establish that in the words of LORD SUMNER the charterer had on July 18 "become wholly and finally disabled" from finding a cargo and loading it before delay frustrated the venture, they are entitled to succeed. LORD SUMNER's words expressly refer to the time
 D of breach as the date at which the inability must exist. But that does not mean in my opinion that the facts to be looked at in determining inability are only those which existed on July 18; the determination is to be made in the light of all the events, whether occurring before or after the critical date, put in evidence at the trial. Apart from the special principle illustrated in *Bank Line, Ltd. v. Arthur Capel & Co.* (22) ([1919] A.C. 435), that is the usual mode of proof. Here
 E again, there is not much authority in cases dealing with anticipatory breach for the same reason, namely, that the vast majority deal with renunciation; but enlightenment is, I think, to be obtained from looking at some of the earlier cases on the application of the doctrine of frustration. In these cases, of course, the doctrine of renunciation plays no part. Take, for example, *Geipel v. Smith* (14) (L.R. 7 Q.B. 404). The owners refused to load a cargo because Hamburg, the port of discharge, was under blockade and they contended that the performance of the contract was prevented by an excepted clause, namely, restraint of princes. The court held that as the blockade had lasted for more than a reasonable time (I think they must be treated as equating a reasonable time with such time as would frustrate the object of the venture), the owners were
 F justified in throwing up the contract. COCKBURN, C.J., said (*ibid.*, at p. 411):

"... the defendants rest their defence on the ground that it was here impossible to expect, from the nature of the circumstances, that the obstacle of the blockade would be removed within a reasonable time. It is a sufficient answer on the defendants' part that it was not likely to be removed within a reasonable time; and assuming that either party was
 H bound to wait a reasonable time to ascertain whether the obstacle would be removed, in point of fact it was not so removed, and the defendants were therefore justified in not attempting to perform their contract."

BLACKBURN, J., said (*ibid.*, at p. 413):

I "... the defendants say 'we are not going to let our ship sail to the port of loading at all, because you, the plaintiffs, never will be ready and willing to perform your part of the contract'. But then it is said, it is possible the blockade might be raised within a reasonable time. No doubt it was possible. But it must be taken on this record that it was not raised within a reasonable time; so if the defendants chose to run the risk, and in the event turn out right, they are in the same position as if they had waited the reasonable time and had then sailed away."

In these citations it will be seen that COCKBURN, C.J., thought it would be a sufficient answer for the defendants to say that the blockade was not likely to be removed. This is the answer that has subsequently been taken up and developed by *Embiricos v. Sydney Reid & Co.* (21) ([1914] 3 K.B. 45), and *Bank Line, Ltd. v. Arthur Capel & Co.* (22) and is now, I think, to be treated as the right answer in cases to which the doctrine of frustration applies. The other answer, however—and the only answer that BLACKBURN, J., gave—embodies the ordinary rule, and in my opinion is applicable to cases of anticipatory breach.

More authority of the same sort may be found in those cases which exemplify the equitable doctrine of making time the essence of the contract. If a party rescinds without giving reasonable notice and thereby making time of the essence, he is in the same position as one who acts before a reasonable time has expired. In *Thorpe v. Fasey* (19) ([1949] 2 All E.R. 393 at p. 398) WYNN-PARRY, J., said:

“It is true that in the present case the vendor did not, as he could have done, make time of the essence of the contract. That is not fatal to his case, if he can demonstrate that the evidence discloses that the purchaser is unable or unwilling, whatever time is given, to perform his contract . . .”

I considered the same sort of point in *Etablissements Chainbaux S.A.R.L. v. Harbormaster, Ltd.* (27) ([1955] 1 Lloyd's Rep. 303), on which counsel for the owners relied. In this case there was an obligation on the buyers who undertook to furnish a letter of credit; they failed to do so within the contract time; the sellers extended the time and then cancelled without giving a reasonable notice of their intention to do so. The position at the date of cancellation was, although the sellers did not know it, that the buyers could not have furnished a letter of credit within any reasonable extension of time. I said (*ibid.*, at p. 314):

“Does it make any difference that the defendants did not know what we now know to be the true facts? In my judgment, it does not. Defendants who act as these defendants did no doubt run a considerable risk; they run risks that they will not be able to discharge the burden, which I think is upon them, of proving affirmatively that if they had given a reasonable notice the other side could not have complied with it; but in this case I think that the defendants do discharge that burden. The evidence shows quite clearly that any reasonable extension of time such as I might have been willing to fix in other circumstances, such as fourteen days or another month at the most, would not have availed the plaintiffs at all . . . When the facts disclosed that, that is a good enough justification for the defendants' attitude.”

In my judgment in this case I referred to the authorities which seemed to me to support my conclusion and I need not cite them again here.

I said earlier that counsel for the charterer did not contend that the principle in *Embiricos v. Sydney Reid & Co.* (21) and *Bank Line, Ltd. v. Arthur Capel & Co.* (22) applied in cases of anticipatory breach. But I think perhaps that I ought to say why, because during a large part of his argument he did appear so to contend; and the question was discussed whether the arbitrator ought to be asked to make a finding of fact on that basis. Such a finding of fact would be about the expectation of reasonable and well-informed men on July 18 as to whether a cargo could be found without a delay long enough to defeat the charter. The arbitrator has found what conclusion a reasonable shipowner would have drawn from the facts known to him on that day. It does not however necessarily follow that the well-informed man who might be credited with a wider knowledge of the facts would have necessarily drawn the same conclusion. In the end counsel for the charterer made no request for this

A finding and abandoned the point, I think rightly. Questions of breach of contract are not to be determined on the principle of *Embiricos v. Sydney Reid & Co.* (21). Speaking of this principle, as laid down by SCRUTTON, L.J., I said this in *G. W. Grace & Co., Ltd. v. General Steam Navigation Co., Ltd.* (28) ([1950] 1 All E.R. 201 at p. 204):

B “That principle is at least as old as the conception of constructive total loss, but it is a principle to be applied with discrimination. It involves the court in proceeding on an erroneous estimate of the facts and probabilities, for, if the estimate is not erroneous, no point arises. That course can be taken only when it serves the important commercial purpose indicated by SCRUTTON, L.J. When a claim for damages is being considered, the event has happened and need no longer be forecast. The right to damages depends on a wrong done and an injury actually sustained, not on someone’s estimate of whether a wrong is likely to be done or an injury likely to be sustained. A master is not to be deprived of his remedy because, in ignorance of the danger, he entered a port which well-informed men might erroneously have pronounced to be safe, nor is he to be given damages if he sustains injury in conditions which fall short of the danger-point merely because well-informed men might have erroneously pronounced his entry into the port to be foolhardy. In my judgment, the arbitrator, being concerned only with a claim for damages for injury to the ship, rightly proceeded on the view he formed of the true facts.”

E I think that this is the right view. An anticipatory breach must be proved in fact and not in supposition. If, for example, one party to a contract were to go to another and say that well-informed opinion on the market was that he would be unable to fulfil his obligations when the time came, he might get the answer from his adversary that the latter did not care to have his affairs discussed on the market and did not choose to give any information about them except the assurance that he could and would fulfil his obligations. If that assurance F was rejected and the contract rescinded before the time for performance came and the assurance in fact turned out to be well-founded, it would be intolerable if the rescinder was entitled to claim that he was protected because he had acted on the basis of well-informed opinion.

G For all these reasons I have come to the conclusion that if counsel for the owners can produce out of the Special Case a finding that on July 18 the charterer was unable to load a cargo within such a time as would not have frustrated the object of the venture, the owners would be entitled to succeed, notwithstanding that that was not a conclusion which they would have been justified in drawing from the facts known to them at the time. I pass therefore to deal with a group of submissions by counsel for the charterer on this point. They are:

- H (1) The point is not open to counsel for the owners because it was not argued in the arbitration;
 (2) That there is no finding of fact on which the point can now be made good; and
 (3) That it is not a case in which the award ought to be remitted for such a finding to be made.

I I shall begin by stating what appear to me to be the general principles in the light of which these three submissions should be considered.

The question of law for my decision is stated in para. 36 of the award in the customary phraseology:

“Whether upon the facts found and upon the true construction of the charterparty the [owners] were entitled on July 18, 1951, to treat the charterparty as discharged by the [charterer’s] breach and to claim damages accordingly.”

When the question of law is left in this general form, a party is entitled to argue any point of law that arises on the facts found. The purpose of arguing the law before the arbitrator—and the only useful purpose, as far as I can see, once it becomes clear that a case is to be stated—is to enable him to know what facts to find as relevant to the points of law which the parties are taking. It is the duty of each party, when he gets the Special Case, to consider it and satisfy himself that the relevant facts are found. If they are not, he should apply to the court within the six weeks allowed by R.S.C., Ord. 64, r. 14, to have the case remitted for the findings he wants. If the relevant facts have not been stated, it must, strictly speaking, be the fault either of the party for failing to make his point properly or of the arbitrator for failing to apprehend it. I say “strictly speaking” because there may be cases of complexity where it is difficult to put the blame on anybody. If, however, it is the fault of the arbitrator, the applicant is, I think, entitled to remission almost as of right; if it is his own fault, he must ask for indulgence. The court must then exercise its discretion, which is a wide one.

The importance of making an application in time is twofold. It may be a case which it is best to remit at once before the argument of law begins. If it is not, and if the court thinks that time and money may be saved by first hearing the argument, the result of which may make the remission unnecessary, the application will nevertheless make it clear beyond doubt that the applicant's grievance was one which occurred to him at once on reading the case, and that the point of law is not an afterthought which arose for the first time during the hearing of the argument. If the application is not made in time and the applicant has to ask for an extension, he must, I think, not only explain the delay, but also show “a strong case on the merits indicating a really definite issue for consideration”; per SCOTT, L.J., in *Temple Steamship Co., Ltd. v. V/O Sovfracht* (29) ((1943), 76 Lloyd's Rep. 35 at p. 36).

Under the Arbitration Act, 1950, s. 22, the court has the power to remit of its own motion without any application being made. The existence of this power, and the fact that it has not infrequently had to be used, has, I believe, led parties to think that there is no need, except when the Special Case is so deficient as to make argument impossible, to take the initiative in making an application; and that it is better to wait and see how the matter develops at the hearing. For my part, I am not prepared to use this power unless I find that I cannot deal with the matter justly on the material provided. Remission is a step which a court is slow to take because there is no merit at all in arbitrations unless awards are to be treated, if at all possible, as final on the facts. The court does not expect all awards to be perfect and will not remit them merely for minor clarifications. Counsel for the owners invited me to use this power in respect of three points (none of them the subject of his later application) and I have declined to do so. I think that counsel for the charterer is also right in submitting that the power ought not to be used to assist one side rather than the other and certainly not to relieve a party of the consequences of not making in time an application which he ought to have made.

In *Hudson Bay Co. v. Dominga* (30) ((1922), 10 Lloyd's Rep. 476), the Court of Appeal held that where the umpire stated the facts as he found them and then asked the court, not a question as to a specific point of law, but generally to say whether having regard to the facts as found the one party or the other was in the right, the parties are entitled to take any questions of law that arise on those facts. In my judgment this decision applies only to clear and conclusive findings and not to incidental or narratory findings. Although the question of law is here stated in a general form, it is quite clear that the arbitrator regarded his conclusion as turning on the question of whether or not an intention had been evinced to renounce the contract; and I do not think that it would be right to make too much of findings set out in the course of the narrative, which he could

A not have thought to be material to the points of law which the parties were really arguing.

In this connexion it is not, I hope, out of place for me to comment on a form of award that appears to me to be in a new style. The award in this case consists of forty-six pages of foolscap; and another that I have had before me this term, also by a legal arbitrator, was of the same length. Both these documents are cast as judgments rather than awards; they set out the evidence in extenso with the views and comments of the arbitrator on it and on the matters of law discussed. The Court of Appeal has several times said that arbitrators ought not to annex bundles of correspondence to their awards, and I think the same principle applies to extended narratives of evidence. Strictly speaking, a case stated should contain nothing but findings, positive or negative, of fact. In practice, it is always necessary to include some explanatory matter, but it should, I think, be kept to a minimum; its purpose being simply to make the findings easily intelligible. The award in this case would be admirable if the court had full appellate jurisdiction or even had power to draw an inference of fact, but it has not. Unless the question is whether there is any evidence to sustain a finding, the court is not concerned with the evidence, nor with the processes by which the arbitrator arrived at his inference or conclusions of fact. The effect of setting out the evidence may conceivably be to cause the judge to entertain doubts, which he ought not to entertain, about the value of the findings and almost certainly will be to allow the argument at the hearing to range much more freely than it ought to. No doubt the reason that lies behind this type of award is that the arbitrator wants to give the parties as good a run as he can at the hearing of the argument. But that is not in my opinion the proper object of arbitral proceedings, which is to cut out all further argument on questions of fact; and that object should be achieved as firmly and concisely as possible.

Another disadvantage about this type of Special Case—and the one that is material to the point I have to decide—is that it is very difficult to make sure how much of it is meant to be a firm finding of fact and how much merely narrative or disputable evidence. When, for example, the arbitrator sets out information given in correspondence, does he mean to find that the information is true or just that it was given? Paragraph 9 of the Special Case, which opens with “I find the following facts”, is qualified in many places by phrases such as “the evidence points strongly to”. However the findings of fact on which counsel for the owners principally rely are in para. 33 and are unqualified. They contain much material from which an inference about the charterer's inability to ship might be made, but the inference is not drawn. In para. 20 an inference about inability is drawn, but is limited in scope (it relates to the option); it is based perhaps on the absence of evidence (whereas it may be contended that it is for the owners to call evidence proving inability); and it is, or may be said to be, qualified by the expression “in my view”.

I do not overlook the consideration that there is a specific finding about what a reasonable shipowner would conclude “on the facts known to him by July 18, 1951, as interpreted in the light of subsequent events”; and that it is in favour of counsel for the owners. As I have already said, I do not know precisely what this means. All that is clear about it is that it is directed to renunciation and not to proof of impossibility. On the whole, I have come to the conclusion that, while there are many indications of how the arbitrator had looked at the matter and, “a strong case on the merits indicating a very definite issue for consideration” (I need say no more than that), there is no clear and conclusive finding on this point; and the reason why there is no such finding is shown well enough by the form of para. 34, which makes it clear that at the arbitration the parties were arguing about renunciation and not about impossibility in fact. I must therefore hold that counsel for the owners cannot argue the point on the Special

Case as it stands; and that, subject to his application that the award should be remitted to the arbitrator for a specific finding of fact, the owners must lose on the argument before me. A

In these circumstances ought I to refuse counsel for the owners' application? On the whole, and not without much hesitation, I have come to the conclusion that the owners ought not to be barred altogether from taking this point and that they can now be allowed to do so without injustice to the charterer. I extend the time for this application to be made, but do not wish it to be treated as any sort of a precedent; nor do I modify the view that I have already expressed in general about the duty of parties to examine awards for supposed defects or to offer an adequate explanation if they have failed to do so. I shall grant both applications on terms. In the first place, I shall not allow the result of the remission to affect the costs of the hearing which have been incurred to date. As the case stands, the charterer is entitled to succeed and therefore he must have the costs of the hearing to date. In the second place, I think that he is entitled to have the costs that may further be incurred in the arbitration as the result of the remission. If the point had been taken during the original hearing before the arbitrator, the probability is that it could have been disposed of then without increasing the costs of the arbitration, as they may be in consequence of a further hearing. I do not make an unqualified order about this, as it may conceivably turn out that the additional hearing before the arbitrator is one which might have substantially increased the length of the arbitration anyway. B C D

In the result, therefore, I have reached a decision on a point of law which is not before me. To be strict, I should have remitted the award to the arbitrator for the further finding of fact; and if he made the finding in favour of the charterer, the point of law about the nature of the disablement that justifies rescission would not arise. But the point having been fully argued before me, I have thought it right to express my conclusion on it, because I think that thereby I may save the parties the cost of further argument before me. If the further finding of fact is in the charterer's favour, the award in para. 37 will stand. If it is in the owners' favour, I shall uphold the alternative award in para. 39 subject to any fresh award the arbitrator may see fit to make on the question of costs. I expect therefore that when the remitted case comes back to this court, I shall be able to give the appropriate judgment without hearing further argument. E F

Case remitted to the arbitrator.

Solicitors: *Constant & Constant* (for the owners, the claimants); *Holman, Fenwick & Willan* (for the charterer, the respondent).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

A

PRACTICE DIRECTION.

[QUEEN'S BENCH DIVISION (Ashworth, J.), April 1, 1957.]

Practice—Trial—Fixing date for non-jury actions.

B

ASHWORTH, J.: It has now become possible to form some view as to the working of the scheme* for fixing dates for the trial of cases in the Queen's Bench Division.

C

The response to the scheme was very great, so much so that by the middle of March applications in nearly three hundred cases had been heard. In planning the scheme it was a matter of paramount importance to ensure that cases would in fact be tried on the dates fixed for them; in other words, that there would be judges available to try them on those dates. For this reason the number of courts allotted for the trial of fixtures was at first limited to four and, apart from an increase to six in the last weeks of these sittings, this number has been retained.

D

The result of this limitation, coupled with the large number of applications for fixtures, has inevitably been that trials have had to be fixed for dates a long time ahead, and when a temporary stay was placed on applications a fortnight ago, the earliest date available for a fixture was one in January, 1958.

E

The possibility of increasing the number of courts available for the trial of fixtures to six or more has been carefully considered. While it is true that at times there may be enough judges in London for six or more such courts, circuit and other commitments are such that it would not be possible to plan on a basis of six courts throughout the year without running a serious risk that fixed cases would not in fact be tried on the dates allotted to them. So far every fixture has at least been in the list for the day for which the case was fixed, and it is considered that this principle should be maintained.

F

It has always been realised that a system of fixed dates must inevitably involve delay, and in order to mitigate that position the following further Practice Direction is given with the approval of the Lord Chief Justice:—

G

1. The number of courts available for fixtures will be increased to six for the first two weeks of next Michaelmas sittings and next Hilary sittings, as there ought then to be sufficient judges available in London.

H

2. If on the hearing of an application for a fixture one of the parties objects on the ground that the case will thereby be delayed, the clerk of the lists may, instead of fixing a date for trial, leave it in the general list marked "Not to come on for trial" before such date as the parties agree or in default of agreement as will enable the parties adequately to prepare for trial. A party objecting to this course may appeal to the judge in charge of the lists.

I

3. In order to give an opportunity to parties whose cases have already been fixed for dates later than Oct. 31, 1957, to apply for an earlier date, in particular a date in the first two weeks of Michaelmas sittings, application may be made to the clerk of the lists for advancement at any time before the last day of these sittings.

4. Subject to the preceding paragraph, the stay on the making of applications for fixtures which is at present in force will continue until May 6, 1957, after which date any open dates available may be allotted to applicants.

5. Applications to fix a date will not be entertained in respect of any of the cases in the general list which have been included in the warned list for the week

* See Practice Direction ([1957] 1 All E.R. 219).

beginning May 6, 1957, or in respect of any of the next fifty cases included in the general list. All these cases will have been disposed of long before any date which might be allotted as a fixture and it is undesirable that applications for fixtures should be used merely as a method of achieving delay. This, however, will not prevent parties applying on special grounds to the judge in charge of the list for a fixture.

Re PEACOCK (*deceased*).

MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. *v.*
PEACOCK AND ANOTHER.

[CHANCERY DIVISION (Upjohn, J.), March 5, 7, 21, 1957.]

Will—Class gift—Member of class precluded from taking by felonious killing of testator—Destination of share of excluded member.

By his will dated Jan. 25, 1955, a testator gave his residuary estate "Upon trust for such of them my said wife [G.] my stepson [S.] and my son [D.] as shall survive me and attain the age of twenty-one years and if more than one in equal shares as tenants in common absolutely and if one only then the whole to that one". On Dec. 16, 1955, the testator was feloniously killed by his wife, G., who was convicted of manslaughter, and thus was debarred from taking any benefit under his will. S. and D. both survived the testator, and S. had attained the age of twenty-one. The Crown disclaimed any interest in the estate. On the question of the destination of the share of residue bequeathed to G.,

Held: the residuary gift was a gift to a group and tantamount to a class gift (*Re Woods, Wood v. Creagh*, [1931] 2 Ch. 138 applied); and, accordingly, those residuary legatees who at the testator's death were capable of taking beneficially, viz., S. and D., were entitled to the residuary estate in equal shares, but subject, as regards D., to his attaining the age of twenty-one.

Principle stated by SIR GEORGE JESSEL, M.R., in *Re Coleman & Jarrom* ((1876), 4 Ch.D. at p. 173) applied.

[As to the incapacity of a murderer to benefit under the will or intestacy of the murdered person, see 1 HALSBURY'S LAWS (3rd Edn.) 10, 11, para. 15; and for cases on the subject, see 44 DIGEST 226, 504-510.]

As to class gifts, see 34 HALSBURY'S LAWS (2nd Edn.) 143, 144, paras. 186, 187; and for cases on the subject, see 44 DIGEST 760-762, 6191-6213.]

Cases referred to:

- (1) *Re Callaway, Callaway v. Treasury Solicitor*, [1956] 2 All E.R. 451; [1956] Ch. 559.
- (2) *Re Woods, Woods v. Creagh*, [1931] 2 Ch. 138; 100 L.J.Ch. 385; 145 L.T. 206; Digest Supp.
- (3) *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 44 Digest 226, 504.
- (4) *Aplin v. Stone*, [1904] 1 Ch. 543; 73 L.J.Ch. 456; 90 L.T. 284; 44 Digest 278, 1107.

- A (5) *Fell v. Biddolph*, (1875), L.R. 10 C.P. 701; 44 L.J.C.P. 402; 32 L.T. 864; 44 Digest 274, 1070.
 (6) *Re Coleman & Jarrom*, (1876), 4 Ch.D. 165; 46 L.J.Ch. 33; sub nom. *Coleman v. Jarrom*, 35 L.T. 614; 44 Digest 515, 3349.

Adjourned Summons.

- B The trustee of the will of Harold Peacock, deceased, issued an originating summons for the determination of the question whether on the true construction of the testator's will and in the events which had happened, and particularly having regard to the conviction of the testator's widow, Gladys Peacock, in his said will named, of the manslaughter of the testator, the testator's residuary estate should be held on trust (a) for the defendants in equal shares; or (b) as to one equal third share for each of the defendants and as to the remaining equal third share on the trusts applicable on the testator's intestacy, but as if the said Gladys Peacock had predeceased him; or (c) for some other and what trusts.

The Crown had expressly disclaimed any interest in the estate as *bona vacantia*. The testator's widow was not a party to the application.

- D *Robert S. Lazarus* for the plaintiff, the trustee of the will.
Raymond Walton for the first defendant, a stepson of the testator.
Michael Browne for the second defendant, a son of the testator.

Cur. adv. vult.

- E Mar. 21. UPJOHN, J., read the following judgment: The testator, Harold Peacock, was killed feloniously by his wife on Dec. 16, 1955. She was indicted for his murder at York Assizes and found guilty of manslaughter on Feb. 14, 1956, and sentenced to prison. In these circumstances it is quite clear that the widow can take no benefit under his will or on his intestacy and she has not been made a party to this summons; the question that I have to solve is what is the destination of the interests that the widow would have taken but for her felony.

- F The testator's will was dated Jan. 25, 1955, and by it he gave to his wife his personal chattels and £1,000 free of duty. Those gifts have been treated as falling into residue, I do not doubt correctly, and I am not further concerned therewith. It is in connection with residue that the difficulty arises. The testator gave his residuary estate on the usual administration trusts and gave the net proceeds as follows:

- G "Upon trust for such of them my said wife Gladys Peacock my stepson Stanley Abbott Peacock and my son Douglas Peacock as shall survive me and attain the age of twenty-one years and if more than one in equal shares as tenants in common absolutely and if one only then the whole to that one."

- H The defendant Douglas Peacock is the only child of the testator (by an earlier marriage) and he is nearly nineteen years of age. Subject to attainment of full age therefore this defendant will be entitled to any estate not disposed of by the will of the testator.

- I Fortunately for me the Crown has expressly disclaimed any interest in the estate as *bona vacantia*, and for the purposes of this case I can banish the doubts which recently assailed VAISEY, J., in *Re Callaway, Callaway v. Treasury Solicitor* (1) ([1956] 2 All E.R. 451). The question therefore is this: does the share of residue which the widow would have taken apart from her felony lapse and fall to be dealt with as on an intestacy so that subject to attaining twenty-one Douglas will take two shares and Stanley Peacock one share, or is the residuary gift to be treated as equivalent to a class gift and if so, in the circumstances of the case, ought the usual rule as to class gifts to be applied

so that lapse is negated and residue is divisible among those members of the class capable of taking, i.e., into moieties subject to Douglas attaining full age ? A

Apart altogether from the wife's felony the construction of the will to my mind gives rise to no difficulty. It may not strictly be a class gift, for the wife, stepson and son all respectively stand in a different relation to the testator, but so far as lapse is concerned the testator has made it abundantly clear that this gift is tantamount to a class gift. It is a gift to a "group", to adopt the word used by MAUGHAM, J., in *Re Woods, Woods v. Creagh* (2) ([1931] 2 Ch. 138), but for the purposes of lapse it has the characteristics of a class gift. Thus if, for example, the wife had predeceased the testator residue would be divisible into moieties and there would have been no lapse of her one third share. The case is completely covered by *Re Woods* (2), and indeed is stronger than that case, for that there is no room for lapse in the event of a beneficiary predeceasing the testator is shown by the use of the words, "and if one only then the whole to that one". B C

That does not solve the problem, however. On the one side it is argued that the case must be treated as a class gift, and as the wife has failed to qualify she is struck out of the will just as though she had predeceased the testator. On the other hand it is argued that one must look at the actual facts; you then find that in fact the widow survived and takes a vested share of residue, but as she is disabled from taking, that share is necessarily undisposed of. D

The actual point is apparently free of direct authority, but apart from some persuasive authority which I mention later there would in my judgment be much to be said for the second view. As FRY, L.J., said in *Cleaver v. Mutual Reserve Fund Life Assn.* (3) ([1892] 1 Q.B. 147 at p. 158): E

"... the principle of public policy must be applied as often as any claim is made by the murderess, and will always form an effectual bar to any benefit which she may seek to acquire as the result of her crime."

One must therefore see what claim the felon can establish and, when it is established, public policy steps in as a personal bar. Applying that to this case, the felon by reason of survivorship establishes a claim to membership of the class or group and therefore to a vested share of residue; but being debarred from taking that share, it is undisposed of. Thus in the analogous case of disqualification of a legatee by reason of having witnessed the will, SWINFEN EADY, J., in *Aplin v. Stone* (4) ([1904] 1 Ch. 543) pointed out (*ibid.*, at p. 548) that F

"The proper way of dealing with these cases is first to construe the will, and ascertain what interests are given, and then to apply s. 15 of the Wills Act." G

In that case there was a gift held, on construction, to be to A. if living at the death of the testator's wife and otherwise to her children, and it was held that A. having witnessed the will was disqualified and there was an intestacy. H

On the other hand, a different result has been reached under s. 15 of the Wills Act, 1837, where the gift is to a class and is not in form alternative, and the cases which I must now mention were distinguished in *Aplin v. Stone* (4) on that ground.

It is quite clear that in the case of a class gift the share of the person excluded by reason of having witnessed the will does not lapse, but goes to swell the shares of the remaining members of the class. The reason for that was explained by LORD COLERIDGE, C.J., delivering the judgment of the Court of Common Pleas in *Fell v. Biddolph* (5) (1875), L.R. 10 C.P. 701. He said (*ibid.*, at p. 709): I

"By the operation of the statute, the names of Thomas and Sarah (assuming the latter to be an attesting-witness, as the plaintiffs contend) are struck out of the will: they are rendered incapable of taking, and

- A therefore in our judgment are not to be reckoned in the class ascertained at the testator's death."

He summarised the law as follows (*ibid.*, at p. 710):

- B "Upon the whole, we are of opinion that, upon the current of authority and the reason of the decisions, so far as we can deduce it, the devise was to a class, and to such a class as would take not separate shares the value of which would vary with their number, but in undivided shares, the whole portion devised, and that this is to be taken by those who at and after the testator's death came within the limits of the class, and who were capable of taking."
- C In *Re Coleman & Jarrom* (6) ((1876), 4 Ch.D. 165), SIR GEORGE JESSEL, M.R., was not concerned with a witness to a will, but he stated the rule against lapse in the case of class gifts in this way (*ibid.*, at p. 173):
- D "I think the true rule is that those members of the class who are at the testator's death capable of taking take, and that those who become incapable of taking—whether by dying in the testator's lifetime, or by attesting the will, or by some other operation of law—do not take."

- E That rule is of perfectly general application, and I think I ought to apply it to class gifts where the law of public policy steps in to render a member of the class incapable of taking. It can, in my judgment, be no valid ground of distinction that this is a gift not strictly to a class but to a group. The application of the principle stated by SIR GEORGE JESSEL, M.R., merely means that the testator must be taken as having intended that only those of the group of his three named beneficiaries were to take as were capable of taking, with the consequence that, subject to Douglas attaining twenty-one, the residue will be divided into moieties, and I must declare accordingly.

Declaration accordingly.

Solicitors: *A. F. & R. W. Tweedie*, agents for *Cook, Fowler & Outhet*, Scarborough (for all parties).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

BOYD v. WILTON.

[COURT OF APPEAL (Jenkins, Morris and Sellers, L.J.J.), March 4, 5, 1957.]

Agriculture—Agricultural holding—Tenancy—Termination of tenancy—Compensation claim—Validity—Notice claiming under contract and under Agricultural Holdings Act, 1948, s. 57—Subsequent abandonment of claim under Act—Whether notice bad—Agricultural Holdings Act, 1948 (11 & 12 Geo. 6 c. 63), s. 57 (1), (3), s. 70 (1), (2), (4).

Within two months after the termination of a tenancy of an agricultural holding, the landlord served on the tenant under the Agricultural Holdings Act, 1948, s. 70 (2), notice of the landlord's "intention to make against [the tenant] certain claims arising out of the termination of the tenancy" and specified as the nature of the claims: "Conditions of letting dated Feb. 25, 1939, cl. 3, 4, 5, 6, 7, 8, the Agricultural Holdings Act, 1948, s. 57, and the custom of the country". On reference of the matter to arbitration, the tenant in the statement of his case objected to the landlord's notice as being bad in law in that he had claimed both under the contract of tenancy and under the Act of 1948 contrary to s. 57 (3) (b) of the Act. At the hearing, the landlord's solicitors abandoned all claims except claims under the contract of tenancy.

Held: the landlord's notice was valid, since—

(i) s. 57 of the Act of 1948 related to rights to compensation and not to methods of enforcing them or questions of procedure, and the prohibition in s. 57 (3) (b) against claiming compensation under both the contract of tenancy and s. 57 (1) meant merely that no one should have an enforceable claim to compensation in respect of both, and

(ii) the landlord was not prohibited from giving notice under s. 70 (2) of intention to make alternative claims under either s. 57 (1) or the contract of tenancy, which this notice did, and the landlord, having abandoned at the arbitration all alternative claims save one, could validly pursue that claim.

Appeal dismissed.

[As to notice of claims on the termination of agricultural tenancies, see 1 HALSBURY'S LAWS (3rd Edn.) 324, 325, para. 673.

For s. 57 and s. 70 of the Agricultural Holdings Act, 1948, see 28 HALSBURY'S STATUTES (2nd Edn.) 72, 80.]

Appeal.

The tenant appealed against an order of His Honour JUDGE SHEPHERD, Q.C., in Liskeard County Court, made on Jan. 16, 1957, on a Special Case stated by an arbitrator for the opinion of the court under the Agricultural Holdings Act, 1948. The judge had decided that the landlord's notice to the tenant (who was tenant of an agricultural holding) dated Nov. 28, 1955, of his intention to make claims against the tenant under three headings, the conditions of letting, s. 57 of the Act of 1948, and the custom of the country on the termination of the tenancy was not an invalid notice by virtue of s. 57 (3) (b) and s. 70 (2) of the Act, on the ground that (i) the landlord at a hearing before the arbitrator on Mar. 8, 1956, more than two months after the termination of the tenancy, abandoned all claims against the tenant other than those based on the written contract of tenancy, and (ii) the word "claim" in s. 57 (3) was synonymous with the word "recover" in s. 57 (1) of the Act. The tenant contended that the notice was invalid as being contrary to s. 57 (3), and that the judge was wrong in law in holding as he did.

D. M. Scott for the tenant.

Anthony Cripps for the landlord.

- A** **JENKINS, L.J.:** This is an appeal from an order of His Honour JUDGE SHEPHERD, Q.C., sitting at Liskeard County Court, made on Jan. 16, 1957, whereby he decided questions raised on a Special Case stated by an arbitrator under the Agricultural Holdings Act, 1948. As was ultimately held, the tenancy in question was governed by a document dated Feb. 25, 1939, and it was for a term of fourteen years from Michaelmas, 1938; but, in the events which happened, it lasted for seventeen years and came to an end at Michaelmas, 1955. On the tenancy coming to an end, certain cross-claims arose. The questions which the arbitrator referred to the learned judge were two. The first was which of two tenancy agreements governed the rights and liabilities of the parties. That has been decided by the learned judge in favour of the landlord, and is not the subject of any appeal. The second concerned the validity of the landlord's notice of intention to make certain claims under the Act. That question, like the first one, was decided by the learned judge in the landlord's favour, and from that part of his decision the tenant now appeals to this court.

The Agricultural Holdings Act, 1948, s. 57, provides:

- D** “(1) The landlord of an agricultural holding shall be entitled to recover from a tenant of the holding, on the tenant's quitting the holding on the termination of the tenancy, compensation in respect of the dilapidation or deterioration of, or damage to, any part of the holding or anything in or on the holding caused by non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry.

- E** “(2) The amount of the compensation payable under the foregoing sub-section shall be the cost, as at the date of the tenant's quitting the holding, of making good the dilapidation, deterioration or damage.

- F** “(3) Notwithstanding anything in this Act, the landlord may, in lieu of claiming compensation under sub-s. (1) of this section, claim compensation in respect of matters specified therein under and in accordance with a written contract of tenancy, so however that—(a) compensation shall be so claimed only on the tenant's quitting the holding on the termination of the tenancy; and (b) compensation shall not be claimed in respect of any one holding both under such a contract and under the said sub-s. (1); and for the purposes of para. (b) of this sub-section any claim under s. 7 (1) of this Act shall be disregarded.”

- G** Then s. 70 provides:

- H** “(1) Without prejudice to any other provision of this Act, any claim of whatever nature by the tenant or landlord of an agricultural holding against his landlord or tenant, being a claim which arises—(a) under this Act or any custom or agreement; and (b) on or out of the termination of the tenancy of the holding or part thereof, shall, subject to the provisions of this section, be determined by arbitration under this Act.

- I** “(2) No such claim as aforesaid shall be enforceable unless before the expiration of two months from the termination of the tenancy the claimant has served notice in writing on his landlord or tenant, as the case may be, of his intention to make the claim. A notice under this sub-section shall specify the nature of the claim, and it shall be a sufficient specification thereof if the notice refers to the statutory provision, custom or term of an agreement under which the claim is made.”

Then sub-s. (3) allows certain further periods of time to facilitate negotiations.

Then sub-s. (4) provides:

“Where, by the expiration of the said period and any extension thereof made under the last foregoing sub-section, any such claim as aforesaid has not been settled, it shall cease to be enforceable unless, before the expiration

of one month from the end of the said period and any such extension, or within such longer time as the Minister may in special circumstances allow, an arbitrator has been appointed by agreement between the landlord and the tenant under the subsequent provisions of this Act in that behalf or an application for the appointment of an arbitrator under those provisions has been made by the landlord or the tenant."

The provisions for arbitration are contained in s. 77 of, and Sch. 6 to, the Act.

The landlord, on Nov. 28, 1955, and therefore within the period of two months from the termination of the tenancy at Michaelmas of the same year, sent to the tenant a notice under s. 70 (2) of the Act. That document is headed:

"Agricultural Holdings Act, 1948. Re the Holding known as Lower Langdon, St. Neot, Liskeard, Cornwall."

It is addressed to the tenant c/o his valuer or agent, and is in these terms:

"I hereby give you notice pursuant to s. 70 of the above Act of my intention to make against you certain claims arising out of the termination of the tenancy of the above holding or part thereof, the nature of which claims is set out in the schedule hereto."

Then there are two columns in the schedule. On the left-hand side there is a catalogue of various defects, or alleged defects. That column is headed "Nature of claim". On the other side the heading is "Statutory provision, custom or term of agreement under which the claim is made". In that column there is this:

"Conditions of letting dated Feb. 25, 1939, cl. 3, 4, 5, 6, 7, 8, the Agricultural Holdings Act, 1948, s. 57 and the custom of the country."

The catalogue of defects covered by that entry in the second column concludes with a total "£2,000", which is presumably the sum claimed by the landlord for making those matters good. Then there is this second enumeration of defects in the left-hand column:

"Repairs to farmhouse, farm buildings, repairs and renewals of landlord's fittings and fixtures, repairs and renewals to water supply to farmhouse hot water supply, sewers and sanitation."

That is brought out at £700; and in the right-hand column, covering the second group of defects, there is this:

"Conditions of letting dated Feb. 25, 1939, cl. 3 and the Agricultural Holdings Act, 1948, and statutory instrument 184*."

The parties employed valuers in the usual way to negotiate on the matter, but they failed to reach any agreement and, in the result, an arbitrator was appointed. In the statement of the tenant's case for the purposes of the arbitration, he took this objection to the notice from the landlord:

"As to such notice as a whole the same is bad in that the landlord has claimed under both the alleged contract and under the Act and under the custom of the country contrary to s. 57 (3) (b)."

That objection by the tenant is based on a critical examination of s. 57; and the invalidity of the notice is said to flow from the provision in s. 57 (3) (b), that

"compensation shall not be claimed in respect of any one holding both under such a contract and under the said sub-s. (1)."

* Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (S.I. 1948 No. 184); 1 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 84.

A As appears from the Case Stated by the arbitrator at pp. 6 and 7, at the hearing which took place on Mar. 8, 1956, the landlord's solicitors abandoned any claim against the tenant under s. 57 (1) of the Act. The arbitrator recorded various contentions of the parties. In para. 2 (c) he stated one of the landlord's contentions to be:

B "That the landlord's notice dated Nov. 28, 1955 (document Q), is a valid notice under s. 70 of the Act of his intention to make claims against the tenant under the conditions of letting (document J)."

Then, amongst the tenant's contentions, so far as material, there is this, in para. 3 (d):

C "That the notice given by the landlord and dated Nov. 28, 1955 (document Q) is not a valid notice in that the landlord has purported to make claims under the conditions of letting (document J), under s. 57 of the Act, and under the custom of the country, contrary to s. 57 (3) (b) of the Act."

D The landlord and tenant having respectively raised these contentions, the arbitrator referred the matter for the opinion of the court. It came in due course before the learned county court judge, and on Jan. 16, 1957, he made the order under appeal. By his order, the learned judge stated "his opinion on the questions of law stated for the opinion of the court as follows"; then he dealt first with the question about the tenancy agreement with which we are not now concerned, and secondly with the question of the validity of the landlord's notice under s. 70 of the Act. As to that, he expressed his opinion thus:

E "The landlord's notice to the tenant dated Nov. 28, 1955 (document Q) of his intention to make claims against the tenant under three headings, namely, the said conditions of letting dated Feb. 25, 1939, s. 57 of the said Act and the custom of the country, is not an invalid notice by virtue of s. 57 (3) (b) and s. 70 (2) of the said Act for the following reasons:—(a) The landlord at a hearing before the arbitrator which took place on Mar. 8, 1956, being after the expiration of two months from the termination of the tenancy, abandoned all claims against the tenant other than those based upon the written contract of tenancy, and (b) The word 'claim' as used in s. 57 (3) of the said Act bears the same meaning as and is synonymous with the word 'recover' in s. 57 (1) of the said Act."

G Counsel for the tenant claims that the answer given by the learned judge to that question is wrong in both its branches. He argues the matter, in effect, thus—
H if one reads s. 57 of the Act perfectly literally and giving every word contained in it its ordinary meaning, one finds that there is categorically a prohibition against any claim by a landlord both under sub-s. (1) of the section and under a contract of tenancy:

"compensation shall not be claimed in respect of any one holding both under such a contract and under the said sub-s. (1)."

I Counsel says that it follows that any notice of intention to make a claim served under s. 70 (2) which claims not only under a contract of tenancy but also under s. 57 (1) is an invalid notice. He says that, while such invalidity might no doubt be cured by substituting within the two months' period a fresh notice claiming only on one of the two grounds, that possibility necessarily disappears once the period of two months from the termination of the tenancy, being the period allowed by s. 70 (2) for the giving of notice of intention to claim, has expired; once that period has run, no notice which is otherwise invalid can be given validity by any amendment or disclaimer; the two months' period allowed for giving notice of intention to make a claim has run out and during the time

allowed no valid notice has been given, because the notice cannot be a valid notice if it expresses an intention to claim that which the Act says may not be claimed. A

I think that that argument has a good deal to be said for it as capable of being extracted from the language of the Act without doing violence to that language; but, in my view, it cannot prevail. We have heard full and interesting arguments on both sides, but in the end I think that the matter comes down to a short question of construction. The learned judge founded himself, as appears from the part of his order which I have read, on the view that the word "claim" as used in s. 57 (3) of the Act bears the same meaning as the word "recover" as used in s. 57 (1) of the Act. That view was attacked by counsel for the tenant as having no warrant for it in the language of the Act. He asked what justification there could be for substituting "recovery" for "claim"? He contended that when the Act said "claim" it meant "claim", and when it referred to "recovery" it meant "recovery". I agree that at first sight the learned judge's method of solving the matter appears to have been a somewhat radical one, owing to the substitution of words which it involved. If, however, one looks at s. 57 of the Act as a whole, it is reasonably plain, in my view, that s. 57 is dealing with rights to compensation, and not with methods of enforcing rights or questions of procedure. Thus, I think that s. 57 (3) can be fairly construed as meaning that no one is to have an effective or enforceable claim to compensation in respect of any given holding both under a contract of tenancy and under sub-s. (1). They can get one or the other, but not both of these things. I would add that there is nothing in s. 57 to say that, if a claim is put forward on both grounds in respect of any one holding, then the landlord putting forward the claim shall be disqualified from receiving compensation on either ground. B C D E

Moreover, this section is dealing with rights, and, that being so, I do not think it is really directed to the putting forward of claims. It is directed rather to the existence of enforceable claims. Even if one construes sub-s. (3) in the most literal manner possible, it imports no more than a prohibition against making a claim both under the contract and under the said sub-section. In my view, that language is not apt to prohibit the making of claims in the alternative. I think it might well be held not to prohibit the making of two distinct claims, one under the Act and one under a tenancy agreement. It is no doubt clear that at some stage there must be an election. If a landlord puts his case in the alternative, he must at some stage elect which alternative he is going to adopt. If he puts forward an excessive claim, in that it claims twice over, once under the contract and once under the sub-section, it is clear that he must abandon one or other of those claims before he can recover anything; but I see nothing in s. 57 (3) to disqualify such a person from recovering at all. No doubt, in order that his notice under s. 70 (2) should be a valid notice, he must be able to point to some claim which is a claim permitted by the Act. For example, if a landlord intermixed in respect of different items comprised in the same holding claims under the Act and claims under a written tenancy agreement, it may be that he would produce the result that a good claim—that is to say, a claim only under the Act or only under the tenancy agreement—could not be spelt out of the notice so framed; but there is, so far as I can see, no question of that in the present case. F G H I

I think the view that I have formed as regards s. 57 (3) is borne out by the language of s. 70. If a landlord giving a notice under s. 70 was to risk the loss of the whole of his right to compensation if he referred in his notice to the statutory right to compensation and also to the contractual right to compensation, it seems to me that s. 70 would inevitably have been drafted with very much more precision. It is framed in quite loose and general terms, so far as the form of notice is concerned. Under sub-s. (2) the claimant, who is the landlord in this

A case, has to serve a notice in writing on his tenant of his intention to make the claim, and the sub-s. says:

“ A notice under this sub-section shall specify the nature of the claim, and it shall be a sufficient specification thereof if the notice refers to the statutory provision, custom or term of an agreement under which the claim is made.”

There is nothing there to suggest that it is vital not to make claims both under the statute and under the contract.

I have read the notice the validity of which is impeached several times and I have heard the submissions of counsel on it, and, whatever view one takes of s. 57 (3), it seems to me to be reasonably plain that this notice was not a notice making cumulative claims under the tenancy agreement and under the Act. It will be remembered that the first entry in the second column refers to conditions of letting dated Feb. 25, 1939, cll. 3 4, 5, 6, 7, 8, the Agricultural Holdings Act, 1948, s. 57 and the custom of the country. The reference is to s. 57 as a whole, not to s. 57 (3). Therefore, this entry must be regarded as importing into the notice the provisions of s. 57. Under that section a claim may be made under sub-s. (1), and a claim may be made under sub-s. (3), but these two claims are mutually exclusive and can only be pursued as alternatives. That is apparent on the face of the section when it is imported into the notice. So one has what seems to me can fairly be construed as an alternative claim; and, as I have said, in my view, there is nothing in s. 57 (3) to prohibit claims being made in the alternative. As to the second entry in the notice, the second group of matters, I gather no objection was raised to the way that part of the notice was formulated, save that it is said that the reference in the other part of the notice to s. 57 had the effect of destroying the whole of the notice.

As to the first ground on which the learned judge founded himself—i.e., the abandonment of all claims against the tenant other than those based on the written contract of tenancy—although counsel for the tenant argued to the contrary, it seems to me that, where (as in the present case) an alternative claim is made, it must be open to the landlord at the arbitration to state that he abandons one of the alternatives and relies exclusively on the other. So, by the time the arbitration was concluded it was plain that nothing was being claimed by the landlord other than his rights under the tenancy agreement; and that, indeed, appeared from the statement of the landlord's case which was produced for the purposes of the arbitration.

I trust that I have dealt with this matter adequately. I am sensible that I have not dealt in terms with all the arguments and have not cited the authorities to which we were referred, in the course of which observations have been made on the construction of s. 57. I do not think that any of those authorities, which were directed really to other points, can carry the matter much further. I can only say that, in my judgment, the learned judge was right in the conclusion to which he came, though I do not say I am prepared to go all the way with him in his theory that “ claim ” and “ recover ” in this section mean precisely the same thing. For these reasons, in my view, this appeal should be dismissed.

MORRIS, L.J.: The point of law that was stated by the arbitrator in this case related to the validity of the notice that had been served. The contention of the tenant, as expressed in the Case Stated by the arbitrator, is as follows:

“ That the notice given by the landlord and dated Nov. 28, 1955 (document Q) is not a valid notice in that the landlord has purported to make claims under the conditions of letting (document J), under s. 57 of the Act, and under the custom of the country, contrary to s. 57 (3) (b) of the Act.”

It is said by the tenant, therefore, that the notice that was served in this case was a bad notice because of the provisions of s. 57 (3). Section 70 (2) provides that a claim as referred to in sub-s. (1) shall not be enforceable unless before the expiration of two months from the termination of the tenancy the claimant has served notice in writing on his landlord or tenant, as the case may be, of his intention to make the claim. Then it is provided that the notice must specify the nature of the claim and that it shall be a sufficient specification if the notice refers to the statutory provision, custom or term of an agreement under which the claim is made. So the tenant says the claim of the landlord ought not to be proceeded with and cannot succeed because no proper notice of the claim was ever given, for the reason that the notice which was delivered dated Nov. 28, 1955, was an invalid notice.

In that notice, under the heading

"Statutory provision, custom or term of agreement under which the claim is made",

there is a reference first to the conditions of letting, then to s. 57, and then to the custom of the country. I think that it is important to note that the whole of s. 57 is referred to. Section 57 (3) provides that the landlord may, in lieu of claiming compensation under sub-s. (1), claim compensation in respect of matters specified therein under and in accordance with a written contract of tenancy: then it is provided that compensation shall not be claimed in respect of any one holding both under such a contract and under sub-s. (1). In the notice which was delivered there is no specific mention of sub-s. (1). The first mention is of the conditions of letting and then follows a general reference to s. 57. One possible view might be that the reference to s. 57, following on a reference to the contract, was an indication that the claim would be under the contract. As against that view, it might be said that there was no point in mentioning s. 57 unless it was had in mind that the provisions of s. 57 (1) gave an alternative right to the landlord. But it seems to me that there was no reason why the landlord should not serve a notice under s. 70 (2) of his intention to make alternative claims and serve a notice which kept alive his alternative rights under s. 57. I think it is a little difficult to suggest that the landlord, by a general reference to s. 57, which, as anyone who reads it would see, contains provision as to alternative claims, is giving notice that he is proposing to claim in defiance of the terms of the section to which he refers. I think, therefore, that the notice dated Nov. 28 was a notice that complied with s. 70 (2); it gave a notice referring to s. 57 and was a notice which raised alternative claims. When the arbitration came on, the landlord then abandoned any claim under s. 57 (1).

I am not sure that I would express the matter quite in the way in which the learned judge expressed it. He was willing to interpret the word "claim" in s. 57 as being synonymous with the word "recover". But the conclusion that I have reached is to the same effect as that of the learned judge. I think that there is force in what counsel for the tenant has said, that, if in one section one finds first the word "recover" and later the word "claim", one would expect those two words to have some different significance. Section 57 (1) speaks of the landlord being "entitled to recover" from the tenant, and sub-s. (3) speaks of a claim, and provides that the landlord, in lieu of claiming compensation under sub-s. (1), may

"claim compensation in respect of matters specified therein under and in accordance with a written contract of tenancy."

I read the word "claim" in sub-s. (3) as meaning claim to be entitled to recover. But I cannot see that in the present case the landlord has ever said or done anything which indicates a defiance of sub-s. (3). He has never claimed to be entitled to recover compensation both under sub-s. (1) and under the written contract of tenancy. He has never asserted any such right. In the result, therefore,

A I come to the same conclusion as that reached by the learned judge. I agree entirely with my Lord that s. 57 deals primarily with rights.

B **SELLERS, L.J.:** I agree that this appeal should be dismissed for the reasons given by my Lord and MORRIS, L.J. The tenant's contention is that the landlord was out of court in his claim in this case because he had not complied with the requirements of s. 70, which is the section which deals with the method of settling claims between the landlord and tenant on termination of a tenancy. It is said that his claim must fail because within the specified period of two months the landlord has not served the notice which is required by sub-s. (2) of that section. It is the only notice which is required to be served in order to bring into operation the provisions of that section for determination of a dispute of this character. As I understand it, it is said that it is an insufficient or a bad notice because it has made alternative claims and not specified the precise claim which the landlord wished to make. As it seems to me, the contention that the notice is to be designated as a bad or invalid notice must be based, certainly primarily (and, as I think, finally) on the interpretation of s. 70 (2), which provides in respect of a claim arising on termination of a tenancy:

D "No such claim as aforesaid shall be enforceable unless before the expiration of two months from the termination of the tenancy the claimant has served notice in writing on his landlord or tenant, as the case may be, of his intention to make the claim."

E It is then, at that stage, only a notice of intention. Notwithstanding the argument of learned counsel for the tenant, I would hold that the notice which was given (referred to as Q) was clearly a notice under s. 70 and in its express terms was no more than a notice of an intention to make certain claims.

The next part of s. 70 (2) seems to me vital for consideration of this matter. It is in these terms:

F "A notice under this sub-section shall specify the nature of the claim, and it shall be a sufficient specification thereof if the notice refers to the statutory provision, custom or term of an agreement under which the claim is made."

G If it is to be said that that prohibits alternative claims, then I should regard that provision of the sub-section as being misleading, because there is nothing to indicate there that the claims must not be in the alternative. Indeed, it would seem to me that the notice of intention to make a claim is to be, or may well be, of an informal character, specifying the nature of the claim, and it will be sufficient if the claim refers to the matters specified. I would not myself interpret s. 70 (2) as prohibiting in any way alternative claims by way of notice of intention of making a claim. In practice it would seem that it might be most desirable that that could be done. There might be a contract of tenancy alleged by the landlord or alleged by the tenant—it might be a favourable one for the tenant—which either of them was seeking to set up, but because of the contentions of the other side, which at that stage might not be very clearly known, it was desired to have an alternative should that fail. The next step is provided by sub-s. (3), under which the landlord and the tenant or their representatives may get together and discuss the matter and possibly arrive at a settlement. I can see no reason there why the alternative claims should not be discussed; and, although I am not very familiar with the practice in this branch of the law, I apprehend that it must have occurred many times that the contract would be referred to and there might be a dispute about that; then, the claim failing under the contract or on a disagreement on the contract, the parties would fall back on s. 57 (1).

Be that as it may, the alternative claim would seem to be well within the province of s. 70 (2). A

I do not propose to add anything more to what my Lords have said about s. 57 itself. It does in its terms deal with compensation, as I think, and is not dealing, as s. 70 is, with procedure in relation to the settlement of the claims or, failing settlement, to arbitration. On those grounds I agree that this appeal should be dismissed. B

Appeal dismissed.

Solicitors: *Robbins, Olivey & Lake*, agents for *Stephens & Scoun*, St. Austell (for the tenant); *Law & Worssam*, agents for *Blight, Son & Broad*, Callington (for the landlord).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.] C

GIBB v. UNITED STEEL COMPANIES, LTD. AND ANOTHER.

[CARLISLE ASSIZES (Streatfeild, J.), January 22, 30, February 12, 1957.]

Master and Servant—Loan of servant—Dock labourer—General servant of harbour board—Working regularly for company acting as master stevedores at docks—Dock labourer injured through unsafe system of work—Whether harbour board or company liable. E

The plaintiff was employed as a dock labourer at the Workington Docks, which were owned and occupied by the second defendants, Workington Harbour and Dock Board (referred to hereinafter as "the harbour board"). The first defendants, a company, were the consignees of ninety-five per cent. of the cargoes arriving at the port of Workington. Prior to 1943 the dock labourers, including the plaintiff, were directly employed by the first defendants, who were the master stevedores at the docks, handling not only their own cargoes but all the cargoes arriving at the port. On the formation of a national pool of dock labourers in 1943 under the National Dock Labour Scheme, the harbour board became the "registered port transport employers" under the scheme, and thus became, in law, the plaintiff's general employers. Under an agreement between the harbour board and the National Dock Labour Corporation, the harbour board undertook to pay to the corporation the total weekly wages earned by the dock labourers at their docks and to pay all proper claims for injury sustained by any docker while in their employment. In practice, however, the first defendants continued to act as master stevedores for all cargoes arriving at the docks, although, since 1943, they had to indent on the harbour board for the dock labour which they required. The first defendants paid to the harbour board the wages of all the dock labourers employed, obtaining reimbursement, where appropriate, from the other consignees. They had a large global employers' liability policy, in which dock labourers generally in any ports where the first defendants' cargoes were handled (including Workington) were included in the schedule for the purpose of fixing their premium. Dock labourers were not included in the employers' liability policy taken out by the harbour board. Only the harbour board, however, could initiate the special machinery for securing the dismissal of a dock F G H I

- A labourer and negotiate with his trade union as to rates of pay. In 1953 the plaintiff was seriously injured in the course of his employment, being crushed between the buffers of two railway wagons owing to the fact that one of the wagons had not been braked. In an action for damages against the defendants, the court held that the plaintiff's employers were guilty of negligence in failing to lay down and maintain a reasonably safe system of work in the circumstances of the case. On the question which of the defendants were at the material time the plaintiff's employers, and, therefore, liable in damages,

Held: although the plaintiff was legally the general servant of the harbour board and was working on premises of which they were the owners and occupiers, at the time of the accident he was pro hac vice the servant of the first defendants, who had not only the right to direct him what to do but also full power to direct the method in which he carried out his work, and, therefore, the first defendants were liable to the plaintiff in damages.

Mersey Docks & Harbour Board v. Coggins & Griffiths (Liverpool), Ltd. ([1946] 2 All E.R. 345) applied in principle but distinguished on the facts.

- D [As to the existence of the relationship of master and servant, see 22 HALSBURY'S LAWS (2nd Edn.) 112, para. 191; and for cases on the subject, see 34 DIGEST 22-27, 24-55.]

Cases referred to:

- (1) *Winter v. Cardiff Rural District Council*, [1950] 1 All E.R. 819; 114 J.P. 234; 2nd Digest Supp.
- E (2) *General Cleaning Contractors, Ltd. v. Christmas*, [1952] 2 All E.R. 1110; [1953] A.C. 180; 3rd Digest Supp.
- (3) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; 103 L.J.K.B. 465; 151 L.T. 87; *revsd. on other grounds*, H.L., [1936] A.C. 206; 36 Digest (Repl.) 173, 929.
- F (4) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.
- (5) *Hutchinson v. London & North Eastern Ry. Co.*, [1942] 1 All E.R. 330; [1942] 1 K.B. 481; 111 L.J.K.B. 369; 166 L.T. 228; 36 Digest (Repl.) 114, 564.
- G (6) *Mersey Docks & Harbour Board v. Coggins & Griffiths (Liverpool), Ltd.* [1946] 2 All E.R. 345; [1947] A.C. 1; 115 L.J.K.B. 465; 175 L.T. 270; 2nd Digest Supp.
- (7) *O'Reilly v. Imperial Chemical Industries, Ltd.*, [1955] 3 All E.R. 382; 3rd Digest Supp.
- (8) *Denham v. Midland Employers' Mutual Assce., Ltd.*, [1955] 2 All E.R. 561; [1955] 2 Q.B. 437; 3rd Digest Supp.

H Action.

The plaintiff, Ernest Gibb, claimed damages against one or other of the defendants, United Steel Companies, Ltd. and Workington Harbour and Dock Board, for damages for personal injuries due to negligence. The case is fully reported only on the question which of the defendants were the plaintiff's employers at the time so as to be liable to him in damages.

- I The plaintiff, who was now fifty years of age, was employed as a dock labourer at the Workington Docks, having worked there for some thirty years. The second defendants, Workington Harbour and Dock Board (referred to hereinafter as "the harbour board"), were the legal owners and occupiers of the docks, railways, locomotives, cranes, and their equipment; and since 1943, when the National Pool of Dock Labourers was formed, they had been the plaintiff's general employers. The first defendants, United Steel Companies, Ltd., acted as master stevedores at the docks, not only for their own cargoes, which constituted

about ninety-five per cent. or more of the whole of the cargo arriving there, but for other cargoes as well. Since 1943 the first defendants indented on the harbour board for the labour required when cargoes came in. Prior to 1943 the first defendants had been the plaintiff's employers. A

On June 29, 1953, the plaintiff was one of a gang of dockers engaged in bringing empty railway wagons to a point on the track, alongside the quay, where they were loaded with coal-duff from a ship by means of a crane and grab. Each loaded wagon was then manhandled further along the track, and, when a sufficient number of wagons were filled, they were coupled up by a shunter and taken away by a locomotive. The method of working was for one of the men to start an empty wagon moving by means of a pinch-bar inserted behind the rear wheel of the wagon and levered down on the surface of the rail. As soon as some momentum had thus been imparted to the wagon, the remainder of the gang would push it up to the markers where it was to be filled, and where it would be stopped by means of its brake. The filled wagons were then moved further along the track, being started either by means of the pinch-bar, as before, or by a bump from the next empty wagon coming up to be filled. For some thirty years the dockers had adopted the practice of not applying the brakes of a filled wagon (except the first one) when it had reached its appointed place further along the track, unless, after watching it for a moment, they thought that it was in danger of running back owing to the fact that the track was uneven and undulating in places. The men worked on piece rates and it speeded up the work if the brakes were applied only when necessary. The foremen were aware of this practice, and the dockers considered the practice reasonably safe. No instructions with regard to the braking of wagons were ever given to the dockers by any responsible official of the employers, who were at all times content to leave the matter to the experience of the dockers themselves. It was only occasionally that unbraked wagons moved on their own. On the day of the accident one of the wagons brought up to be filled had overshot its mark by some three or four feet and the plaintiff, by himself, proceeded to move it back to its right position while the crane driver continued loading it. The plaintiff inserted his pinch-bar under one of the forward wheels of the wagon and, standing astride of the rail, began to press downwards to lever the wagon back into position. Owing, apparently, to the vibration set up in the uneven track by the dropping of the grab-loads of coal-duff into the wagon, the equilibrium of the last-filled unbraked wagon was disturbed and it rolled back unexpectedly towards the plaintiff while he was standing astride the rail with his back to the filled wagons. The plaintiff was caught between the buffers of the two wagons and very seriously injured. B C D E F G

The plaintiff alleged (a) that the first or second defendants, whichever of them were his employers at the time of the accident, were negligent at common law in causing an unsafe system to be operated in that wagons were left unbraked, and (b) that the defendants were negligent in that the track was in a bad state of repair and that the defendants failed to examine or maintain it in a safe condition. Each of the defendants, while denying liability, alleged that the plaintiff was guilty of negligence in failing to apply the brake of the wagon which caused his injury and in standing in a position astride the rail, which he must have known was dangerous, having regard to the condition of the track. H

The action came on for trial at Carlisle Assizes on Jan. 22, 1957, and was transferred to Lancaster Assizes and heard there on Jan. 30. Judgment was given at Liverpool Assizes on Feb. 12. I

HIS LORDSHIP (STREATFEILD, J.) found that want of reasonable care on the part of the harbour board to maintain their railway track in reasonable condition for the class of traffic for which it was intended was not proved, but that the actual state of the track was a material consideration in determining whether the employers (whoever they were) took sufficient care to lay down and enforce

- A a reasonably safe system of work. The system of merely watching a loaded wagon to see if it would remain stationary on its own and, if it did do so, leaving the brake off, was not a reasonably safe system although the dockers themselves thought that it was. After quoting a passage from the speech of LORD PORTER in *Winter v. Cardiff Rural District Council* (1) ([1950] 1 All E.R. 819 at p. 822, letters C-F) and the speech of LORD OAKSEY (*ibid.*, at p. 822), on which the
- B defendants relied, and passages from the speeches of LORD OAKSEY and LORD REID in *General Cleaning Contractors, Ltd. v. Christmas* (2) ([1952] 2 All E.R. 1110 at p. 1114, letter D-p. 1115, letter A, and p. 1117, letters A-D), on which the plaintiff relied, HIS LORDSHIP said that, where jobs were simple and various, it might be reasonable to leave much to the man on the spot, but, where a danger was obvious and a practice of ignoring it had grown up, it was not reasonable-
- C to expect workmen to take the initiative in devising and using precautions; that it was the employer's duty to consider the risks of the work and the work place, and to instruct even experienced men what they should do to cope with them; and that, in his judgment, the question of braking the wagons was not a matter which the employers were justified in leaving solely to the judgment of the dockers, experienced though they were. Founding himself on the speeches
- D of LORD OAKSEY and LORD REID in *General Cleaning Contractors, Ltd. v. Christmas* (2) HIS LORDSHIP held that the employers were in breach of their common law duty to take reasonable care to lay down and enforce a reasonably safe system of work in the conditions in which the plaintiff was set to work and that the breach was the cause of the accident.

- E On the question of contributory negligence, HIS LORDSHIP referred to dicta of LAWRENCE, J., in *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.* (3) ([1934] 2 K.B. 132 at p. 140), of LORD WRIGHT in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (4) ([1939] 3 All E.R. 722 at p. 738), and of GODDARD, L.J., in *Hutchinson v. London & North Eastern Ry. Co.* (5) ([1942] 1 All E.R. 330 at p. 336), and held that the plaintiff was not guilty of contributory negligence. His LORDSHIP then assessed the general damages to which the plaintiff was
- F entitled at £6,500, the special damages having been agreed at £1,050, and turned to the final question which is reported below.

J. R. D. Crichton, Q.C., and *G. Heilpern* for the plaintiff.

R. H. Forrest, Q.C., and *C. Q. Henriques* for the first defendants, United Steel Companies, Ltd.

- G *D. J. Brabin, Q.C.*, and *G. W. G. Jones* for the second defendants, Workington Harbour and Dock Board.

Cur. adv. vult.

- Feb. 12. STREATFEILD, J., read a judgment in which after stating the facts, reviewing the evidence and deciding the issues of negligence and
- H contributory negligence as indicated previously, he continued: Finally, there arises the question which of the defendants were at the time of the accident the plaintiff's employers, who owed him the duties at common law, the breach of which renders them liable to pay these damages. The first defendants contended that at all material times the plaintiff was and remained the general servant of the harbour board. The harbour board contended that, although
- I the plaintiff was in law their general servant, his services at the material time had been transferred, *pro hac vice*, to the first defendants. I agree with counsel for the harbour board that it is a pure question of fact to be determined on the whole of the evidence, and is not resolved simply by determining who engaged the plaintiff, and paid his wages, and had the right to dismiss him. The proper test is: Who has the right at the moment to control the manner of the execution of the acts of the servant? See *Mersey Docks & Harbour Board v. Coggins & Griffiths (Liverpool), Ltd.* (6) ([1946] 2 All E.R. 345). That was a case concerning

a crane-driver hired, with his crane, by a harbour board to stevedores, and it was held that, notwithstanding an express agreement to the contrary between the parties, the crane-driver remained the general servant of the harbour board, because the hirers had no right to control the method of execution of his work, although they could direct him what work he was to do. The onus on the general employers, to prove that the services of their general servant were transferred to another, is a heavy one; but there may, on the facts, be a great difference between the services of a technical craftsman, and those of a labourer; see the observations of LORD UTHWATT ([1946] 2 All E.R. at p. 354). Reference is also made to *O'Reilly v. Imperial Chemical Industries, Ltd.* (7) ([1955] 3 All E.R. 382).

What then was the position of the plaintiff on the facts? The Workington Harbour and Dock Board were incorporated by the Workington Harbour and Dock Act, 1905. They are the legal owners and occupiers of the docks, railways, locomotives, cranes, and their equipment, and they employ as their servants the crane-drivers, engine-drivers, shunters and platelayers, and are responsible for the maintenance of the docks and equipment. The harbour board have issued redeemable debenture stock, the whole of which is held by the first defendants; and ninety-five per cent. or more of the cargoes arriving at the port of Workington, consisting of iron ore, Welsh coal, steel rails, and sleepers, are for the first defendants. For the handling of this traffic, the first defendants maintained an office of their shipping department on the harbour board's premises. In 1944 Mr. Bridgwater was appointed the manager of the first defendants' shipping department, and ran that office. At that time there was, in the same office, a separate clerk and manager of the harbour board, but in 1947 Mr. Bridgwater took on that position also, so that in one office on the harbour board's premises he was both the manager of the first defendants' shipping department and clerk and manager of the harbour board, dealing almost exclusively with the first defendants' cargoes.

Prior to 1943 the first defendants were unquestionably the "master stevedores". Whenever cargoes were discharged, the first defendants directly employed the dock labourers, including the plaintiff, and paid their wages. Had this accident occurred before 1943, it would have been quite unarguable that the first defendants were not his employers. He was then, without doubt, their general servant. In 1943 the National Dock Labour Corporation (afterwards called the National Dock Labour Board) came into existence, and formed the dockers into a National Pool of Dock Labourers, with certain advantages to the men of guaranteed wages. As part of the machinery for paying wages, the National Dock Labour Board insisted on the various harbour and dock authorities becoming the "registered port transport employers" under the scheme. Accordingly, the Workington Harbour and Dock Board became so registered, and on June 25, 1943, entered into a written agreement with the National Dock Labour Corporation whereby they each undertook to carry out the dock labour scheme as applied to Cumberland. Under this agreement the harbour board undertook to pay to the corporation, on or before each Monday, the total wages earned by the dockers for the week ending the previous Saturday, which the corporation were due to pay to the men on the following Thursday. Various other financial arrangements were made for different classes of workers, and the harbour board undertook to pay all proper claims for injury sustained by any docker while in their employment. The National Dock Labour Corporation undertook, as agent for the employers, to engage such dock workers as they might request, and pay over to the dockers individually the wages received in bulk from the employers. I was not shown the national scheme but was informed that, under it, only the harbour board could initiate the special machinery for securing the dismissal of a dock worker. Further, it was the harbour board

A who alone had power to negotiate with the Transport and General Workers' Union as to rates of pay.

This change of circumstances in 1943 undoubtedly altered the plaintiff's status. In law he clearly became the general servant of the harbour board, and he himself told me that he regarded himself as employed by the harbour board. So he was as general servant, but that does not prevent his services
B being transferred, *pro hac vice*, to others, so as to render those others liable to him for their negligence, or liable to third parties for his negligence. The question is whether the general employers, the harbour board, have discharged their onus of proving that the plaintiff was the temporary servant of the first defendants to such an extent as to give them the right of controlling the method of carrying out his work, as opposed to merely directing him what work he had
C to do. As to this, the facts are somewhat striking.

Although as between the National Dock Labour Board and the harbour board, the harbour board were the employers and paid the wages, as between the harbour board and the first defendants the position was very different. Mr. Bridgwater in his dual capacity told me that even after 1943 the first defendants remained the master stevedores. Whenever a cargo came in for
D the first defendants, he, in his capacity as the manager of their shipping department, inquired from them what wagons they had available, and the number of gangs of dockers they required for unloading. He then, as agent for the first defendants, indented for the dock labour required. He summarised this by saying: "When I was giving orders, I do not merely *think*, but I *know*, I was acting as manager of the shipping department of [the first defendants]".

E This is, in my view, confirmed by the method of payment of the dockers. Although the harbour board were legally liable to pay the men's wages to the National Dock Labour Board, it was the first defendants who put them in funds to do so. The position of the payment of the dock labourers is particularly striking. Mr. Bridgwater rendered two invoices. One was in respect of the specific wages which the harbour board were to pay as such to the dock workers
F and their foreman. The other was in respect of their charge for the craneage and haulage, which charge included the use of cranes and locomotives, as well as the wages of crane drivers, engine drivers, and shunters. This is a strong indication indeed that, with regard to the dock workers, whose wages were invoiced in specie, the first defendants were "master stevedores", whereas with regard to harbour equipment and services, the harbour board were acting
G as an ordinary harbour authority.

This view is confirmed when one considers what happened to the remaining five per cent. of the cargoes arriving at Workington for other consignees. In such cases the consignees asked the harbour board (who, they knew, were the registered employers under the national scheme) to arrange for the dock labour. The harbour board, however, did not invoice the wages to be paid for such
H labour to the consignees, but invoiced them to the first defendants as master stevedores, who in turn invoiced over to the other consignees. This is the strongest possible evidence that the first defendants were master stevedores, not only for their own cargoes, but for all cargoes arriving at the port of Workington.

I It is not without significance that the harbour board have an employers' liability policy in which these dock labourers are not included, whereas the first defendants have a very large global employers' liability policy, in which dock labourers generally in any ports where their cargoes are handled (including Workington) are included in the schedule for the purpose of fixing their premium. If, in fact, dockers in the plaintiff's position are not the servants of the first defendants, it is odd that no witness was called on their behalf to tell me that it was a mistake that dockers (legally employed by the harbour board) should be included in their own policy. Nobody from the first defendants ventured to

tell me that Mr. Bridgwater was wrong in his very strong assertion that in giving orders for dockers, and giving orders to dockers, he was acting as manager of the first defendants' shipping department. A

Counsel for the first defendants contended that a man's service cannot be transferred to another, and his own position changed without his knowledge and consent, and he prays in aid the absence of any contract between the first defendants and the National Dock Labour Board. He referred to *Denham v. Midland Employers' Mutual Assce., Ltd.* (8) ([1955] 2 All E.R. 561), which, however, turned on the question of the liability of an insurance company under a policy confined expressly to employees engaged under contracts of service. B
The judgments of DENNING and ROMER, L.JJ., make it quite clear that, although no liability arose under the policy unless there was a contract of service, that does not prevent the transfer of the use and benefit of the services of a servant to temporary employers, *pro hac vice*, so as to make them liable to third parties for the servant's negligence, or liable to the servant for their own negligence. C

I agree with the final observation of counsel for the harbour board that, if this is not a case of the transfer of the services of a general servant to other employers, *pro hac vice*, then it is time for the Court of Appeal or House of Lords to say that the doctrine no longer exists. On this overwhelming evidence I have no doubt whatever that at the material time the plaintiff, although legally the general servant of the harbour board, was, *pro hac vice*, the servant of the first defendants; and this is no less the case because in practice he was never anything else, when engaged to handle a cargo at Workington docks. D
That being the case, the duty to take reasonable care to lay down and enforce a reasonably safe system of work lay fairly and squarely, and in law, on the shoulders of the first defendants, who had full power to direct the method in which the plaintiff carried out his work; and this is no less so where they put him to work on premises of which another legal entity was the owner and occupant. E
Having failed in that duty, and that being the cause of this disastrous accident, the plaintiff is entitled to judgment against the first defendants for the sum of £7,550 (including £1,050 agreed special damage) with costs. F

Judgment for the plaintiff against the first defendants. Judgment for the second defendants against the plaintiff.

Solicitors: *Sumner & Singleton*, Whitehaven (for the plaintiff); *Noel J. Noble*, Barrow-in-Furness (for the first defendants); *Clutterbuck, Trevenen & Mawson*, Carlisle (for the second defendants).

[Reported by K. BUCKLEY EDWARDS, Esq., Barrister-at-Law.]

EASTERBROOK v. EASTERBROOK.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), March 18, 1957.]

B *Infant—Maintenance—Order of High Court—Enforcement—Judgment summons—Order for maintenance of two children of marriage—No payment under order—Separate summons in respect of debt due to each child.*

Where a husband, against whom a maintenance order has been made for the maintenance of the two children of the marriage, is in arrears with his payments to both children, a separate judgment summons should be issued in respect of the debt due to each child.

[As to judgment summons in respect of arrears of maintenance for children of marriage, see 12 HALSBURY'S LAWS (3rd Edn.) 472, para. 1057, note (k); and for cases on the subject, see 27 DIGEST (Repl.) 675, 6432, 6433.

C For the Matrimonial Causes (Judgment Summons) Rules, 1952, see 3 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 271-274.]

Case referred to:

(1) *Shelley v. Shelley* (No. 1 & No. 2), [1952] 1 All E.R. 70, 72; [1952] P. 107, 111; 116 J.P. 39; 3rd Digest Supp.

Judgment Summons.

E In September, 1954, the wife was granted a decree nisi of divorce and on Mar. 9, 1955, an order was made against the husband that he should pay, inter alia, maintenance to the two children of the marriage at the rate of 30s. a week each. The husband made no payments under the order and on Feb. 15, 1957, the wife issued a judgment summons as the next friend of the two children in respect of the arrears of payments to the children. The question arose at the hearing of the summons whether one summons could be issued in respect of the total debt owing to both children and counsel relied on *Shelley v. Shelley* (1) ([1952] 1 All E.R. 70, 72) to support his contention that only one summons need be issued.

W. Kee for the wife as next friend.

G **COLLINGWOOD, J.:** I am now told that reference has been made to the record in *Shelley v. Shelley* (1) ([1952] 1 All E.R. 70, 72) which shows that there were in fact two summonses on the file in that case. The fundamental point is that there are two individual debts, one due to each child. I cannot think that they can be the subject of the same judgment summons simply because the two children appear by the same next friend. Separate summonses must be issued in respect of what is due to each child.

Summons dismissed.

Solicitors: *Edward Fail & Co.* (for the wife as next friend).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

BOLAM v. FRIERN HOSPITAL MANAGEMENT COMMITTEE.

[QUEEN'S BENCH DIVISION (McNair, J.), February 20, 21, 22, 25, 26, 1957.]

Hospital—Negligence—Electro-convulsive therapy—Relaxant drugs not administered, and patient not restrained by manual control—Two recognised schools of thought on method of treatment—Whether doctor following one school negligent—Whether duty to warn of risks.

Medical Practitioner—Negligence—Test of liability—Whether under duty, when advising electro-convulsive therapy, to warn of risks.

In 1954 the plaintiff, who was suffering from mental illness, was advised by a consultant attached to the defendants' hospital to undergo electro-convulsive therapy. He signed a form of consent to the treatment but was not warned of the risk of fracture involved. There was evidence that the risk of fracture was very small, viz., of the order of one in ten thousand. On the second occasion when the treatment was given to the plaintiff in the defendants' hospital he sustained fractures. No relaxant drugs or manual control (save for support of the lower jaw) were used, but a male nurse stood on each side of the treatment couch throughout the treatment. The use of relaxant drugs would admittedly have excluded the risk of fracture. Among those skilled in the profession and experienced in this form of therapy, however, there were two bodies of opinion, one of which (since 1953) favoured the use of relaxant drugs or manual control as a general practice, and the other of which, thinking that the use of these drugs was attended by mortality risks, confined the use of relaxant drugs to cases where there were particular reasons for their use. The plaintiff's case was not such a case. Similarly there were two bodies of competent opinion on the question whether, if relaxant drugs were not used, manual control should be used. So, too, different views were held among competent professional men on the question whether a patient should be expressly warned about risk of fracture before being treated, or should be left to inquire what the risk was; and there was evidence that in cases of mental illness explanation of risk might well not affect the patient's decision whether to undergo the treatment. The plaintiff having sued the defendants for negligence in the administration of the treatment, viz., in not using relaxant drugs or some form of manual control, and in failing to warn him of the risk involved before the treatment was given, the jury returned a verdict for the defendants. In the summing-up,

The jury were directed: (i) a doctor is not negligent, if he is acting in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, merely because there is a body of such opinion that takes a contrary view.

Principle stated by LORD PRESIDENT CLYDE in *Hunter v. Hanley* ([1955] S.L.T. at p. 217) applied (see p. 122, letter B, post).

(ii) that the jury might well think that when a doctor was dealing with a mentally sick man and had a strong belief that his only hope of cure was submission to electro-convulsive therapy, the doctor could not be criticised if, believing the dangers involved in the treatment to be minimal, he did not stress them to the patient (see p. 124, letter G, post).

(iii) in order to recover damages for failure to give warning the plaintiff must show not only that the failure was negligent but also that if he had been warned he would not have consented to the treatment (see p. 124, letter I, post).

[**Editorial Note.** The view that the duty of a medical practitioner does not necessarily extend, as a consequence of the confidential relationship between doctor and patient, to warning the patient of the dangers of proposed treatment, unless the patient makes inquiry concerning them, accords with Canadian

- A authority (see *Kenney v. Lockwood**, [1932] 1 D.L.R. 507). The direction that, where there are two different schools of medical practice, both having recognition among practitioners, it is not negligent for a practitioner to follow one in preference to the other accords also with American law; see 70 CORPUS JURIS SECUNDUM (1951) 952, 953, para. 44. Moreover it seems that by American law a failure to warn the patient of dangers of treatment is not, of itself, negligence
- B (ibid., 971, para. 48 m).

As to the civil liability of a medical practitioner for wrongful acts, see 22 HALSBURY'S LAWS (2nd Edn.) 318, 319, paras. 601-603; and as to negligence in the practice of a profession, see 23 HALSBURY'S LAWS (2nd Edn.) 577-579, para. 829.]

Cases referred to†:

- C (1) *Hunter v. Hanley*, [1955] S.L.T. 213.
 (2) *Roe v. Ministry of Health*, *Woolley v. Ministry of Health*, [1954] 2 All E.R. 131; [1954] 2 Q.B. 66; 3rd Digest Supp.

Action.

- In this action John Hector Bolam, the plaintiff, claimed damages against Friern Hospital Management Committee, the defendants, in respect of injuries which he received while undergoing electro-convulsive therapy on Aug. 23, 1954, at Friern Hospital.

- The plaintiff, a salesman, was admitted to Friern Hospital on Apr. 29, 1954, suffering from the after-effects of a mental illness of the depressive type. He was discharged from the hospital on July 30, 1954, but was readmitted on Aug. 16, 1954, suffering from depression. On Aug. 18 the plaintiff was examined by Dr. J. de Bastarrechea, consultant psychiatrist attached to Friern Hospital, who advised the plaintiff to undergo electro-convulsive therapy, and told him that it was proposed to apply that treatment on the following day. Electro-convulsive therapy is carried out by placing electrodes on the head which allow an electric current from a machine to pass through the brain. One of the results of the treatment is to cause convulsions in the nature of a fit. Dr. de Bastarrechea did not warn the plaintiff of the risks involved, one of which was the risk of fracture. The plaintiff signed a form consenting to the treatment. On Aug. 19 the plaintiff was treated with electro-convulsive therapy. He again received this treatment on Aug. 23 when it was administered by Dr. C. Allfrey, a senior registrar at Friern Hospital. On this occasion an initial shock was passed through the plaintiff's brain for approximately one second and was followed within approximately four seconds by a succession of five momentary shocks administered for the purpose of damping the amplitude of the jerking movements of the plaintiff's body. No further shocks were administered and the convulsion was not unusually violent. The voltage of the current was 150 volts, the frequency fifty cycles per second. During this treatment the plaintiff lay in a supine position, a pillow was placed under his back, and his lower jaw was supported on a mouth gag by a male nurse; otherwise, he was not restrained in any way, although a male nurse stood at each side (viz., three male nurses in all) of him in case he should move from it. No relaxant drugs were administered to the plaintiff prior to the treatment. In the course of this treatment the plaintiff sustained severe physical injuries consisting in the dislocation of both hip joints with fractures of the pelvis on each side which were caused by the head of the femur on each side being driven through the acetabulum or cup on the pelvis.

The medical evidence showed that competent doctors held divergent views on the desirability of using relaxant drugs, and restraining the patient's body

* This was an appeal from McEvoy, J., reported sub nom. *Kinney v. Lockwood Clinic, Ltd.* ([1931] 4 D.L.R. 906).

† The defendants also cited *Marshall v. Lindsey County Council*, [1936] 2 All E.R. 1076; *Hatcher v. Black* (1954), *The Times*, July 2.

by manual control, and also on the question of warning a patient of the risks of electro-convulsive therapy. A

The plaintiff contended that the defendants were negligent in permitting Dr. Allfrey to administer electro-convulsive therapy without the previous administration of a relaxant drug, or without restraining the convulsive movements of the plaintiff by manual control, and in failing to warn the plaintiff of the risk which he was taking in consenting to have the treatment; and, further, that Dr. Allfrey was negligent in so administering the treatment and that the defendants were vicariously responsible for that negligence. B

N. R. Fox-Andrews, Q.C., and R. F. Ormrod for the plaintiff.

J. Stirling, Q.C., and E. D. Sutcliffe for the defendants.

McNAIR, J.: Members of the jury, when some days ago this case was opened to you by counsel for the plaintiff and you were told the tragic story of this plaintiff's sufferings and his experience, and when you later saw him in the witness-box and saw what a hopeless condition he was in, you must inevitably have been moved to pity and compassion. Nobody hearing that story or seeing that man could fail to be so moved; but counsel have told you, rightly, that the jury is not entitled to give damages based on sympathy or compassion. You will only give damages if you are satisfied that the defendants have been proved to be guilty of negligence. Counsel for the plaintiff accepts that he has to satisfy you, first, that there was some act of negligence, in the sense which I will describe in a moment, on behalf of the defendants, which primarily means negligence by Dr. Allfrey*, and, secondly, that that negligence did cause the terrible injuries which the plaintiff suffered, or at least that the defendants negligently failed to take some precaution which would have minimised the risk of those injuries. C

Before dealing with the law, I think it right that I should say this, that you have got to look at this case in its proper perspective. You have been told by one doctor that he had only seen one acetabular fracture in fifty thousand cases, involving a quarter of a million treatments. It is clear that the particular injury which produced these disastrous results in the plaintiff is one of extreme rarity. Another fact which I think it right to bear in mind is this, that whereas some years ago when a patient went into a mental institution afflicted with mental illness, he had very little hope of recovery—in most cases he could only expect to be carefully and kindly treated until in due course merciful death released him from his sufferings—today, according to the evidence which you have had before you, the position is entirely changed. Distinguished practitioners from some of the leading mental hospitals in the country have put before you what, I venture to think, are quite staggering figures of the number of patients now treated in these hospitals. Today, a man who enters a mental hospital suffering from a particular type of mental disorder has a real chance of recovery. You were told that that change was due almost entirely to the introduction of physical methods of treatment of mental illness, and of those physical methods the electro-convulsive therapy, which you have been considering during the last few days, is the most important. When you approach this case and consider whether it has been proved against the defendants that negligence was committed, you have to bear in mind the enormous benefits which are conferred on men and women by this form of treatment. E F

Another general comment that I would make is this: On the evidence it is clear, is it not, that the science of electro-convulsive therapy is a progressive science? Its development has been traced for you over the few years in which it has been used in this country. You may think on this evidence that, even today, there is no standard settled technique to which all competent doctors will agree. The doctors called before you have mentioned in turn different variants of the technique that they use. Some use restraining sheets, some use G H

* Dr. Allfrey was the doctor who administered the electro-convulsive therapy to the plaintiff on Aug. 23, 1954. I

- A relaxant drugs, some use manual control; but the final question about which you must make up your minds is this—whether Dr. Allfrey, following on the practice that he had learned at Friern Hospital and following on the technique which had been shown to him by Dr. de Bastarreechea*, was negligent in failing to use relaxant drugs or, if he decided not to use relaxant drugs, that he was negligent in failing to exercise any manual control over the patient beyond merely
- B arranging for his shoulders to be held, the chin supported, a gag used, and a pillow put under his back. No one suggests that there was any negligence in the diagnosis, or in the decision to use electro-convulsive therapy. Furthermore, no one suggests that Dr. Allfrey, or anyone at the hospital, was in any way indifferent to the care of their patients. The only question is really a question of professional skill.
- C Before I turn to that, I must explain what in law we mean by “negligence”. In the ordinary case which does not involve any special skill, negligence in law means this: Some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent?
- D In an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he
- E has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by
- F counsel. Counsel for the plaintiff put it in this way, that in the case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent. Counsel for the plaintiff was also right, in my judgment,
- G in saying that a mere personal belief that a particular technique is best is no defence unless that belief is based on reasonable grounds. That again is unexceptionable. But the emphasis which is laid by counsel for the defendants is on this aspect of negligence: He submitted to you that the real question on which you have to make up your mind on each of the three major points to be considered† is whether the defendants, in acting in the way in which they did, were acting
- H in accordance with a practice of competent respected professional opinion. Counsel for the defendants submitted that if you are satisfied that they were acting in accordance with a practice of a competent body of professional opinion, then it would be wrong for you to hold that negligence was established. I referred, before I started these observations, to a statement which is contained in a recent Scottish case, *Hunter v. Hanley* (1) ([1955] S.L.T. 213 at p. 217),
- I which dealt with medical matters, where the Lord President (LORD CLYDE) said this:

“In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion, and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The

* Dr. de Bastarreechea was a consultant psychiatrist attached to Friern Hospital.

† For the three main points relied on by the plaintiff, see p. 122, letter F, post.

true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care.” A

If that statement of the true test is qualified by the words “in all the circumstances”, counsel for the plaintiff would not seek to say that that expression of opinion does not accord with English law. It is just a question of expression. I myself would prefer to put it this way: A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying: “I don’t believe in anaesthetics. I don’t believe in antiseptics. I am going to continue to do my surgery in the way it was done in the eighteenth century”. That clearly would be wrong. B C D

Before I deal with the details of the case, it is right to say this, that it is not essential for you to decide which of two practices is the better practice, as long as you accept that what Dr. Allfrey did was in accordance with a practice accepted by responsible persons; but if the result of the evidence is that you are satisfied that his practice is better than the practice spoken of on the other side, then it is a stronger case. Finally, bear this in mind, that you are now considering whether it was negligent for certain action to be taken in August, 1954, not in February, 1957; and in one of the well-known cases on this topic it has been said you must not look through 1957 spectacles at what happened in 1954. E

The plaintiff’s case primarily depends on three points. First, it is said that the defendants were negligent in failing to give to the plaintiff a warning of the risks involved in electro-convulsive therapy, so that he might have had a chance to decide whether he was going to take those risks or not. Secondly, it is said that they were negligent for failing to use any relaxant drugs which admittedly, if used, would have excluded, to all intents and purposes, the risk of fracture altogether. Thirdly—and this was, I think, the point on which counsel for the plaintiff laid the most emphasis—it is said that if relaxant drugs were not used, then at least some form of manual control beyond shoulder control, support of the chin, and placing a pillow under the back, should have been used. F G

Let us examine those three points. Bear in mind that your task is to see whether, in failing to take the action which it is said Dr. Allfrey should have taken, he has fallen below a standard of practice recognised as proper by a competent reasonable body of opinion? First let me deal with the question of warning. There are two questions that you have to consider. First—does good medical practice require that a warning should be given to a patient before he is submitted to electro-convulsive therapy? Secondly—if a warning had been given, what difference would it have made? Are you satisfied that the plaintiff would have said: “You tell me what the risks are. I won’t take those risks. I prefer not to have the treatment.” H

The plaintiff relies, on this aspect of the case, on the evidence of Dr. Randall* I who, you may think, was a most distinguished psychiatrist, well qualified to express an opinion. He said regarding his practice as to giving a warning:

“Having assessed the patient, it is then put to him that he might benefit from electro-convulsive therapy—some people call it electro-shock therapy, but from the point of view of the patient that is not material because the

* Dr. Randall was consultant psychiatrist at St. Thomas’s Hospital and Charing Cross Hospital.

- A patient is never aware either that he has a shock or a convulsion. Our practice at St. Thomas's Hospital, and my practice at Charing Cross Hospital is to provide the patient with a consent form."

Dr. Randall was asked whether he would warn the patient of the risks involved. He answered:

- B "Yes, I would indeed; in fact, we do. I make a practice always of saying to the patient that, using the technique of relaxation, he would be given an injection which would put him to sleep; that he would then be given another injection which would have the effect of paralysing all his muscles so that he could not move. I explain to the patient that if he were not given a relaxant drug his body would make some strong movements."
- C Dr. Randall was asked about the warning:

- "Q.—If you feel very sincerely as a doctor that it is the only hope of relieving this illness, would you think it wise to discourage the patient by describing to him the possible risk of serious fractures? A.—I suppose that one has to form some opinion whether the patient is likely to be influenced by it. Depressed patients are often deluded about their bodily health, and nothing will alter their attitude. Taking that distortion of judgment into account, it is probable that to tell a patient that a risk of fracture exists will not materially alter his attitude to treatment, or his attitude to his illness."
- D

- If it is right that to tell a patient of the risk of fracture will not materially alter his attitude to treatment or his attitude to his illness, you may ask yourselves: Is there really any great value in giving this warning? In dealing with consent forms, Dr. Randall says that these forms are provided so that the patient may be aware of the nature of the treatment, and also because it is the practice of the boards of governors of hospitals to provide them in case litigation ensues. Then Dr. Randall's evidence continued:
- E

- F "Q.—Does it help the patient in any way to be told all the risks which are involved in electro-convulsive therapy? A.—In the outcome I think that it does, because the patient takes the decision whether or not to have a treatment which might affect his whole future, and at that point he has the chance of deciding whether he will do it or whether he will not do it. Q.—Would you quarrel with a point of view as being wholly unsound if it was held that it was not beneficial to the patient to hear about that sort of thing? A.—I can believe that there would be circumstances in which it could be considered that it would not be beneficial to tell a patient of possible dangers and mishaps, subject to what I have already said."
- G

Then I put questions to him:

- H "Q.—Do you think that other competent people might take a contrary view to the one which you have expressed? A.—I think so, my Lord; yes, they might. Q.—Other competent people might think that it is better not to give any warning at all? A.—I think that that is going a little further than I could go generally, but I think that other people might consider it better not to give any warning at all."

- I Counsel for the plaintiff quite rightly relies on answers which Dr. Randall gave in re-examination:

"Q.—Do you think it ever right to give no warning of the risk to a person who can understand the warning? A.—I think that it is not right to give no warning of the risks to a patient who can understand the import of the warning."

That is the high-water mark of the case for the plaintiff in favour of the view that it was negligent, in the sense which I have used, not to give a warning.

Against that, you have to consider the evidence given by the defendants; A first, by Dr. de Bastarrechea, who says:

"I don't warn as to technique. I don't think it desirable to do so.

If the patient asks me about the risks, I say that there is a very slight risk to life, less than in any surgical operation. Risk of fracture 1 in 10,000.

If they don't ask me anything, I don't say anything about the risk."

Dr. de Bastarrechea also said that in his view there was some danger in emphasising to a patient who ex hypothesi is mentally ill any dangers which in the doctor's view were minimal, because, if he does so, the patient may deprive himself by refusal of a remedy which is the only available hopeful remedy open to him. In cross-examination Dr. de Bastarrechea agreed that when an operation is decided on, the patient should be carefully examined, but not that he should be warned of all the risks involved. He agreed that a man should be given the opportunity of deciding whether to take the risk, but it should be left to him to put questions; he should be told that there were some slight risks, but not told of the risks of catastrophe.

Dr. Baker, consultant psychiatrist and deputy superintendent at Banstead Hospital, on the question of warning, said:

"I have to use my judgment. Giving the full details may drive a patient away. I would not say that a practitioner fell below the proper standard of medical practice in failing to point out all the risks involved."

Dr. Page, deputy medical officer at the Three Counties Hospital, Bedfordshire, said:

"Every patient has to be considered as an individual. I ask them if they know of the treatment. If they are unduly nervous, I don't say too much. If they ask me questions, I tell them the truth. The risk is small, but a serious thing when it happens; and it would be a great mistake if they refused to benefit from the treatment because of fear. In the case of a patient who is very depressed and suicidal, it is difficult to tell him of things which you know would make him worse."

That is, in very summary form, the evidence on this point that you have to consider; and, having considered it, you have to make up your minds whether it has been proved to your satisfaction that when the defendants adopted the practice that they did (namely, the practice of saying very little and waiting for questions from the patient), they were falling below a proper standard of competent professional opinion on this question of whether or not it is right to warn. Members of the jury, though it is a matter entirely for you, you may well think that when a doctor is dealing with a mentally sick man and has a strong belief that his only hope of cure is submission to electro-convulsive therapy, the doctor cannot be criticised if he does not stress the dangers, which he believes to be minimal, which are involved in that treatment.

The second point on the question of giving a warning is this: Suppose you come to the conclusion that proper practice requires some warning to be given, if a warning had been given, would it have made any difference? Only the plaintiff can answer that question, and he was never asked it. The plaintiff dealt with the point quite shortly when he said:

"On Aug. 16 I was examined by Dr. de Bastarrechea. He told me he recommended convulsive treatment. I knew what it meant; but Dr. de Bastarrechea did not give me any warning of any risk."

The question what the plaintiff would have done if he had been told that there was a one in ten thousand risk was never put. Surely, members of the jury, it is mere speculation on your part to decide what the answer would have been, and you might well take the view that unless the plaintiff has satisfied you that he would not have taken the treatment if he had been warned, there is really nothing in this point.

- A I now pass to what I venture to believe is the real point which you have to consider, or the two real points that you have to consider: Was it negligent, in the sense which I have indicated, not to use relaxant drugs? It is really a double point: Was it negligent not to use relaxant drugs and, if no relaxant drugs were used, was it negligent to fail to use manual control? But it is easier to take them separately. On the plaintiff's side, the argument is put this way,
- B that if relaxant drugs had been used, it is common ground that the risk of fracture in the operation would, to all intents and purposes, be excluded; therefore it ought to be excluded. On the other hand, the defendants say that the risk of fracture without the use of relaxant drugs is minimal, although if a fracture does occur it may be very serious to the patient; but there is also, in the use of relaxant drugs, with an anaesthetic, another risk which has got to be
- C balanced against the risk of fracture, and that is the mortality risk. The defendants say that, forming a judgment as best they can as medical men, balancing what they believe to be a remote risk of fracture on the one hand with what they believe to be a remote risk of mortality on the other hand, they, as a matter of professional skill, have decided not to use relaxant drugs except in cases where there is something special in the patient's condition which indicates
- D that a relaxant drug should be used. For instance, if a man has had a recent fracture or is suffering from some arthritic condition, or, as I think that some witnesses mentioned, hernia. In those circumstances the defendants say that they would use relaxant drugs merely to avoid the greater risk of straight electro-convulsive therapy in those particular cases; but that they select the cases in which relaxant drugs are to be used by the exercise of their clinical
- E judgment. That is the argument, and you have to make up your minds which you think is right.

Dr. Randall gave evidence in support of the relaxant school of thought. He said that since he has used relaxant drugs, he has never had a fracture. He also told you that until 1953, the year before the plaintiff's accident, he only used relaxant drugs in selected cases, but in 1953 he started using them in every case. He agreed, however, that there was a large body of opinion which believed in giving electro-convulsive therapy straight and unmodified today. In the final questions that I put to Dr. Randall at the end of his evidence this appeared:

- G "Q.—You told the jury, as I understand it, that although you are in favour of relaxants, there is a large body of opinion of competent persons, whose opinion you respect, who take a contrary view. A.—Yes. Q.—That being so, supposing in August, 1954, a practitioner using electro-convulsive therapy did not use relaxants, could you say that he was falling below the standard of care required of a competent practitioner merely by failing to use relaxants? A.—One could not say that. It is a known method of reducing, minimising, fractures, but that it was not used you could not say
- H many other hospitals would not have taken the same attitude to it."

- I I can summarise the evidence given for the defendants in this way. Dr. de Bastarrechea says that he started to use relaxant drugs in selected cases as far back as 1948, and continues that practice today; but that he does not use them universally, for two reasons: because, viewing it fairly, he believes that the risk of a fracture with any serious results when electro-convulsive therapy is used straight, i.e., without relaxant drugs, is very small, and because he is conscious that there is a mortality risk when relaxant drugs are used. He produced figures from Friern Hospital which show that six deaths were recorded since 1951, following on electro-convulsive therapy: Dr. de Bastarrechea recalled from his own memory two further deaths in earlier years, making eight in all. Of those eight deaths, five at least were deaths in cases where relaxant drugs had been used, and one only was a death resulting from straight electro-convulsive therapy. Those figures are produced in support of the clinical impression which Dr. de Bastarrechea

had formed, that there was some risk of death in the use of relaxant drugs which he balanced against the risk of fracture without using them. He formed a judgment, on which he operated in Friern Hospital, that unless there were indications in favour of using relaxant drugs, it was better not to use them. Dr. Allfrey found the same practice existing at Knole when he was first trained there. He told you that from 1946 to 1952 no relaxant drugs were used, but from 1949 onwards they began to be used in selected cases but were never used as a routine. When he arrived at Friern Hospital, he found this same practice, i.e., that relaxant drugs were used only in selected cases. Counsel for the plaintiff urged strongly that you should come to the conclusion that Dr. Allfrey realised he was wrong, because during the week following on the misfortune to the plaintiff he changed his practice. The record book shows that from Aug. 25 to Aug. 30, the plaintiff's operation on Aug. 23 having been the last without relaxants, Dr. Allfrey always used relaxants. It was said that was because he realised that his previous practice was wrong. What Dr. Allfrey himself said on that was this:

"Q.—Were there, in that next week, fourteen treatments? A.—Yes. Q.—

In every case in the week succeeding this unfortunate occurrence every man you treated had a relaxant. A.—The reason was because [the plaintiff] had sustained a fracture and, until I had become certain in my own mind that there was nothing wrong with my technique, that there was no unknown factor which I had not taken into account, I thought that for the next week or two, at any rate until the return of Dr. de Bastarrechea when I could discuss it with him, I should take the added risk perhaps of using a relaxant in order to avoid further fractures."

If that is true, surely there is nothing in the point that, having had this disaster, Dr. Allfrey checks over his technique and wants to have an opportunity of discussing the matter with Dr. de Bastarrechea.

Dr. Marshall who gave his evidence with extreme moderation and extremely carefully, and who has the advantage of unique experience, being deputy superintendent of Netherne Hospital, said that he agreed that if relaxant drugs were properly given, there was really no risk of fracture, but that he believed that there were other more serious risks, including the risk to life, which should not be taken as a matter of routine or lightly, but only if there was a definite reason. Dr. Page, from the Three Counties Hospital, you will remember, started to use relaxant drugs and then had a distressing experience when a medical colleague of his died on the operating table whilst under relaxant drugs, which did not predispose him towards the use of relaxant drugs, but his present practice, he told you, was to use a relaxant drug in selected cases where indicated. Dr. Baker from Banstead Hospital said that relaxant drugs were given only when there was an indication in favour, and not otherwise, as, for instance, in the case of arthritis. On that body of evidence, is it really open to you to say that mere failure to give relaxant drugs is itself any evidence of negligence in the case of a medical man? There is a firm body of opinion against using relaxant drugs as a routine, and all the witnesses agree that there is this body of opinion, although one (Dr. Randall) prefers to take the risk in using relaxant drugs and thus eliminate the risk of fractures.

We now come to the question of manual control which arises in this way: It is urged by the plaintiff that if one does not use relaxant drugs, which one knows will eliminate all risk of fracture, the least one can do is to exercise some form of manual control. Manual control was not used here, and this accident happened. The defendants say that there are two schools of thought: There is a school of thought, to which they adhere, which believes honestly, on reasonable grounds, that if one holds the patient down firmly, either with a restraining sheet or by a nurse lying over his body the risk of fracture is increased. Therefore, since the end of 1951, the defendants have adopted a new technique of leaving the patient's limbs free to move, but at the same time holding him down at the

A shoulders and seeing that a nurse stands on either side of the couch ready to catch him if he shows any sign of falling off.

Dr. Randall was called by the plaintiff in support of his case on the question of using manual control. He was quite definitely of the opinion, a personal opinion which he said was shared by others, that some manual control was necessary. Indeed, that is not disputed by the defendants.

B [His LORDSHIP considered the evidence of Dr. Randall on this point. Dr. Randall had said that although there was a school of thought that restraint was unnecessary, he would not, in 1954, have given electro-convulsive therapy without using some form of restraint; he would not, at that time, have administered the treatment without precautions, i.e., without using a relaxant drug or some form of manual control. Further he had thought that it would be

C unwise in 1954 to give the treatment without using such precautions, because in his experience fractures occurred when restraint was not used, but occurred to a very much less extent when it was used. Dr. Randall had agreed that there was a competent body of medical opinion who believed that the more one restrained a patient, the more likely there were to be fractures. When asked if he thought that a doctor who had decided not to use relaxant drugs and who, also, had

D decided not to use any method of manual control because he held the view that it increased the risk of fracture, was falling below the level of skill of a competent practitioner, Dr. Randall had said that his own view was that fractures were more common if restraint was not used, and he would think such a doctor was being foolhardy in not using restraint of some sort, and that he was using inadequate precautions; he would think that that doctor was falling below the ordinary

E standard of care required of a practitioner. His LORDSHIP continued:] That is the view of a skilled person; you have to form your judgment how far Dr. Randall was merely expressing a personal view in favour of the practice which he preferred, or to what extent (if at all) he was condemning the practice advocated by the defendants. But with him, as against him, you have to weigh the whole body of opinion represented by the witnesses called by the defendants.

F Dr. de Bastarrechea was quite definite in his view that since he changed over to the use of no manual control after 1951, a decision which he took as a matter of clinical judgment, he got the impression that the fracture risk at any rate had not increased. [His LORDSHIP reviewed the evidence afforded by a consideration of figures from the casualty book of Friern Hospital, and referred to the evidence of Dr. Marshall to whom the figures were put, concluding that Dr. Marshall did

G not seem to take the view that there was anything in that list which suggested that the practice adopted at Friern Hospital was open to criticism. His LORDSHIP continued:]

Dr. Allfrey also dealt with this matter. I have not said anything about Dr. Allfrey in detail, though he is, you have got to bear in mind, primarily the man under attack, for it was during his operation that the disaster occurred. You

H have got to form your judgment of Dr. Allfrey, make up your minds whether you think that he was a careful practitioner interested in his art, giving thought to the different problems, or whether he was a man who was quite content just to follow the swim. You may recall that on quite a number of occasions in the course of his evidence he gave instances, where he had applied his inquiring mind to the problem and had come to a conclusion. On the use of restraint, he told

I you that during his training he knew that there was a school of thought that favoured restraint, but that he got the impression that the general view was against it. He recalls how he was taught that there was a greater danger of fracture if two ends of a rigid member like a stick were held firm than if one was left swinging or both were left swinging, and that persuaded him that there was something in the view that restraint should not be used. At Knole Hospital he adopted under tuition (and, as he got older, on his own responsibility) the practice of leaving the limbs free to move, merely holding down the shoulders.

When he came to Friern Hospital he found the same practice was being carried out there by Dr. de Bastarrechea. The question about which you have to make up your minds is whether Dr. Allfrey, in following that practice, is doing something which no competent medical practitioner using due care would do, or whether, on the other hand, he is acting in accordance with a perfectly well recognised school of thought. Dr. Marshall at Netherne Hospital adopts the same practice. Dr. Baker at Banstead Hospital adopts the same practice. It is true, and in fact interesting as showing the diversity of practice, that Dr. Page at the Three Counties Hospital, adopts a modification of that practice, inasmuch as he prefers to carry out the treatment in bed, with the patient controlled to some extent by the blanket, sheets and counterpane. That may be of interest to you as showing the diversity of practice; but it would not be right to take that as a condemnation of the practice adopted by the defendants.

That, members of the jury, is all that I have to say on the question of liability; but, before I leave this question altogether, I think it right to remind you of, or refer you to, what I venture to say were some very wise words used recently in the Court of Appeal in *Roe v. Ministry of Health* (2) ([1954] 2 All E.R. 131), a case not dissimilar to this. It was a most tragic case where two men in the prime of life were submitted to an anaesthetic for, in both cases, some trivial condition requiring operative treatment and, as the result of a mishap in the anaesthetic, both men came off the operating table paralysed. After a very long inquiry, the trial judge came to the conclusion that it had not been established that, by the standard of care and knowledge operating at the time, the anaesthetist was negligent. The Court of Appeal took the same view, and one finds this in the judgment of DENNING, L.J. (*ibid.*, at p. 137):

"If the anaesthetists had foreseen that the ampoules might get cracked with cracks that could not be detected on inspection they would, no doubt, have dyed the phenol a deep blue; and this would have exposed the contamination. But I do not think their failure to foresee this was negligence. It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way. Something goes wrong and shows up a weakness, and then it is put right. That is just what happened here."

Then again (*ibid.*, at p. 139):

"One final word. These two men have suffered such terrible consequences that there is a natural feeling that they should be compensated. But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure."

That concludes what I wish to say on the question of liability.

[His LORDSHIP then directed the jury on the question of damages. The jury, having retired and considered their verdict, found that the defendants were not negligent.]

Judgment for the defendants.

Solicitors: *Pennington & Son* (for the plaintiff); *J. Tickle & Co.* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A **McCLELLAND v. NORTHERN IRELAND GENERAL HEALTH SERVICES BOARD.**

[HOUSE OF LORDS (Lord Oaksey, Lord Goddard, Lord Tucker, Lord Keith of Avonholm and Lord Evershed), February 18, 19, 20, April 4, 1957.]

B *Master and Servant—Wrongful dismissal—Contract of employment with statutory corporation—Employment expressed to be permanent—Right to terminate employment in circumstances other than those specified.*

By an advertisement in a newspaper in June, 1948, the respondent board invited applications for posts which "subject to a probationary period . . . will be permanent and pensionable". The appellant applied for a post and in July, 1948, was selected for appointment. Conditions of service known as the "September conditions", were approved in September, 1948. The appellant accepted these conditions and her employment, which under them was probationary until confirmed, was confirmed in February, 1949. Under cl. 9 of the conditions, every employee was required to take the oath of allegiance and failure to do so involved immediate dismissal. By cl. 12* the board could dismiss any officer for gross misconduct or who was proved to be inefficient and unfit to merit continued employment, and, except in the case of gross misconduct, the board had to give at least one month's notice of their intention to exercise their powers of dismissal; all permanent officers who wished to terminate their employment with the board had to give one month's notice in writing. In 1953 the board sought to terminate the appellant's employment on the ground of redundancy of staff, and she was finally given six months' notice expiring in August, 1954. The appellant contended that her employment was not subject to termination on reasonable notice by the board.

F **Held** (LORD TUCKER and LORD KEITH OF AVONHOLM dissenting): the appellant's employment had not been validly terminated by the board because it was terminable only as provided in the September conditions, which were exhaustive in that respect, and, accordingly, a power to terminate her employment by reasonable notice would not be implied.

Appeal allowed.

G [**Editorial Note.** The decision turned on the effect of cl. 12 of the September conditions, which governed the appellant's contract of service after she was confirmed in her post. It is to be noted, therefore, that if the permanency of the appellant's employment had rested only on the offer by advertisement of a "permanent and pensionable" employment, her employment would have been held to have been a general hiring, and, as such, to have been terminable by reasonable notice. This appears from the opinions of LORD GODDARD (see p. 133, H letter I, post) and LORD EVERSLED (see p. 140, letters A to C, post); and with this view, on this point, the opinions of LORD TUCKER and LORD KEITH OF AVONHOLM are in accord.

As to the duration of a contract of service, see 22 HALSBURY'S LAWS (2nd Edn.) 144, para. 235; and for cases on the subject, see 34 DIGEST 52-54, 263-280.

I As to the implication of terms in contracts, see 8 HALSBURY'S LAWS (3rd Edn.) 121, 122, para. 212, 124, para. 215, note (b); and for cases on the subject, see 12 DIGEST (Repl.) 685-688, 5269-5285.]

Cases referred to:

(1) *Reigate v. Union Manufacturing Co. (Ramsbottom)*, [1918] 1 K.B. 592; 87 L.J.K.B. 724; 118 L.T. 479; 12 Digest (Repl.) 686, 5278.

(2) *Salt v. Power Plant Co., Ltd.*, [1936] 3 All E.R. 322; Digest Supp.

* The terms of cl. 12 are set out at p. 130, letter I, post.

Appeal.

Appeal by Elizabeth Maureen McClelland from an order of the Court of Appeal for Northern Ireland (LORD MACDERMOTT, C.J., PORTER and BLACK, L.JJ.), dated Mar. 29, 1956, affirming an order of CURRAN, J., in the Chancery Division in Northern Ireland, dated May 9, 1955, on an originating summons issued by the appellant, the respondents to which were the Northern Ireland General Health Services Board. The facts appear in the opinion of LORD OAKSEY.

E. W. Jones, Q.C., and *C. B. Shaw* (both of the Bar of Northern Ireland) for the appellant.

W. F. Patton, Q.C., and *John MacDermott* (both of the Bar of Northern Ireland) for the respondent board.

The House took time for consideration.

Apr. 4. The following opinions were read.

LORD OAKSEY: My Lords, this is an appeal from an order of the Court of Appeal for Northern Ireland affirming an order of the Chancery Division in Northern Ireland declaring on an originating summons that the engagement of the appellant as a senior clerk with the respondent board had been validly terminated. The appellant had been, and was, employed as a clerk in the service of the Northern Ireland Hospitals Authority and, on June 21, 1948, she read an advertisement in the "Belfast Evening Telegraph" which invited applications for posts on the general staff of the Northern Ireland General Health Services Board, and stated, in reference to senior clerks:

"Subject to a probationary period, appointments will be permanent and pensionable. Salaries and wages will be subject to deductions under a superannuation scheme."

The appellant accordingly applied for a post, and, on July 29, 1948, after an interview, was selected for appointment as a senior clerk at a salary of £300 per annum rising to £400. In the month of August, 1948, she was shown a copy of the conditions of service, which were called "the September conditions", and it is convenient to set out cl. 4, cl. 9 and cl. 12 of these conditions:

"4. Probation: The appointment of every new entrant shall be subject to a term of probation of six months. At the end of the probationary period, subject to a satisfactory report by the secretary, the appointment will be confirmed. If the board think fit, the period of probation may be extended. Unless a satisfactory report is received from the secretary at the end of an officer's period of probation or extended period of probation, the board may dismiss him by giving him one month's notice of their intention.

"9. Oath of allegiance: Every person employed will be required to take the oath of allegiance as prescribed in regulations made under s. 80 of the Health Services Act (Northern Ireland), 1948. Any failure to comply with this requirement or any failure to honour such oath if taken will involve immediate dismissal of the person concerned from the service of the board.

"12. Dismissal and reduction in rank, and termination of employment otherwise: The board may dismiss any officer for gross misconduct and may dismiss any officer who is proved to their satisfaction to be inefficient and unfit to merit continued employment. Except where an officer has been guilty of gross misconduct, the board shall give at least one month's notice of their intention to exercise their powers of dismissal under this rule. As an alternative to dismissal, the board may order the reduction in rank of an officer who is found by them to be unfit to discharge the duties of the grade in which he has been employed. One month's notice in writing shall be

- A given by all permanent officers who wish to terminate their employment with the board."

Having served a probationary period of six months, on Feb. 16, 1949, the appellant was confirmed in her post as a senior clerk.

- B On Aug. 14, 1950, the board inserted the following provision in the said conditions:—"Female officers will, on marriage, be required to tender their resignations to the board". The appellant made inquiries whether this condition was to be applied to officers already on the staff, and, being advised and being under the impression that it did not apply to them, got married in March, 1951. On May 29, 1953, the board wrote to the appellant terminating her employment on June 30, 1953, on the ground of redundancy of staff. After further correspondence between the board and the appellant's solicitor, the board's establishment officer wrote, on June 25, 1953, saying:

"The committee agreed that, in order to enable you to qualify for superannuation benefits, the notice of dismissal dated May 29 be withdrawn and that your services be retained until Dec. 31, 1953."

- D On Nov. 30, 1953, the appellant received the following letter:

"Northern Ireland General Health Services Board,
9, Upper Queen Street,
Belfast.

Nov. 30, 1953.

Ref. No. G.H.S.

- E Dear Madam,

As you are aware, the board some time ago considered the situation created by the refusal of some married women on their staff establishment to accept as applicable to themselves the requirement in the terms of service that female members of the staff should tender their resignations on marriage. To enable the position to be clarified, the board extended the employment of the persons concerned to Dec. 31, 1953.

- F In order that there may be no further dubiety as to the applicability of the terms of service, the board, acting on legal advice, now intend to serve on each married woman on their establishment six months' notice of dismissal expiring on the anniversary date of her employment. Notice will, therefore, in due course be served on you expiring on Aug. 16, 1954, the anniversary date of your appointment, and employment with the board will continue to be open to you from Dec. 31, 1953, to that date.

- G Yours faithfully,
(Signed) W. BIRNIE,
for secretary.

- H Mrs. E. M. McClelland,
Dental Branch,
9, Upper Queen Street,
Belfast."

- I The appellant thereupon commenced these proceedings by originating summons in the Chancery Division, and, on May 9, 1955, CURRAN, J., gave judgment in favour of the board holding that the appellant was a civil servant holding office during the pleasure of the Crown, and that her dismissal was, accordingly, valid. This view of the case had not been argued and it has at no time been supported by the board.

On appeal to the Court of Appeal, the appeal was dismissed by LORD MACDERMOTT, C.J., and BLACK, L.J., PORTER, L.J., dissenting. LORD MACDERMOTT, C.J., and BLACK, L.J., were of opinion that the case depended on the September conditions, and that cl. 12 did not preclude the board from terminating the employment of a permanent officer by reasonable notice. In arriving at this

conclusion, the Lord Chief Justice relied on the fact that there was, in his view, no express provision or plain implication that the right to give a reasonable notice was taken away, that the heading of cl. 12 was insufficient to make the clause comprehensive, that the fact that the clause empowered a permanent officer to give one month's notice signified that the office was not of a permanent nature, and that many of the conditions applied to temporary officers. BLACK, L.J., was of opinion that cl. 12 of the September conditions, since it only dealt with certain limited and specified cases for dismissal, did not exclude the right to give reasonable notice. PORTER, L.J., who dissented, held that the meaning of the word "permanent" was supplemented and explained by the word "pensionable" and, after citing the words of SCRUTTON, L.J., in *Reigate v. Union Manufacturing Co. (Ramsbottom)* (1) ([1918] 1 K.B. 592 at p. 605), he held that cl. 12 was an express provision for the rights of the parties to determine the contract and that it was not necessary to imply any further right to give the transaction the efficacy that both parties must have intended it to have.

In my opinion, PORTER, L.J., was right and the appeal ought to be allowed.

I do not think it is necessary to discuss the cases which were cited in the court below, for the question depends on the construction of this contract. No doubt the word "permanent" must be construed in the light of its context, but no case has been cited in which the word "permanent" has been linked with the word "pensionable" and in which the termination of the contract on the one side and on the other is expressly defined.

Counsel for the board in your Lordships' House based their arguments on the fact that, in the case of a general hiring for an indefinite time, a master is entitled to give his servant a reasonable notice, and contended that the contract in question was a contract of master and servant for a general hiring. It is, no doubt, true that a general hiring without more is terminable on reasonable notice, but, in my opinion, the contract in question was not a simple contract of general hiring for an indefinite time. It began by an offer of a permanent and pensionable post. That offer did not, of course, conclude a contract, but it cannot be ignored in the construction of the contract which was then concluded. That contract incorporated provisions under which the appellant, after a period of probation, was entitled to an annual pension on a contributory basis on completing ten years' service in circumstances of ill health or on attaining the age of sixty, a short service gratuity for five years and other pension rights and allowances for sickness. Moreover, the contract was expressly subject to the September conditions.

The clauses I have set out all contain express powers of termination and, in my opinion, there is no ground for suggesting that it is necessary to imply a further power to terminate the contract in order to give the contract the efficacy which the parties must have intended it to have. With the greatest respect to the Court of Appeal in Northern Ireland and those of your Lordships who take a different view I think, on the contrary, that to offer an officer a permanent and pensionable post on such terms and then to claim the right to give him notice which will deprive him of all the pension and other rights offered by the express terms of the contract not only is not a right which the parties must have intended the master to have but one which no reasonable person could have contemplated he would claim.

For these reasons, I move your Lordships that this appeal be allowed.

LORD GODDARD: My Lords, the respondents are a statutory corporation established under the Health Services Act (Northern Ireland), 1948, and the number, remuneration and conditions of service of their staff are subject to the approval of the Ministry of Health and Local Government. The board are, apparently, required to recruit staff by advertisement and, on June 21, 1948, they advertised in the "Belfast Evening Telegraph" inviting applications for

A posts on their staff. The advertisement set out the qualifications required and the salary offered and stated that

“Subject to a probationary period, appointments will be permanent and pensionable. Salaries and wages will be subject to deductions under a superannuation scheme.”

B The appellant, who at that time was a clerk in the service of the Northern Ireland Hospital Authority, applied for a position as senior clerk and, following an interview with the board, she was informed by letter dated July 29, 1948, that she had been selected for appointment. She accepted the appointment, resigned from her employment with the Hospital Authority and started work under the respondents on Aug. 16. It is clear, in my opinion, and neither party
C seeks to contend otherwise, that the service on which she then entered was for the probationary period referred to in the advertisement, and during that period, indeed quite soon after Aug. 16, she was given a document containing the full conditions of service, which she agrees she accepted as the conditions of her employment. The probationary period ended in February, 1949, and her appointment was then confirmed. Until it was confirmed it would have been,
D in my opinion, permissible for the board to have terminated the employment at any rate on one month's notice. The object of a probationary period is to ascertain if the candidate was likely to prove efficient and, as will be seen below, a month's notice can be given for inefficiency. In 1953 the board sought to determine the appellant's engagement and, after some discussion and correspondence into which it is unnecessary to enter, she was finally given six months' notice expiring on Aug. 16, 1954. It is not disputed that, if the board had the
E right to determine the employment, the notice was adequate.

The question on which there has been a difference of opinion in the Court of Appeal is whether the board had the right to determine the employment. The question, to my mind, depends on the true construction of cl. 12 of the conditions of employment. It is entitled “Dismissal and reduction in rank, and termination of employment otherwise”. This title indicates, in my opinion, that the
F clause is intended to be comprehensive. It provides that an officer may be dismissed for gross misconduct and if found to be inefficient and unfit to merit continued employment. It provides that, except where the officer has been guilty of gross misconduct, the board shall give at least one month's notice of their intention to exercise their powers of dismissal under the rule, and that they
G may, instead of dismissing, order a reduction in rank of the officer found to be unfit to discharge the duties of the grade in which he was employed. The clause then provides that an officer may terminate his employment by giving one month's notice. The only other provision in the conditions with regard to dismissal is one providing that a failure to take the oath of allegiance or failure
H to honour the oath if taken will involve instant dismissal. Officers employed by the board are entitled to the benefits and liable to contribute towards the Health Services Superannuation Scheme established by the Ministry of Health and Local Government. This scheme provides for a pension to an officer of ten years' service who becomes incapable on account of ill health or has attained the age of sixty. If he has attained the age of sixty and has completed five years' service he may receive a lump sum retiring allowance if he retires owing to ill
I health. There is also a provision for repayment of contributions to an officer who retires but does not become entitled to a pension.

That an advertisement offers permanent employment does not, in my opinion, mean thereby that employment for life is offered. It is an offer, I think, of general as distinct from merely temporary employment, that is that the person employed would be on the general staff with an expectation that, apart from misconduct or inability to perform the duties of his office, the employment would continue for an indefinite period. But, apart from a special condition, in my opinion a general employment is always liable to be determined by reasonable

notice. Nor do I think that, because a person is offered pensionable employment, the employer thereby necessarily engages to retain the employee in his service long enough to enable him to earn a pension. But when one comes to consider the express condition in this case relating to dismissal, in my opinion the fact that the offer was a permanent and pensionable employment does assist in the construction to be placed on that condition. As I have said, the clause appears to be comprehensive in its terms. It provides, no doubt unnecessarily, for dismissal without notice for gross misconduct but also for the length of notice to be given in a case of inefficiency and for the notice the officer may give to terminate his employment. If it was intended that the board should have a similar right to determine the engagement, it is strange that it does not provide what notice is to be given, and this omission seems to me the more significant when it is remembered that the conditions apply to officers of various degrees or standing and varying rates of salary. Senior executives would ordinarily be entitled to longer notice than a typist or machine operator and, had it been the intention that all these offices should be determined at the pleasure of the board, I should have expected that, considering their number and variety, the length of notice to be given and received would be stated in the conditions. Remembering the terms of the advertisement in conjunction with the provisions of cl. 12, I think the fair conclusion is that the board offered and the appellant accepted employment on terms as secure as is, in fact, enjoyed by civil servants. Although a civil servant, as is well known, is employed at the pleasure of the Crown and can be dismissed at any moment, in fact once he has qualified by examination or probation and is taken on the establishment he is secure in his employment till he reaches the retiring age, apart of course from misconduct or complete inefficiency.

I think, on the true construction of cl. 12, that the board debarred themselves from giving notice apart from the reasons specified therein and I would, therefore, allow the appeal.

LORD TUCKER: My Lords, on Aug. 16, 1948, the appellant started to work for the respondent board as a senior clerk at a salary of £300 per annum rising by annual increments of £12 to £396 and a further single increment of £4 to £400. She had been selected for this post as a result of an interview following on an advertisement inserted by the board in the Press inviting applications for senior clerkships and other posts which, it was stated, would, subject to a probationary period, be permanent and pensionable. This probationary period came to an end on Feb. 16, 1949, when she was confirmed in her post as senior clerk and became an established officer. In the meantime, on Sept. 3, 1948, the Ministry of Health and Local Government had approved a document which has been referred to as "the September conditions" and which had been prepared by the respondent board, setting out the conditions of employment of its staff. The appellant was handed a copy of this document, and it is common ground that her continued employment at the end of the probationary period was on the basis of her acceptance of these conditions so far as applicable to her case.

My Lords, unless there is to be found in this document something which clearly confers on the appellant an appointment for life subject only to determination as therein expressly provided, it would, I think, be impossible to suppose that the use of the words "permanent and pensionable" in this advertisement indicated anything more than that the posts available were on the regular established staff and were subject to the terms of a pension scheme. In this context this is, I think, their natural meaning, and, judging from the appellant's letter of June 23, 1948, in which she states:

"I was appointed to the permanent staff of the Orange and Protestant Approved Society, 12 Donegall Square West, Belfast, on Nov. 27, 1939,

A and continued with them until Jan. 13, 1948, when I was transferred to Stormont under the Ministry of Labour and National Insurance",

there can, I think, be no doubt that this is the sense in which the appellant understood the word "permanent". It is, in my view, impossible to hold that these words conferred on her a contractual right to a freehold tenure of the post of senior clerk or did anything more than indicate that the posts available would have the degree of security of tenure which attaches to the regular as distinct from the purely temporary staff, and would qualify for pension rights and benefits and be subject to the obligation to contribute as laid down in the scheme, which scheme it is to be observed is not one to which the board is in any way a party. It is a scheme which is imposed on the board and its officers by S.R. & O. (Northern Ireland) 1948 No. 161,* made by the Ministry of Health and Local Government under s. 61 of the Health Services Act (Northern Ireland), 1948. The advertisement, in my view, formed no part of the eventual contract between the parties, but there is, I think, no ground for holding that the appellant could reasonably have supposed that the final terms of her contract at the conclusion of the probationary period would give her the legal right to a life appointment, or that the board could for one moment have contemplated such a result.

D It may well be, however, that the language used in the September conditions on its proper construction compels your Lordships to hold that this document, contrary to any expectation which the appellant could reasonably have entertained, has, in fact, conferred on her a status of irremovability. This is the angle from which I approach the construction of cl. 12 of the conditions on which the result of this appeal depends. Has it expressly or by necessary implication deprived the board of the right to determine by reasonable notice the contracts of service of its "permanent" (i.e., regular and established) staff, a right which attaches to all contracts of service of indeterminate duration in the absence of custom or provision expressed or implied to the contrary?

E Clause 12 is headed—"Dismissal and reduction in rank, and termination of employment otherwise", and reads as follows:

F "The board may dismiss any officer for gross misconduct and may dismiss any officer who is proved to their satisfaction to be inefficient and unfit to merit continued employment. Except where an officer has been guilty of gross misconduct, the board shall give at least one month's notice of their intention to exercise their powers of dismissal under this rule. As an alternative to dismissal, the board may order the reduction in rank of an officer who is found by them to be unfit to discharge the duties of the grade in which he has been employed. One month's notice in writing shall be given by all permanent officers who wish to terminate their employment with the board."

G Three other clauses must also be referred to. Clause 4, which deals with the probationary period of six months, contains the following:

H "Unless a satisfactory report is received from the secretary at the end of an officer's period of probation or extended period of probation, the board may dismiss him by giving him one month's notice of their intention."

Clause 9 requires every person employed to take the oath of allegiance and proceeds:

I "Any failure to comply with this requirement or any failure to honour such oath if taken will involve immediate dismissal of the person concerned from the service of the board."

Clause 19 deals with sickness payments and by sub-cl. (3) (h) provides:

"The provisions of this scheme shall cease to apply to an officer on the termination of his employment whether by reason of permanent ill-health

* The Health Services (Superannuation) Regulations (Northern Ireland), 1948.

or infirmity of mind or body or by reason of age, but without prejudice to the right of an officer whose employment is terminated by reason of permanent ill-health or infirmity to receive the period of notice provided by his contract of service."

My Lords, a contract for employment for life is rare; such a contract covering a class of persons which may include young clerks and typists must be rarer still; and one which gives such security to such a class of persons but enables them to terminate their employment on a month's notice must be almost unique. I would, therefore, expect to find express language in any contract intended to have this result, and would require compelling words before I would feel justified in construing a contract as producing such a result by implication or the application of some rule of construction.

It is to be noted in the first place that cl. 12 does not deal comprehensively with all cases of dismissal; cf. cl. 4 and cl. 9 referred to above. Secondly, the reference to the notice to be given by permanent officers wishing to terminate their employment is the only instance of the use of the word "permanent" with reference to staff tenure anywhere in the document. Clause 12 does not seem to me inconsistent with an employment of indeterminate duration subject to an express concession in favour of the staff of a standard period of notice where they desire to terminate their employment, and express provision recognising the common law right of immediate dismissal for gross misconduct coupled with a special fixed period in the case of unfitness. This leaves the board with their right to terminate by reasonable notice, which will vary with the different grades or status of their officers and the length of which is accordingly not specified. The *expressio unius* rule of construction does not, I feel, compel a different construction since the clause is not exhaustive and in any event is concerned with defining the length of notice required, in the absence of gross misconduct, rather than in prescribing the only circumstances in which the employment can be terminated.

My Lords, having regard to the fact that there is a difference of opinion in your Lordships' House on this matter, I have thought it right to set out my reasons for thinking this appeal should be dismissed. Otherwise I should have contented myself with expressing my complete agreement with the judgment of the Lord Chief Justice of Northern Ireland (LORD MACDERMOTT). In arriving at this conclusion, which is dependent on the construction of cl. 12 in the special context of this case, I can derive no assistance from any of the authorities which were referred to in argument.

LORD KEITH OF AVONHOLM: My Lords, this case raises a question of general importance which may affect not only persons in the employment of the respondent board in a like case with the appellant, but may well have repercussions on the powers of public bodies or authorities which do not rank as branches of the Civil Service to terminate the employment of their servants.

A point raised in the case is whether the advertisement, in response to which the appellant applied for service with the respondent board, forms part of her contract of service. The point, in my opinion, is immaterial. I incline to the view that it was merely a notice of the kind of employment for which applications were invited, with a note of the salary scales for the respective classes of posts to be filled, and with an indication of the qualifications for appointments and conditions to be observed by applicants. But it is not disputed that the appellant was, in fact, appointed to a permanent and pensionable post on the board's staff, whatever that may mean, and the statement or representation in the advertisement has, accordingly, been fulfilled. The only question is what results flow from this appointment.

A mere statement that a person holds a permanent and pensionable post is very imprecise. It contains no indication of the degree of permanence or the

- A nature and conditions of the pension. It is to be noticed that, by letter from the board's secretary, dated July 29, 1948, the appellant was informed that she had been selected as senior clerk on the board's staff at a certain salary scale, and was asked to say whether she was finally prepared to accept the appointment. She did accept, and took up her duties on Aug. 16, 1948. She came at once under the pension scheme set up by the Health Services (Superannuation) Regulations (Northern Ireland), 1948 (S.R. & O. (Northern Ireland) 1948 No. 161), and dated June 24, 1948. This was not a pension scheme of the board, but a government pension scheme made under the Health Services Act (Northern Ireland), 1948, which applied to the appellant as an officer of the board, an employing authority under the regulations. The statement in the advertisement that the appellant's appointment would be pensionable was thus satisfied. The
- C appellant, of course, would have to comply with the conditions of the pension scheme, and, under the scheme, the board were entitled to deduct her contributions from her salary and pay them over to the Ministry; but the board did not guarantee her any pension, or control the conditions of its payment in any way, nor were they, in my opinion, bound to do so by any contract made with her.

- I turn, then, to the question of the permanence of her appointment. When
- D the appellant took up her appointment on Aug. 16, 1948, there were no terms and conditions of service in existence. But s. 56 (1) of the Health Services Act (Northern Ireland), 1948, required the board to determine the number, qualifications, remuneration and conditions of service of officers of the board. On Aug. 18, 1948, the Finance and General Purposes Committee of the board recommended certain terms and conditions of service which were adopted by the board on Aug. 25 and approved by the Ministry on Sept. 3, 1948. From Aug. 16 to Sept. 3 neither the board nor the appellant were under any conditions other than those specified in the board's letter of July 29, and I think that counsel was right in his contention for the board that, during that period and subject to proving her fitness for the post during a probationary period of service, the appellant held her post under a contract of general hiring. That is to say, she held a permanent post in the sense of an appointment on the board's permanent staff of indefinite duration. She was on the board's staff as senior clerk at an annual salary of £300 with yearly increments, and that clearly meant on their permanent staff. On the view that she held her post under a general hiring, her service could not be terminated inside a year, and then only on reasonable notice before the expiry of the year, failing which it would continue for a further
- G year. It is quite impossible, in my opinion, to hold that, during this period, she was holding a lifelong appointment.

- I come now to Sept. 3, when the terms and conditions of service (conveniently referred to as "the September conditions") were approved. It is common ground that these became conditions of the appellant's service. The appellant says in her affidavit that she accepted them. It is immaterial whether they
- H became contractual conditions or were imposed by effect of statute. The appellant's case is built up on the language of cl. 12 of Part 5 of these September conditions. This clause starts with a statement which is no more than declaratory of the common law, viz., that the board may dismiss any officer for gross misconduct and any officer who is proved to their satisfaction to be inefficient and unfit to merit continued employment. The clause would be neither better
- I nor worse if this opening statement had been omitted altogether. But it serves as an introduction for what immediately follows, for the clause provides that, except where an officer has been guilty of gross misconduct, the board shall give him at least one month's notice of dismissal under the rule. Alternatively, they may order reduction in rank of an officer who is found to be unfit to discharge the duties of the grade in which he has been employed. These may well be regarded as provisions favourable to the inefficient officer. At any rate, they fix the minimum amount of notice for dismissal on the ground of inefficiency,

and to that extent may modify the common law rules as to notice in such a case, or at least remove uncertainty on the point. It may be noticed in passing that nothing is said about notice of dismissal for gross misconduct but, in my opinion, the clear implication is that the common law power of summary dismissal is left to operate in such a case. The clause concludes with the sentence:

"One month's notice in writing shall be given by all permanent officers who wish to terminate their employment with the board."

This condition is not, in my opinion, entirely unrelated to what has gone before, because it would apply to an officer who had, by order of the board, been reduced in rank and who was unwilling to accept such reduction. And this may well explain the heading to the clause: "Dismissal and reduction in rank, and termination of employment otherwise:". But it also has, I think, a wider ambit and would apply to any officer who for any reason wished to terminate his employment with the board.

The appellant's contention is that, apart from some special cases of dismissal or termination of employment dealt with in other clauses of the September conditions, cl. 12 is exhaustive of the powers of the board to terminate her employment. I am quite unable to accept that contention. As I have said, the opening words of the clause are mere surplusage. If they are omitted, as they might well have been, the clause would be nothing but a statement of the length of notice to be given by the board in a case of inefficient service, with an alternative of reduction in rank, and a statement of the length of notice to be given by a permanent officer wishing to terminate his employment. It is impossible, in my opinion, to extract from this an implication, and it can only be an implication, that the appellant, and indeed all the other permanent officers, hold lifelong appointments except in certain circumstances in which the appointments are expressly authorised to be terminated. Appeal was made to the maxim: "*Expressio unius exclusio alterius*". But a declaration in the conditions of certain common law powers of the board cannot, in my opinion, exclude other common law powers that the board may have to terminate contracts of service. The invocation of the maxim here is, in my opinion, inapposite. I would refer in this connexion to what, I think, is accurately expressed in 11 HALSBURY'S LAWS (3rd Edn.) 395, para. 644, as follows:

"The maxim, however, requires to be applied with caution. The failure to make the *expressio* complete may be accidental; and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, will lead to inconsistency or injustice. It should only be applied when the instrument, on the face of it, apparently contains all the terms which the parties have agreed upon."

In this connexion it is illuminating to look at cl. 19 of the September conditions. This deals with absence and pay on sick leave. There is no express provision, however, for termination of employment in the event of prolonged ill-health. There appears, however, in cl. 19 (3) (h) this statement:

"The provisions of this scheme shall cease to apply to an officer on the termination of his employment whether by reason of permanent ill-health or infirmity of mind or body or by reason of age, but without prejudice to the right of an officer whose employment is terminated by reason of permanent ill-health or infirmity to receive the period of notice provided by his contract of service."

It is plainly the assumption of this sub-clause that an officer's service may be terminated by reason of permanent ill-health or infirmity and this, of course, would be so at common law. Thus we have again another illustration of a direction as to the period of notice to be given in a situation which presupposes the terminability of the employment. The reference to the period of notice provided by the contract of service may create a difficulty where there is no

- A contract of service expressly dealing with the matter. But that rather strengthens the view that the contracts of service are terminable generally. If there is no specified period of notice, parties will just have to fall back on common law rules. It may be noticed here that the contracts of service with the board will vary as to the length of notice required in cases not specially noticed in the September conditions or in the contracts of service, for some
- B employees are engaged, under the conditions, at yearly salaries paid monthly and others at weekly salaries. In the result, my view is that, wherever the matter can be tested by a reference to particular conditions, it is not the circumstances in which service can be terminated that are being dealt with, but the length of notice required in particular cases. I can find no reason for thinking that the ordinary common law rules governing the relations between master
- C and servant are being otherwise abrogated.

I do not find any of the cases that have been cited helpful. In only one was it held that a servant held a lifelong appointment subject to satisfactory service and that was *Salt v. Power Plant Co., Ltd.* (2) ([1936] 3 All E.R. 322). That was a very exceptional case of employment for a defined temporary period of service which could be terminated by notice within a further fixed period of time

- D “and in the absence of such notice the engagement to remain in force as a permanent one subject to your continuing to perform your duties to the satisfaction of the directors.”

The language used and the contrast between the two periods of service were there so strong as to render inevitable the conclusion that a lifetime service was intended. It was sought to equate the probationary period of service in the present case followed by a subsequent period of service on the permanent staff with the two periods of service in *Salt's* case (2), but the comparison is, in my opinion, invalid, particularly when regard is had to the entirely different terms of service in the present case.

- E I would add that the presumptions are all against the claim made by the appellant. There are judicial offices held *ad vitam aut culpam* for historical and constitutional reasons which it is unnecessary to explore. But it would need the clearest language to convince me that a contract of personal service was intended to be a contract for life, or a contract to endure till a servant has qualified for a full retirement pension. The position in the present case, if the appellant's argument be acceded to, would be the more remarkable in that it
- G would be only the board that was bound, for the servant is entitled to terminate his employment at any time on one month's notice. Specific performance of such a contract could not, of course, be enforced, but refusal by the board to continue to employ the appellant would be a breach of contract sounding in damages. In the case of employment on the permanent staff of public bodies, there is, no doubt, often an expectancy of permanence for the working life of the
- H servant. But the law would be slow to hold, for obvious reasons, that a servant is bound to give lifelong service, or a master to afford lifelong employment. The appellant's case seems to have stemmed in origin from the idea that the advertisement was an offer of such an employment, which conceivably might have been as much to her detriment as to her benefit. But the appointment advertised was what she in fact got, a permanent and pensionable appointment in the
- I sense of an appointment on the board's permanent staff and an appointment which would bring her under a pension scheme. That is all, in my opinion, that the advertisement could reasonably convey. If the advertisement were to be treated as an offer accepted by her, it would, in my opinion, be quite unreasonable to construe it as an offer binding her and the board to a lifelong contract of employment. Nor are the September conditions, in my opinion, capable of being construed as binding the board to any such contract.

I would dismiss the appeal.

LORD EVERSLED: My Lords, if the terms of the appellant's service depended only on the respondent board's advertised offer and its acceptance by the appellant, I should think that the board were entitled to succeed; for I should not regard the use of the word "permanent", even when the word "pensionable" is added to it, as sufficient in that context to create a promise of a life employment or to disable the board as employers from terminating the employee's contract of service on reasonable notice. And I should reach the same conclusion if the terms of the relevant contract were derived from the board's secretary's letter of July 29, 1948, with or without the advertisement. Whether or not a servant engaged according to the terms contained in the advertisement or to those in the letter or both should be treated as engaged on "a general hiring", I do not for my part think that, in a contract of service, use of the word "permanent" would be of itself sufficient to import the notion of a life appointment. The word is clearly capable, according to the context, of many shades of meaning; and it seems to me of considerable importance, in interpreting its use in a contract of service, that such a contract cannot be specifically enforced.

But the appellant was, until Feb. 16, 1949, on probation only; and it is not in doubt that, during that period, she had no security of tenure. She was, however, at the end of the period, taken on as an established officer. In the meantime, as she stated in her affidavit, she had received a copy of the staff conditions and terms of service which have been referred to in the case as "the September conditions". In my judgment, her service was, after Feb. 16, 1949, governed by the September conditions, and I agree with the learned Lord Chief Justice of Northern Ireland (LORD MACDERMOTT) that thenceforth the contents of the advertisement formed no part of her contract. Thenceforth the advertisement seems to me only significant as a matter of history and as showing that the appellant was (after February, 1949), and was intended to be, a member of the established or "permanent" staff of the board, whose service was regulated by the September conditions. For, with all respect to the noble Lord, LORD MACDERMOTT, I do not think that the September conditions as a whole (and particularly Part 5 of them) applied to "temporary employees". The final clause of Part 3 of the conditions seems to me to indicate that, in the case of temporary employees, only Part 1 of the conditions, that headed "Grades, Numbers and Rates of Remuneration", would (in the absence of special terms of engagement) be applicable.

The sole question in the appeal, then, is whether, as regards determination of the service of "permanent" officers, the contractual terms are to be found exclusively in Part 5 of the September conditions, including cl. 12, which has already been read to your Lordships. This question is one of the proper construction of the conditions and its difficulty is emphasised by the circumstance that your Lordships have disagreed on it, as did the members of the Court of Appeal in Northern Ireland. My Lords, I have reached the conclusion that these September conditions should, on their true interpretation, be taken as intended to comprehend the whole terms of the contracts of service of those to whom they are applicable. Much may turn on the premise to a consideration of the meaning of the conditions—whether, in a contract of service made in the twentieth century with a statutory board such as the respondent board (whose established officers participate in the pension scheme contained in regulations promulgated by the Ministry of Health and Local Government of Northern Ireland), it is correct to regard the common law right of a master to determine his servant's engagement as of so well-established and paramount a character that the contract should be interpreted as necessarily subject to that right (and to a corresponding right on the part of the servant) so that only the clearest express terms will exclude it. Such was the view of the learned Lord Chief Justice of Northern Ireland and BLACK, L.J. It was observed in the course of

A the debate before your Lordships by my noble and learned friend, LORD GODDARD, that, in any contract of service of the Crown (e.g., in the Civil Service), there always resides in the Crown a right of determination, though, in the absence of misconduct or incapacity, its practical significance may be negligible. In the present case, the learned judge at first instance, CURRAN, J., decided the question on the basis that the appellant was, in truth, a civil servant, a basis
 B which has since been conceded to have been erroneous. But it is clear, as LORD GODDARD pointed out, that, in substantial characteristics, the present contract is, and was intended to be, similar to the contract of a civil servant. It is, however, not a contract of service of the Crown and the paramount right of the Crown has no application to it. On the other hand, if the analogy was intended, should not the practical results have been intended also?

C In my judgment, the September conditions, viewed as a whole, appear to be intended as truly comprehensive, and, in regard to determination, as exhaustive. It is to be noted that, if the board's argument is correct, their *prima facie* right at law to determine the contracts of their senior staff (including, for example, the medical adviser who, by another provision of the conditions, must be a medical practitioner of at least ten years' standing) and of their intermediate staff, is
 D subject to the substantial qualification that the Ministry's approval must be first obtained (see Part 1); for on this view I cannot regard the word "removals" as limited to dismissals for misconduct or incapacity. I refer also to cl. 5 and cl. 8 in Part 5 ("Increments" and "Efficiency Bar"), both of which by their language assume that service will continue, though the officer has not shown
 E himself "satisfactory" or "entirely suitable". I refer also to the elaborate provisions in regard to sickness payments in cl. 19.

I turn to the all-important cl. 12. It is true that the presence of the special provisions of cl. 9 as regards oaths of allegiance, and of the provisions and inferences of cl. 19 (3) (h) relating to the case of an officer incapable through illness of performing his part of the contract at all, show that cl. 12 does not in its
 F context exhaustively cover every case of determination. But it does not, in my judgment, follow that the clause is, nevertheless, subject to some overriding power of determination which finds no reference or allusion at all elsewhere throughout the conditions.

If cl. 12 had ended with some such formula as "but the employment of
 G permanent officers shall not otherwise be terminable", it could not, I conceive, have been contended that the board was still possessed of a vested right to determine any officer's employment on reasonable notice. The clause does not, of course, so end; but it is introduced by the heading "*Dismissal and reduction in rank, and termination of employment otherwise.*" I am unable to accept the view of the heading that it is a mere summary of, and can have no effect on, the
 H clause which follows and the scope of which should be determined by a first reading of it without regard to the heading. The heading is part of the conditions; and, according to ordinary principles of construction, its last five words mean, and would be taken by a reader to mean, that in the succeeding clause would be found reference to the circumstances in which alone, apart from dismissal, a service contract might be terminated. If express provision is made
 I elsewhere in the conditions for dismissal (as in cl. 9) the exhaustive character of cl. 12 is, no doubt, to that extent necessarily qualified. But I have been unable to agree that cl. 12 is further limited and, particularly, that its purpose is confined to an expression of specific limitations on more general though undefined rights, on both sides, said to be implicit in the contracts of service. The express power to dismiss for gross misconduct would be inconsistent with that view—or, at best, otiose. Nor can I regard the dual requirement of inefficiency and unfitness as of substantial weight in favour of the board's view.

Emphasis was laid in the course of the argument for the board and in the judgments of the majority in the court below on the absence of reciprocity introduced by the last sentence in the clause: A

"One month's notice in writing shall be given by all permanent officers who wish to terminate their employment with the board";

and it was stressed that the form of the words I have quoted rather assumed and defined than conferred a right on the officer's part to terminate his employment. In my judgment, the last-mentioned criticism is not more than a criticism of the elegance of the clause. In its context, the last sentence to my mind is, and is intended to be, a complete statement of the officer's right of voluntary termination. And the argument on reciprocity seems to me, with all respect to those who have taken a different view, to beg the very question which we have to decide. As a matter of practical common sense, the situation of the employer board and that of one of its servants are very different. The loss or damage to the board occasioned by the departure of one of its servants would, save in very exceptional circumstances, be negligible. To a servant, certainly a servant in the position of the appellant, the security of employment with the board for the period of working life is of immense value. B C

I, therefore, conclude that the effect of the September conditions which the board put forward and made the contractual basis of the appellant's service was that, so long as she did not render herself liable to dismissal on one or other of the grounds expressly stated in her contract and was willing and able to serve the board, the appellant was entitled to continue in her employment for her life. Counsel for the board suggested that the board's offer of security of employment should, on the true effect of the conditions, be taken as subject to the qualification that the "job" for which the appellant was engaged remained available, having due regard to the nature and scope of the board's statutory activities. But all your Lordships were of opinion that such a qualification could not, as a matter of construction, be extracted from the conditions. If the power of termination on reasonable notice implicitly remains in the board, then the occasion and purpose of its exercise are irrelevant. D E F

The result, on the view which I take, may be to saddle the board with contracts with their officers which they ought not reasonably to have undertaken or contemplated—though I do not accept the view (particularly in the light of the advertisement and her own sworn evidence) that the appellant herself could never have so regarded her prospects when, after receiving the conditions, she became one of the board's "permanent" officers. But, as SCRUTTON, L.J., observed in his judgment in *Reigate v. Union Manufacturing Co. (Ramsbottom)* (1) ([1918] 1 K.B. 592 at p. 605), quoted by PORTER, L.J., in the court below: G

"The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks that it would have been reasonable to have inserted it . . ."

For the reasons which I have tried to express, I would allow the appeal. H

Appeal allowed.

Solicitors: *Gouldens*, agents for *J. Morris McKee*, Belfast (for the appellant); *Hewlett & Co.*, agents for *Cleaver, Fulton & Rankin*, Belfast (for the respondent board).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

MID-NORTHAMPTONSHIRE WATER BOARD
v. LEE (VALUATION OFFICER).

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm and Lord Evershed), February 25, 26, 27, 28, April 4, 1957.]

B

Rates—Assessment—Profits basis—Water undertaking—Gross receipts—Revenue from precepts on board's constituent authorities—Precepts to meet cost of uncompleted works.

C

A water board, established under a private Act, estimated that its expenditure for the ensuing financial year would exceed its revenue by £66,170, which included a sum (ultimately ascertained at £3,365) for loan charges in respect of capital required to pay for works that were in course of construction but were not yet in beneficial occupation for rating purposes. The board issued precepts for the £66,170 and received that amount in response to them. On the question whether the £3,365 ought to be excluded from the gross receipts of the board for the purpose of computing the value of the board's hereditaments on the profits basis,

D

Held: the whole of the £66,170 received by the board was part of the board's receipts referable to its hereditaments for the purposes of estimating their rateable value on the profits basis, and the £3,365 was not deductible from the £66,170 since the way in which the board applied their receipts was, for present purposes, irrelevant.

E

Aberdeen Magistrates v. Aberdeen Assessor (1927 S.C. 458) and *Parish Council of Edinburgh v. Assessor of Railways & Canals* ((1925), 35 P.L. Mag. 140) approved.

F

Metropolitan Water Board v. St. Marylebone Assessment Committee ([1923] 1 K.B. 86) and *Manchester Corp'n. v. Bolton Area Assessment Committee & Little Hulton Urban District Council* ((1930), 144 L.T. 570) overruled.

Decision of the COURT OF APPEAL sub nom. *Lee (Valuation Officer) v. Mid-Northamptonshire Water Board* ([1956] 2 All E.R. 59) affirmed.

[As to receipts to be taken into account in the valuation of a water undertaking for rating purposes, see 27 HALSBURY'S LAWS (2nd Edn.) 418-420, paras. 849, 850; and for cases on the subject, see 38 DIGEST 547-551, 899-918.]

G

Cases referred to:

H

(1) *Kingston Union v. Metropolitan Water Board*, [1926] A.C. 331; 95 L.J.K.B. 605; 134 L.T. 483; 90 J.P. 69; 38 Digest 547, 901.

(2) *Manchester Corp'n. v. Bolton Area Assessment Committee & Little Hulton Urban District Council*, (1930), 144 L.T. 570; Digest Supp.

(3) *Metropolitan Water Board v. St. Marylebone Assessment Committee*, [1923] 1 K.B. 86; 92 L.J.K.B. 161; 128 L.T. 358; 86 J.P. 225; 38 Digest 547, 903.

(4) *St. James' & Pall Mall Electric Light Co., Ltd. v. Westminster Assessment Committee*, [1934] A.C. 33; 103 L.J.K.B. 9; 150 L.T. 123; 98 J.P. 20; Digest Supp.

I

(5) *Aberdeen Magistrates v. Aberdeen Assessor*, 1927 S.C. 458; 38 Digest 575, m.

(6) *Port of London Authority v. Orsett Union Assessment Committee*, [1920] A.C. 273; 89 L.J.K.B. 481; 122 L.T. 722; 84 J.P. 69; 38 Digest 563, 1017.

(7) *Fife Assessor v. Dunfermline District Committee*, 1929 S.C. 304; Digest Supp.

- (8) *Stirlingshire Assessor v. Stirlingshire & Falkirk Water Board*, 1931 S.C. 369. A
 (9) *Dewsbury Waterworks Board v. Penistone Union Assessment Committee*, (1886), 17 Q.B.D. 384; 55 L.J.M.C. 121; 54 L.T. 592; 50 J.P. 644; 38 Digest 547, 902.
 (10) *Parish Council of Edinburgh v. Assessor of Railways & Canals*, (1925), 35 P.L. Mag. 140.

Appeal.

Appeal by a water board, the Mid-Northamptonshire Water Board, from an order of the Court of Appeal (DENNING, MORRIS and PARKER, L.JJ.), dated Mar. 27, 1956, and reported sub nom. *Lee (Valuation Officer) v. Mid-Northamptonshire Water Board*, [1956] 2 All E.R. 59, allowing an appeal by the valuation officer, William Harold Lee, by way of Case Stated from a decision of the Lands Tribunal, dated July 25, 1955, on an appeal from a decision of the Joint Local Valuation Court for the Administrative County of Northampton and the County Borough of Northampton. C

The facts appear in the opinion of LORD MORTON OF HENRYTON, p. 145, letter F, to p. 147, letter B, post.

Michael Rowe, Q.C., and *W. L. Roots* for the appellant board. D

C. P. Harvey, Q.C., and *P. R. E. Browne* for the respondent valuation officer.

The House took time for consideration.

Apr. 4. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, the question arising on this appeal is how the method of valuation approved by your Lordships' House in *Kingston Union v. Metropolitan Water Board* (1) ([1926] A.C. 331), and generally known as "the profits basis" should be applied in the circumstances of the present case. The respondent is the Valuation Officer for the Wellingborough Urban District Rating Area. He was appointed by the Commissioners of Inland Revenue pursuant to the Local Government Act, 1948, which transferred to such valuation officers the duty of preparing and amending rating valuation lists; he is hereafter referred to as "the valuation officer". The appellants are a body formed by the amalgamation of a number of water undertakings previously supplying water in various parts of the County of Northampton, including Wellingborough, and are hereafter referred to as "the board". E

It is convenient to turn at once to the exposition of the profits basis as a method of valuation which was given by VISCOUNT CAVE, L.C., in the *Kingston* case (1). The learned Lord Chancellor pointed out the difficulty of applying to a body supplying water in a number of different parishes, and having in those parishes reservoirs, mains and other property necessary for the purposes of its undertaking, the "cardinal principle" that the rateable value of a hereditament is the rent at which it might reasonably be expected to let from year to year on certain assumed terms, and continued (*ibid.*, at p. 338): F

"The mains and other works in any particular parish, taken by themselves, might conceivably produce no rent at all, for it is almost impossible to suppose that any person would wish to become the tenant of them; but the same hereditaments, if looked upon as part of a great undertaking extending over a large and populous area, might be quite indispensable to the undertakers (who must be regarded as possible tenants) and so might command an extortionate rent. In these circumstances it was desirable, in order that a fair assessment might be arrived at, to devise some formula which, while allowing a fair value to the hereditaments in each parish, would not compel the undertakers to pay rates on an aggregate sum exceeding the whole yearly value of their undertaking; and accordingly rating G I

A surveyors, soon after the passing of the [Parochial Assessments] Act of 1836, began to assess waterworks and other like concerns, such as railways, canals, gasworks, etc., upon the basis of the profits earned by the whole undertaking. From the gross receipts of the undertakers for the preceding year they deducted working expenses, an allowance for tenant's profit, and the cost of repairs and other statutable deductions, and treated the balance remaining (which would presumably represent the rent which a tenant would be willing to pay for the undertaking) as the rateable value of the entire concern. It was then necessary to distribute this rateable value among the various parishes into which the undertaking extended . . ."

The Lord Chancellor then described the method adopted for this purpose, and continued (*ibid.*, at p. 339):

C "Thus, a series of assessments was reached which, while giving to each individual parish a fair proportion, based upon the hereditaments which it contained and the revenue which it produced, of the total rateable value, did not in the aggregate exceed the rental which the undertakers or any other possible tenants might be expected to pay for the whole undertaking in any year."

D My Lords, it is common ground between the parties that the method of valuation to be applied is the method approved in the *Kingston* case (1); the controversy has related only to the ascertainment of "the rent which a tenant might be expected to pay for the whole undertaking", or "the rateable value of the entire concern" (generally known as "the *cumulo value*"), and now relates only to one element in the ascertainment of the *cumulo value*, namely, the "gross receipts". The moneys in fact received by the board in the relevant year, the year ending Mar. 31, 1952, included £66,170 received pursuant to "precepts" issued by the board to various local authorities under its statutory powers. The valuation officer contends (and the Court of Appeal held) that the whole of this sum of £66,170 should be included in the gross receipts. The board contends that this sum should be reduced by £3,365, for reasons which I shall state after setting out the relevant facts.

E The hereditaments occupied by the board extend into fourteen rating areas. The proceedings in which this appeal arises relate only to hereditaments in the Wellingborough Urban District Rating Area, and originated in two proposals, one made on Sept. 29, 1952, by the valuation officer and the other on Mar. 26, 1953, by the board, for alterations in the values attributed in the valuation list to these hereditaments. It was, however, agreed between the parties, when the matter came before the Lands Tribunal on appeal from the local valuation court, that the tribunal should decide in the first instance the *cumulo* net annual value for the whole of the hereditaments comprised in the undertaking of the board. The tribunal having given its decision, the parties agreed the values which, on that basis, should be attributed to the hereditaments to which the said two proposals related; the tribunal then ordered that the assessments of those hereditaments should be determined accordingly. The Court of Appeal allowed an appeal by the valuation officer, held that the *cumulo value* had been wrongly decided by the Lands Tribunal, set aside the order of the tribunal and remitted the case to the tribunal, but the revised values of the particular hereditaments in question

I have not yet been determined pending the appeal to this House.

The board came into existence on July 1, 1949, under the Mid-Northamptonshire Water Board Order Confirmation (Special Procedure) Act, 1949*, confirming the Mid-Northamptonshire Water Board Order, 1948†. Under this order, during the period from July 1, 1949, to Mar. 31, 1954, the revenue of the board

* 12 & 13 Geo. 6 c. ix.

† Set out in the Schedule to the Mid-Northamptonshire Water Board Order Confirmation (Special Procedure) Act, 1949.

was to be derived partly from charges made to consumers in accordance with the enactments relating to the supply of water previously applicable in the various areas within the board's limits of supply, and partly from "precepts" issued under s. 29 of the order. After Mar. 31, 1954, the whole of the board's revenue (except charges for water supplied for non-domestic purposes) was to be derived from such precepts. A

The board's financial year ends on Mar. 31 in each year. It is the duty of the board to make, before the beginning of each financial year, estimates of its probable revenue and expenditure (other than capital expenditure) during that year, including any credit or debit balance carried forward from any previous year. If these estimates show that the expenditure will exceed the revenue, it is the duty of the board to apportion (on a basis laid down by the order) the sum required to meet the deficiency in revenue among the local authorities whose districts are covered by its undertaking, and to issue to each of such authorities, before the beginning of the financial year in question, a precept for a sum equal to the amount so apportioned to that authority: each authority is bound to pay to the board within two months after the commencement of the year (or by such instalments as may be specified in the precept) the sum stated in the precept. B C

The order contains no provision for the separation of any part of the revenue of the board for any specific purpose, and s. 27 provides that, except as otherwise expressly provided, all the receipts of the board shall be carried to a common fund and all expenses incurred by the board defrayed out of that fund. By s. 30, all moneys received by the board in respect of its undertaking, including amounts brought forward from any previous year (except certain specified moneys of a capital nature) must be applied for specified purposes in a specified order of priority. These purposes include the extension, improvement and construction (if the board think fit) of any works for the purpose of the undertaking. Any credit or debit balance remaining over in any year, including any balance brought forward, must be carried forward to the following year. D E

In the Lands Tribunal and the Court of Appeal the accounts of the board to which reference was made by both parties as the basis of the valuations on which they relied were those for the year ended Mar. 31, 1952; a copy of the board's "Abstract of Accounts" for that year is annexed to the Case Stated. The estimates of revenue and expenditure for that year were made in January, 1951, and showed that expenditure was estimated to exceed revenue (including balance brought forward) by £66,170; in these estimates there was included in the expenditure an amount of £9,515, which it was anticipated would be required for the purpose of paying loan charges in respect of capital expenditure on works not yet in beneficial occupation. The board accordingly issued to the appropriate local authorities precepts for a total amount of £66,170 and received that sum from them during the year. F G

The revenue in fact received by the board in the year ended Mar. 31, 1952, included £195,148 revenue from water charges and the said sum of £66,170 from precepts, a total of £261,318. The "Surplus and Deficiency Account" included in the "Abstract of Accounts" shows that a sum of £30,193, described as "excess of precept income carried forward" was brought forward from the previous year, but neither party included any part of this sum in the "gross receipts" for the purposes of their respective valuations. During the year ended Mar. 31, 1952, the expenditure in fact exceeded the revenue, with the result that the "excess of precept income" carried forward at the end of the year was only £13,651, a reduction of £16,542 as compared with the sum brought forward at its beginning. The inclusion in the estimated expenditure for the year ended Mar. 31, 1952, of the said sum of £9,515 arose from the anticipation of the board, when the estimates were made in January, 1951, that £328,550 would have to be spent in that year on works in course of construction. In fact, H I

A however, only £112,167 was so spent, and the amount required for loan charges was only £3,365 instead of £9,515.

Before the Lands Tribunal, the board contended that the whole of the sum of £9,515 should be excluded from the gross receipts, and relied on the decision of a Divisional Court of the King's Bench Division in *Manchester Corpn. v. Bolton Area Assessment Committee & Little Hulton Urban District Council* (2) ((1930), 144 L.T. 570), in which the previous decision of a Divisional Court in *Metropolitan Water Board v. St. Marylebone Assessment Committee* (3) ([1923] 1 K.B. 86) was followed. This contention succeeded before the tribunal, but the Court of Appeal rejected it, holding that the *Marylebone* case (3) and the *Manchester* case (2) were wrongly decided and should be overruled.

C In his opening speech in this House counsel for the board stated that he would not pursue the contention that the whole of the £9,515 should be omitted from the gross receipts, and would not try to support the decision in the *Marylebone* case (3). He would, however, submit that the decision in the *Manchester* case (2) was correct, and that the £3,365 actually spent on loan charges on works in course of construction should be excluded from the gross receipts.

D Counsel put his submission as follows. He submitted that, in applying the profits basis, which is an economic theory of rent, one must begin with revenue to be derived from the subjects whereof the rental value is to be ascertained, or from any powers exercisable by the hypothetical tenant to raise revenue, for repairs or otherwise, in respect of those subjects. Revenue which does not come from either of these sources is to be disregarded. Works still under construction are not part of the rated hereditament, as they are not in the beneficial occupation of anyone. The board, in its capacity of hypothetical tenant, would have no power under s. 29 of the Order of 1948 to include in its estimate of expenditure sums to be expended to meet loan charges on works not in its notional occupation as tenant during the year in question, and not forming part of the rateable hereditaments. These sums are raised by the board in its capacity as landlord, and the hypothetical tenant has nothing to do with them.

F It is true that the whole revenue of the board is paid into one account and all expenditure is paid from it, but this does not mean that, for rating purposes, the conception of a hypothetical landlord and a hypothetical tenant must be abandoned. The account must be dissected with a view to distinguishing between their respective contributions and expenditure, and in order to do this it is legitimate to have regard to the estimates, as indicating the purposes for which revenue was raised, in order to determine by reference to such purposes to what extent such revenue would be potentially available to the hypothetical landlord and the hypothetical tenant respectively. In this case it is clear that the sum of £3,365 was raised and expended for landlord's purposes, namely, the payment of loan charges on works forming no part of the rateable undertaking. It should, therefore, be disregarded in estimating the receipts of the hypothetical tenant.

H Finally, counsel submitted that, even if, on the ordinary application of the profits system, the sum now in question would be included in the gross receipts of the undertaking, the present case ought to be treated as an exceptional one and some modification ought to be made in the application of the profits system to it.

I My Lords, I shall later give separate consideration to counsel's final point, but, in my view, the rest of his argument is inconsistent with the application of the profits basis as it was stated in the *Kingston* case (1) and as it was applied in this House in *St. James' & Pall Mall Electric Light Co., Ltd. v. Westminster Assessment Committee* (4) ([1934] A.C. 33). The argument is, in substance, the same as part of the argument which was presented, without success, by Mr. Wilfrid Greene, K.C., in the *St. James'* case (4) (*ibid.*, at p. 39); and a similar argument had already been rejected in Scotland in *Aberdeen Magistrates v. Aberdeen Assessor* (5) (1927 S.C. 458), which was, in my opinion, rightly decided.

The position of the hypothetical tenant was stated as follows by LORD BUCKMASTER in *Port of London Authority v. Orsett Union Assessment Committee* (6) ([1920] A.C. 273 at p. 305):

"The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament."

The whole of the revenue from precepts in the present case was simply part of the revenue derived by the board in the year in question from the privileges thus described by LORD BUCKMASTER, and forms part of the gross receipts of the board for that year.

I find myself in entire agreement with the following passage from the judgment of the Court of Appeal in the present case, delivered by DENNING, L.J. ([1956] 2 All E.R. at p. 62):

"It seems to us to be quite wrong to bring into the 'profits basis' any of the estimates which are prepared for the purpose of calculating the amount of the precepts. The estimates are not binding on the board. Once it issues the precepts and gets the money, it can use it as it likes, provided of course that it uses it for the board's purposes. No part of it is earmarked for any particular purpose . . . The revenue from precepts was £66,170. That was the revenue of the board of which it had the right to dispose as it wished. It ought to be taken without any deduction for interest charges."

Counsel sought to distinguish the *Aberdeen* case (5) from the present case on the ground that in the former case the revenue in question arose from ordinary charges to consumers for electricity sold to them, whereas in the present case the £3,365 was part of a sum raised by precept. To my mind, my Lords, this is a distinction without a difference for the present purpose. Moreover, the abstract of accounts shows no earmarking of the sum of £9,515 mentioned in the estimates, or any other sum, for the purpose of financing the loan charges on works not yet in beneficial occupation, and it is impossible for anyone to say from a perusal of the abstract whether the sum of £3,365 was paid out of the moneys received from precepts, or out of moneys received from water charges, or out of the "excess of precept income" carried forward from the previous year, of which (as appears from the facts already stated) at least £16,542 was spent in the year ended Mar. 31, 1952.

As to the two cases already mentioned, which were relied on by counsel for the board in the Court of Appeal, I agree with that court in thinking that the *Marylebone* case (3) cannot stand with the reasoning of this House in the *St. James'* case (4), and counsel does not seek to rely on it. He does, however, rely on the *Manchester* case (2). He seeks to distinguish it from the *Marylebone* case (3) on the ground that in the former case, as in the present case, the sum sought to be deducted from the gross receipts was expended to meet interest on loans in respect of works not yet completed, and he submits that the decision in the *Manchester* case (2) was correct, though the reasoning was wrong in so far as the court relied on the *Marylebone* case (3).

Here, again, my Lords, I would borrow, with gratitude, the language of the Court of Appeal. The passage was directed to the entire sum of £9,515 which was then sought to be deducted from the gross receipts, but it applies equally to the £3,365 now under consideration ([1956] 2 All E.R. at p. 64):

"It is said that a hypothetical tenant would not pay any rent for works which were not completed, so nothing should be included on that account. The answer is, however, that we are not inquiring what rent he would pay for the yet uncompleted works, but the rent for the already completed works."

A The hypothetical landlord of a growing undertaking would reasonably expect to receive enough rent from the existing works to enable him to keep pace with his growing expenditure. The hypothetical tenant is not concerned with what the hypothetical landlord does with his money once he gets it. The hypothetical landlord can lay it out on maintaining the old works or making new ones. The whole question is what is the landlord's rent? What he does with it is his concern, not the tenant's.

B "The point is also put in a slightly different way. It is said that what is being rated is the existing water system, not the uncompleted works which are incapable of beneficial occupation. This, however, carries the matter no further, since the question is always what revenue can be obtained by the hypothetical tenant from his occupation of the hereditaments to be rated and all the receipts from the precepts from part of such revenue. The Court of Session had this very point before it in *Aberdeen Magistrates v. Aberdeen Assessor* (5). The Aberdeen Corporation had spent £7,390 on interest and sinking fund on incomplete and unproductive works. It argued that this should be deducted from its total revenue: but the court held that the deduction was inadmissible. We agree with that decision and think we should follow it."

I now come to counsel for the board's final point, already stated. He seeks to support it by reference to two Scottish cases. The first is *Fife Assessor v. Dunfermline District Committee* (7) (1929 S.C. 304). The facts were that water-works belonging to the district committee included a reservoir constructed during the war of 1914-18 at an exceptionally high cost. The cost had been affected by the general conditions affecting prices and labour during that period and also by the fact that the Admiralty had insisted that the work should be completed as rapidly as possible. The district committee admitted that the principle known as the "profits system" in England and as the "revenue principle" in Scotland was applicable to the valuation of their undertaking; but argued that, owing to the exceptional circumstances already stated, the principle, if strictly applied, would lead to an unreasonable result, and that there ought to be some modification. The Lands Valuation Appeal Court accepted this argument, and made a deduction of twenty per cent. from the valuation ascertained according to the revenue principle, on account of the wholly exceptional circumstances in which the reservoir had been constructed.

G The second case referred to by counsel is *Stirlingshire Assessor v. Stirlingshire & Falkirk Water Board* (8) (1931 S.C. 369). In that case, the water board had carried out extensions of their works under an arrangement with the Unemployment Grants Committee, by which they received from the committee—subject to a number of conditions in favour of unemployed persons—an annual payment for a period of fifteen years of sixty-five per cent. of the interest and sinking fund charges on the loan raised to meet the expenditure. The extensions, which at the time were not required by the board, were undertaken only in deference to the wishes of the committee. It was held by the Lands Valuation Appeal Court that, although the undertaking should be valued on the revenue principle, the annual payment just mentioned was of such an exceptional character that it did not fall to be included in the annual revenue of the board.

H I My Lords, it may be that the Lands Valuation Appeal Court was justified in dealing with these two cases in an exceptional manner, as a most unusual position had arisen owing to the intervention in one case of the Admiralty, and in the other of a governmental committee. It is, however, unnecessary to consider them further, for I can see no ground for treating the present case as an exceptional one. There is nothing in the Case Stated to suggest that the circumstances were in any way exceptional or, indeed, unusual; on the contrary the facts would seem to negative any such suggestion.

I would dismiss the appeal.

My Lords, my noble and learned friend, **LORD EVERSHED**, who is unable to be present today, has intimated to me that he agrees with the opinion which I have just delivered.

LORD RADCLIFFE: My Lords, I have some sympathy with the general line of criticism which has led to this appeal by the Mid-Northamptonshire Water Board (hereafter called "the board"). There is, no doubt, something absurd in the simple proposition that the net annual value of the rateable hereditaments occupied by a water undertaker increases in one year as against the previous year merely by virtue of the fact that, in the second year, the undertaker has to raise and pay loan charges in respect of uncompleted works which are not yet contributing to the receipts of the undertaking and of which the undertaker is not yet in rateable occupation. Yet this is just what does result from using the profits basis as the method of assessment, unless there is some modification of the formula involved to which we ought to give recognition, despite the fact that no such modification has commended itself to the Court of Appeal. In their view, the profits basis, rightly understood, does not admit of any deduction being made from the gross receipts accruing to the undertaking from water rates, water charges or water precepts, although it is shown that part of the money raised was raised for or spent on loan charges in respect of the cost of uncompleted works.

I think that the view of the Court of Appeal must be upheld. It does not seem to me that the anomaly which a comparison of the net annual value of one year with that of another exhibits in this case is of any determining importance, once it is accepted that the rent attributed to a hypothetical tenant, and, therefore, the net annual value, depends in any year on the gross receipts obtained by the undertaker through the exercise of the statutory powers attached to the undertaking. The first element in the computation, the gross receipts, is arrived at, not by asking what maximum sum the undertaker could have got from the operation of his undertaking nor yet by asking what sum he should have got if economic theory rather than statutory powers had been the basis of his receipts—an inquiry which is almost meaningless in the circumstances postulated—but by ascertaining what, in fact, he did get during the accounting year preceding the year of assessment. Computations made in this way must show up anomalies from year to year, because the circumstances which bring about a change in the gross receipts have no necessary connexion with any change in the rateable hereditaments themselves. Possibly the likelihood of anomalies is increased when, as here, a considerable part of the gross receipts is obtained by precepts addressed to constituent local authorities which are themselves the product of estimates of revenue and expenditure made before the financial year is itself begun, and which take account of credit or debit balances on revenue account carried forward from the preceding year.

To take an instance from this case. The practical force of the board's argument is in the comment that the gross receipts of the undertaker would never have been as large as they were if £9,515 of them had not been called for by precept in order to provide money for meeting the loan charges for the uncompleted works. This results, it is said, in basing the net annual value of the existing works in part on the cost of the non-existent works. In one sense this may be true; but at the same time there is a fallacy involved in treating it as the whole truth. The estimates as a whole were, no doubt, the cause of the block sum actually precepted for; yet the amount of that sum was as much conditioned by the fact that the year began with a carry-forward of £30,193 as by the expected requirements of loan finance for the year. Neither the carry-forward at the beginning of the year nor the carry-forward at the end of the year (£13,651) contributes to the computation of gross receipts obtained in the year. There is no more reason for saying that any part of the sums raised by precept in the

- A year was raised for meeting loan charges on new works than there is for saying that these charges were met out of sums carried forward from the preceding year. Since the latter do not come into computation anyway, there would be no hardship in treating the full sum raised by precept in the year as computable revenue for the year. The fact as I see it is that no items of receipt can be allocated to items of expenditure in this way. It is not right to isolate one item of the composite estimates and try to reduce the computation of gross receipts by that amount, if only because the estimates were the cause but not the condition of the resulting precepts and the board were quite free to retain, expend or carry forward the sums raised when, as it turned out, the expenditure required for the year's loan charges on new works was very much less than had been budgeted for. The receipts were general receipts. It is not right, on the other hand, to isolate one item of the actual expenditure and then try to reduce the computation of gross receipts by that amount (this is the form of the appeal as argued before us), because, if one is to use the profits basis at all, the question what is the quantum of gross receipts to attribute to the undertaker as tenant or the tenant as undertaker is not affected by the independent question what use the undertaker in his undifferentiated capacity would have to make of all or some part of those receipts (see the decision of this House in *St. James' & Pall Mall Electric Light Co., Ltd. v. Westminster Assessment Committee* (4), [1934] A.C. 33). The true question is, what comes to the tenant's pocket in exercise of the undertaking.

Regarded in this way, the present case is, I think, rather an illustration of how the profits basis of assessments operates in certain special circumstances than a convincing criticism of the general formula by which the basis is defined. In particular, I do not think that it is correct to say that, if the gross receipts are allowed to include the sum used for loan charges on the uncompleted works, the effect is to rate indirectly hereditaments which are not capable of being rated directly.

- If one turns to decided cases, the general principle is to be found in the decision of this House in *Kingston Union v. Metropolitan Water Board* (1) ([1926] A.C. 331). You must look to "the profits earned by the whole undertaking . . . the gross receipts of the undertakers". It would be wrong to attribute any magical force to the use of the word "undertaking" in this context. The special point that is now before us was not then before the House. "Undertaking" was used to denote the totality of the rateable hereditaments presently occupied by the undertakers. So far I agree with the board. But then receipts do not arise from the mere occupation of physical assets. If the occupier is a statutory occupier they arise from the exercise of the statutory powers and subject to the statutory conditions which are attendant on the conduct of the undertaking on and through those assets. As LORD BUCKMASTER said in *Port of London Authority v. Orsett Union Assessment Committee* (6) ([1920] A.C. 273 at p. 305):

- H "The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament."

Now, if I take the rateable hereditaments of the board as they stood in the relevant year, I find that they could be put to use under the shelter of statutory powers which involved in part the charging of non-domestic consumers for water directly supplied and in part the raising of the balance needed on revenue account by precepts directed to the constituent local authorities on behalf of their ratepayers as a whole. The one as much as the other seems to me a way of obtaining receipts in return for the service of providing a supply of water. The one power as much as the other seems to me a power incidental to the undertaking which would pass to and be exercisable by the hypothetical tenant as occupier of the undertaking for the year of assessment. That, as I understand it,

is the effect of the decision of the Court of Appeal in *Dewsbury Waterworks Board v. Penistone Union Assessment Committee* (9) ((1886), 17 Q.B.D. 384). I should have come to the same conclusion apart from that case. Does it really matter, then, that some of the moneys covered by the precept were raised for or expended on the loan charges for works not yet part of the rateable hereditament? I do not think so. Given different circumstances you might easily find an undertaker whose tariff for water supplied to individual consumers was calculated on the basis of covering loan charges for new but uncompleted works and who did, in fact, include the service of such charges among his current expenditure for the year. Just as much as in the present case, the result would be that the net annual value of the rateable hereditaments was enlarged by the sums required for the construction of hereditaments not themselves rateable. The anomaly is as great in that case as in this. On more than one occasion the Scottish courts have had to consider just that situation, the rating assessment of the statutory undertaker whose charges and, therefore, whose receipts covered provision for loan charges or a sinking fund in respect of uncompleted works. Uniformly, so far as appears, they have held that this circumstance does not require a pro tanto reduction of the computable receipts; see *Parish Council of Edinburgh v. Assessor of Railways & Canals* (10) ((1925), 35 P.L. Mag. 140), and *Aberdeen Magistrates v. Aberdeen Assessor* (5) (1927 S.C. 458). In my opinion, those decisions were correct in principle.

Nor was their correctness challenged by the argument put forward on this appeal. What was said was that a critical distinction ought to be made for this purpose between receipts which, as in the *Aberdeen* case (5), arose from charges directly made to consumers for electricity or water supplied through the medium of the existing rateable assets and receipts which, as here, arose from precepts which were no more than a means of covering the deficit on revenue account caused by the fact that the existing rateable hereditaments did not produce an adequate balance to meet the permissible charges on that account. Precepted receipts, on this view, were not to be regarded as necessarily receipts of the hypothetical tenant; so far as they were used for purposes extraneous to the service of the existing rateable hereditaments, they were "landlord's revenue" and, as such, to be excluded from computation.

My Lords, I regard this distinction as unfounded. I will offer two reasons for my opinion. One is that receipts obtained by precept are not essentially different from receipts obtained by the making of direct charges to individual consumers. Each class of receipt arises from the exercise of a power incident to the undertaking to obtain money on revenue account as a return for the authorised operations of the year. The other reason is that neither the precepting power nor the precepted receipts are capable of being divided between landlord and tenant in the way suggested. The moneys raised by precept (£66,170) were no more particularly applicable to the loan charges on uncompleted works than the moneys raised by charges to domestic or metered consumers or the surplus brought forward from the preceding year (£30,193) and, even if they had been, it is, I think, fundamental that the sum of gross receipts in the hands of the undertaker as tenant is not to be treated as reduced by any consideration of the use to be made of those receipts by the undertaker either as landlord or in his undifferentiated capacity.

It is this last point which is settled by the decision of this House in the *St. James' case* (4). But, if so, the judgment in *Metropolitan Water Board v. St. Marylebone Assessment Committee* (3) ([1923] 1 K.B. 86) cannot any longer be regarded as good law, because it depended essentially on the view that the part of an undertaker's receipts which consisted of precepted revenue ought not to enter the computation of gross receipts if that revenue was raised in order to meet a deficiency on revenue account to which loan charges on borrowed capital contributed at any rate no less an amount. So to decide is to measure gross

- A receipts by the purposes to which they are to be put. And, if the *Marylebone* case (3) decision can no longer be supported, no more can the decision in *Manchester Corpn. v. Bolton Area Assessment Committee & Little Hulton Urban District Council* (2) ((1930), 144 L.T. 570), the effect of which was to exclude from the computation of gross receipts the whole sum raised by a public water rate, because the deficiency which that rate was to balance was contributed to by an
- B even larger charge on the year for the debt service on uncompleted works. The ratio decidendi of this last case was that of the *Marylebone* case (3). It stands or falls with it. Despite the eminent authority and experience of the court which decided the *Manchester* case (2), and the sympathetic plausibility of their view, I do not think that in the light of the later decisions it is open to us to support it.
- I agree that the appeal must be dismissed.

- C **LORD COHEN:** My Lords, I agree with the speech which has been delivered by my noble and learned friend on the Woolsack, and have nothing to add.

- LORD KEITH OF AVONHOLM:** My Lords, the subject of valuation in this case is a water undertaking, and it is common ground that such an undertaking falls to be valued on the profits basis. The application of this basis not infrequently produces somewhat anomalous results, but no better system has been devised for valuing revenue-producing public utility concerns, which bear the stamp of monopolies or quasi-monopolies, and to such concerns the profits basis has been applied for valuation purposes for about a hundred years. It appeared to me that at certain points the board's counsel sought to escape from the rigour of the application of this principle by seeking to equate waterworks under construction with a house, or a factory, under construction. But the latter fall to be treated for valuation purposes as units in themselves, whereas works under construction in a water undertaking are part of the undertaking and are not, in my opinion, capable of being considered in isolation, as something in the occupation of the hypothetical landlord. It may be that no value is generally
- D attributable to such works specifically, during the construction period, a view on the rightness of which I express no opinion, but they cannot, in my opinion, be notionally severed from the undertaking as a whole in order to reduce the cumulo value based on the occupation of the hypothetical tenant. In this respect they differ from such hereditaments as farms and fishings which may have been acquired, as in the present case, by a water board under their statutory powers.
- E These have nothing to do with the supply of water and are rightly treated separately for the purposes of valuation, whether let or not by the statutory authority.

- It follows as a corollary that the revenue received from the carrying on of the water undertaking must be ascribed to the occupation of the hypothetical tenant, even if part of this revenue is raised to service loan charges in respect of works under construction. It was conceded by counsel for the board that this was so where the revenue was raised by means of charges on the consumers, but he drew a distinction in the case where the loan charges for uncompleted works were met out of public rates, or by precepts, as in the present case, on rating authorities. In so contending, he maintained the soundness of the decision in *Manchester Corpn. v. Bolton Area Assessment Committee & Little Hulton Urban District Council* (2) ((1930), 144 L.T. 570), and distinguished *Aberdeen Magistrates v. Aberdeen Assessor* (5) (1927 S.C. 458). In my opinion, it is impossible to draw any such distinction. Public water rates and water charges on consumers are sources of revenue, on either or both of which statutory water undertakers draw for the purpose of carrying on their undertaking. When the undertakers, as assumed hypothetical tenants, enter into occupation of the hereditaments these are the sources from which they will draw their receipts, a proportion of which they will be deemed to pay to the hypothetical landlord as rent. If a proportion of the gross
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receipts were to be regarded as directly derived by, or collected for, the hypothetical landlord in respect of the works under construction. I should have thought that these works would then be rated as a separate hereditament at a corresponding annual value. This would bring no advantage to the water undertakers, though it would benefit the rating authority within whose area the projected works lay. But the true view, I think, is that the total revenue collected, whether by way of rates or by way of water charges, is to be treated as referable to the rateable hereditaments occupied by the undertakers. How the cumulo annual value thus arrived at is to be allocated among the various rating areas is a matter with which your Lordships in this case are not concerned. The true application of the profits basis of valuation requires the whole proceeds raised in respect of the carrying on of a water undertaking to be regarded as receipts of the undertakers as hypothetical tenants and the proportion thereof calculated to belong to the hypothetical landlord to be treated as rent out of which the landlord must pay the loan charges in respect both of completed and uncompleted works.

This, in my opinion, is the necessary result of working out the principles laid down by this House in *St. James' & Pall Mall Electric Light Co., Ltd. v. Westminster Assessment Committee* (4) ([1934] A.C. 33). Authorities more closely in point are the decisions of the Lands Valuation Appeal Court in Scotland in *Aberdeen Magistrates v. Aberdeen Assessor* (5) and *Parish Council of Edinburgh v. Assessor of Railways & Canals* (10) (1925), 35 P.L. Mag. 140). If these latter decisions are applicable they are destructive of the argument for the board. Their counsel I understand accepted these decisions as sound decisions, but sought to distinguish them on the ground that the sums there applied to loan charges on uncompleted works were raised out of water charges levied on the consumers. The distinction, for the reasons I have already given, is, in my opinion, inept. It will also, I think, be found that the case of the *Parish Council of Edinburgh* (10) was one where the loan charges for the uncompleted works were met, at least in part, out of public water rates. In my opinion, these cases were rightly decided and the case of *Manchester Corpn. v. Bolton Area Assessment Committee* (2) was wrongly decided.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Sherwood & Co.*, agents for *C. E. Vivian Rowe*, Northampton (for the appellant board); *Solicitor of Inland Revenue* (for the respondent valuation officer).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A

JONES v. NATIONAL COAL BOARD.

[COURT OF APPEAL (Denning, Romer and Parker, L.J.J.), February 26, 27, 28, March 1, 25, 1957.]

B

Practice—Cross-examination—Interventions by judge during examination and cross-examination of witnesses—Whether new trial should be granted.

Judge—Function of judge at trial of civil action—Intervention on examination of witnesses.

C

The part of a judge at the trial of a civil action is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies (see p. 159, letter G, post).

D

During the examination-in-chief of two of the defendants' witnesses the judge by his interventions took a substantial part of the examination out of the hands of counsel for the defendants; and by judicial interventions in the course of cross-examination of defendants' witnesses counsel for the plaintiff was unduly hampered in his task of testing their evidence. Insufficient primary facts were found to enable an appellate court to determine the case by drawing proper inferences.

E

Held: there should be a new trial, since every litigant was entitled to a fair trial at which his case could properly be put, and without that no cause could be lost nor could the appellate court affirm that it had been.

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Per CURIAM: it is only by cross-examination that a witness's evidence can be properly tested, . . . the very gist of cross-examination lies in the unbroken sequence of question and answer . . . excessive judicial interruption inevitably weakens the effectiveness of cross-examination . . . for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue and to which it is by no means easy, sometimes, to return (see p. 160, letter C, post).

G

Appeal allowed.

[As to a new trial by reason of the course taken at the first trial, see 26 HALSBURY'S LAWS (2nd Edn.) 124, 125, para. 245; and as to the questioning of witnesses by the trial judge, see 15 HALSBURY'S LAWS (3rd Edn.) 445, para. 804, text and note (k).]

H

Cases referred to:

(1) *Ex p. Lloyd*, (1822), Mont. 70, n.; 3 Digest 329, 181.

(2) *Yuill v. Yuill*, [1945] 1 All E.R. 183; [1945] P. 15; 114 L.J.P. 1; 172 L.T. 114; 2nd Digest Supp.

(3) *Re Enoch & Zaretsky, Bock & Co.*, [1910] 1 K.B. 327; 79 L.J.K.B. 363; 101 L.T. 801; 2 Digest 434, 840.

I

(4) *R. v. Cain*, (1936), 25 Cr. App. Rep. 204; 14 Digest (Repl.) 510, 4936.

(5) *R. v. Bateman*, (1946), 174 L.T. 336; 110 J.P. 133; 31 Cr. App. Rep. 106; 2nd Digest Supp.

(6) *Harris v. Harris*, (Apr. 9, 1952), *The Times*.

(7) *R. v. Clewer*, (1953), 37 Cr. App. Rep. 37; 14 Digest (Repl.) 664, 6736.

Appeal.

The plaintiff widow appealed against a decision of HALLETT, J., dated June 13, 1956, dismissing her claim under the Law Reform (Miscellaneous Provisions)

Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, for damages for negligence and breach of statutory duty against the National Coal Board, the employers of the deceased. Her grounds of appeal included various points based on the facts of the case, and also a submission that she had not had a fair trial. The National Coal Board resisted the appeal on the points based on the facts, and in the alternative cross-appealed on the ground that they, too, had not had a fair trial. The facts appear in the judgment. A
B

Gerald Gardiner, Q.C., and W. L. Mars-Jones for the widow.

H. Edmund Davies, Q.C., and H. E. Hooson for the National Coal Board.

Cur. adv. vult.

Mar. 25. **DENNING, L.J.:** The judgment which I am about to read is the judgment of the court. C

On Jan. 21, 1953, the deceased coalminer, Emlyn Jones, was buried by a fall of roof in the Llay Colliery at Wrexham and died. His widow brings this action against his employers, the National Coal Board, claiming damages on the ground that they were in breach of their statutory duties, or alternatively were guilty of negligence at common law.

The case gave rise to complicated issues of fact and law which I will try to state in outline. The deceased was working at a coal face over half a mile below ground. The seam was five feet six inches thick. The face was 125 yards long. It was worked by mechanical cutters, and the coal was taken away on a conveyor belt. There were two roads leading to the face, one at each end. As the face moved forward, the space behind (from which coal had been taken) was filled in with packing, but the roadways were of course kept clear. These roadways had to be made higher than the five feet six inches (the thickness of the seam) and accordingly, as they moved forward, men ripped down the material from the roof above the roadway so as to increase the height. The procedure was for one shift of men to get out the coal from the seam for about eight feet, and for the next shift to rip down the material from above. The place where these rippers worked was called the "ripping". The edge of the material at that place was called the "ripping lip". The roadway up to a point ten yards from the face was called the "road". The last ten yards was called the "roadhead". D
E
F

Some six or seven weeks before the deceased was killed there had been a previous fall at the roadhead at this point, and conditions had not yet been restored to normal working. The fallen debris had been cleared away and the face (of the coal above) had been dressed down. In order to fill in the gap from which material had fallen, timber covering was put over the steel arches. In addition, four rails each nine feet long had been forepoled into the top of the coal seam, so that five feet of each was embedded in the seam leaving four feet outside. The outer ends of these four rails were supported on a rolled steel joist, which was itself supported on three wooden props about five feet high. The space above the rails was also filled with timber. In this way it was believed that the place had been made secure from any further fall downwards or out-bye. G
H

The next step, in order to get back to normal working, was to get out the coal so as to make a normal roadhead again. The whole area was known to be "tender" because of the previous fall, and the wet condition of the strata above the coal. It was unwise, therefore, to make a frontal attack on the face from the roadhead, but better to make a flank attack by working from the side by hand. That is the work on which the deceased and his mate were about to engage on the morning of his death. Previous shifts had made some progress in this flank attack, and had got out coal from the space underneath two of the rails. The deceased had just come on the work, and he and his mates were I

A preparing to get more coal, when a large fall occurred completely burying them. Every effort was made to dig them out. His mate was rescued, but the deceased died. Afterwards the surveyor found that the rolled steel joist was still in position, but the rails had broken. This seems to show that the steps taken to secure the place outwards from the previous fall had been successful, but that those taken to secure the newly exposed roof were not sufficient.

B Such being the facts in outline, counsel for the widow took before us these points:

(i) That the National Coal Board had broken s. 49 of the Coal Mines Act, 1911, which says that "The roof and sides of every travelling road and working place shall be made secure . . ."

C (ii) That the National Coal Board had broken reg. 6 (2) of the Coal Mines (Support of Roof and Sides) General Regulations, 1947 (S.R. & O. 1947 No. 973), which says that

"Where there are any roof rippings within the roadhead, a bar or bars shall be set as near as practicable to each ripping lip extending across the whole width of the ripping."

D (iii) That the National Coal Board had been guilty of negligence at common law in that they had not taken proper steps to support the place where the deceased was working in that they had only put posts there, whereas they ought to have put chocks, which are well known to be much better.

E Counsel for the National Coal Board denied those charges, and in regard to the alleged breaches of statutory duty he relied on s. 102 (8) of the Act of 1911 which excuses the board from liability for damages "if it is shown that it was not reasonably practicable to avoid or prevent the breach".

Thus far the case raised nothing out of the ordinary for our consideration. But counsel for the widow took a further ground of appeal which is stated in the notice of appeal to be

F "that the nature and extent of the learned judge's interruptions during the hearing of the evidence called on behalf of the defendants in particular made it virtually impossible for counsel for the plaintiff to put the plaintiff's case properly or adequately or to cross-examine the witnesses called on behalf of the defendants adequately or effectively."

G Furthermore counsel for the board said that, in case there was any chance of our being persuaded that counsel for the widow's three points on liability were correct, he wished himself to give a cross-notice of appeal in similar terms complaining that the judge's interruptions prevented him from properly putting his case. We gave him leave to give a cross-notice to this effect.

H We much regret that it has fallen to our lot to consider such a complaint against one of Her Majesty's judges: but consider it we must, because we can only do justice between these parties if we are satisfied that the primary facts have been properly found by the judge on a fair trial between the parties. Once we have the primary facts fairly found, we are in as good a position as the judge to draw inferences or conclusions from those facts, but we cannot embark on this task unless the foundation of primary facts is secure.

I In order to consider the complaint we must state the course of the trial. Mr. Mars-Jones of counsel appeared for the widow, and opened the case for her. He relied on s. 49 of the Act, and said it was the duty of the board to make the roof secure, and that the fall showed that they had not done it. In case that approach was wrong, he relied on the Support Regulations and on the common law, and he made several specific criticisms in which he said that the board had failed to do what they ought to have done. He called the widow to give evidence on damages and then an expert, Mr. William Charles Davies. This expert had

not been down the mine, but he relied on a plan which had been made by the board's surveyor shortly after the accident. This enabled him to make criticisms on the same lines as those opened by counsel for the widow. The judge intervened on several occasions during the examination-in-chief of Mr. W. C. Davies and also during his cross-examination, but this was in order to enable him to understand the technical points of the case, and cannot properly be made the subject of complaint. Counsel for the widow then closed his case.

Mr. Edmund Davies, Q.C., who appeared for the National Coal Board, then called Mr. John Kerr. He was the manager of the Llay Main Colliery at the time of the accident and had inspected the spot on Jan. 19, 1953, two days before the roof fell. He was accompanied on that occasion by H.M. Inspector of Mines, who made no complaint of the manner in which the work was being done. Mr. Kerr explained to the judge exactly what was being done to support the roof, and the judge, naturally enough, intervened from time to time to see that he understood. Then leading counsel for the board began to ask Mr. Kerr to deal with the criticisms which had been made by counsel for the widow, and by his expert witness, Mr. W. C. Davies. Now when this happened the judge, we fear, intervened far too much. He had himself made a note of the criticisms and, in his anxiety to understand Mr. Kerr's replies to these criticisms, he took the examination of the witness out of the hands of leading counsel for the rest of that day and of his junior counsel next morning. Counsel for the widow then cross-examined the witness, but during the cross-examination the judge intervened on several occasions to protect the witness from what he thought was a misleading question, and to bring out points in favour of the witness's point of view.

Next leading counsel for the board called Mr. Thomas George Davies. He was the deputy who was actually on duty on Jan. 21, 1953, when the accident occurred. He said that he thought that the roof was secure, and that he told the deceased workman and his mate to get the remainder of the coal off, and try to get another rolled steel joist up at this point. His examination-in-chief proceeded on normal lines, but during his cross-examination by counsel for the widow the judge seemed to be afraid that he was being misled, and intervened at considerable length and in effect stopped his cross-examination on the important points of chocks. When leading counsel for the board re-examined, the judge cut him short saying: "That is what has been given again and again".

Then leading counsel for the board called the surveyor, Mr. Philip Edgar Roberts, who made the plan. Nothing untoward occurred in his short evidence. Finally leading counsel for the board called Mr. Cecil Henry Bates, an expert consultant mining engineer. We are afraid that the judge took the examination-in-chief largely out of the hands of counsel. He took the points of criticism made against the board, and went through them with the witness, and appeared to accept his explanations. Counsel for the widow cross-examined the witness, but after a while the judge disclosed much impatience with him and he brought it to a close.

No one can doubt that the judge, in intervening as he did, was actuated by the best motives. He was anxious to understand the details of this complicated case, and asked questions to get them clear in his mind. He was anxious that the witnesses should not be harassed unduly in cross-examination, and intervened to protect them when he thought necessary. He was anxious to investigate all the various criticisms that had been made against the board, and to see whether they were well founded or not. Hence he took them up himself with the witnesses from time to time. He was anxious that the case should not be dragged on too long, and intimated clearly when he thought that a point had been sufficiently explored. All those are worthy motives on which judges daily intervene in the conduct of cases and have done for centuries.

- A Nevertheless, we are quite clear that the interventions, taken together, were far more than they should have been. In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not LORD ELDON, L.C., who said in a notable passage that "truth is best discovered by powerful statements on both sides of the question" (see *Ex p. Lloyd* (1) (1822), Mont. 70, n.) and LORD GREENE, M.R., who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said LORD GREENE, should himself conduct the examination of witnesses,

"he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict."

- D See *Yuill v. Yuill* (2) ([1945] 1 All E.R. 183 at p. 189).

Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales—the "nicely calculated less or more"—

- E but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties; see *Re Enoch & Zaretsky, Bock & Co.* (3) ([1910] 1 K.B. 327). So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other; see *R. v. Cain* (4) ((1936), 25 Cr. App. Rep. 204); *R. v. Bateman* (5) ((1946), 31 Cr. App. Rep. 106); and *Harris v. Harris* (6) (Apr. 8, 1952, *The Times*, Apr. 9, 1952) by BIRKETT, L.J., especially. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost; see *R. v. Clewer* (7) ((1953), 37 Cr. App. Rep. 37). The judge's part in all this is to listen to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. LORD BACON spoke right when he said that:

"Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal."

- I Such are our standards. They are set so high that we cannot hope to attain them all the time. In the very pursuit of justice, our keenness may out-run our sureness, and we may trip and fall. That is what has happened here. A judge of acute perception, acknowledged learning, and actuated by the best of motives, has nevertheless himself intervened so much in the conduct of the case that one of the parties—nay, each of them—has come away complaining that he was not able properly to put his case; and these complaints are, we think, justified.

We have sufficiently indicated the nature of the interventions already, but there is one matter which we would specially mention. Leading counsel for the widow made particular complaint of the interference by the judge during the cross-examination of the board's witnesses by junior counsel for the widow. Now it cannot, of course, be doubted that a judge is not only entitled but is, indeed, bound to intervene at any stage of a witness's evidence if he feels that, by reason of the technical nature of the evidence or otherwise, it is only by putting questions of his own that he can properly follow and appreciate what the witness is saying. Nevertheless, it is obvious for more than one reason that such interventions should be as infrequent as possible when the witness is under cross-examination. It is only by cross-examination that a witness's evidence can be properly tested, and it loses much of its effectiveness in counsel's hands if the witness is given time to think out the answer to awkward questions; the very gist of cross-examination lies in the unbroken sequence of question and answer. Further than this, cross-examining counsel is at a grave disadvantage if he is prevented from following a preconceived line of inquiry which is, in his view, most likely to elicit admissions from the witness or qualifications of the evidence which he has given in chief. Excessive judicial interruption inevitably weakens the effectiveness of cross-examination in relation to both the aspects which we have mentioned, for at one and the same time it gives a witness valuable time for thought before answering a difficult question, and diverts cross-examining counsel from the course which he had intended to pursue, and to which it is by no means easy, sometimes, to return. Leading counsel for the widow submitted that the extent of the learned judge's interruptions was such that junior counsel for the widow was unduly hampered in his task of probing and testing the evidence which the board's witnesses gave. We are reluctantly constrained to hold that this submission is well-founded. It appears to us that the interventions by the learned judge while junior counsel for the widow was cross-examining went far beyond what was required to enable the judge to follow the witnesses' evidence and on occasion took the form of initiating discussions with counsel on questions of law; further, and all too frequently, the judge interrupted in the middle of a witness's answer to a question, or even before the witness had started to answer at all. In our view it is at least possible that the constant interruptions to which counsel for the widow was subjected from the bench may well have prevented him from eliciting from the board's witnesses answers which would have been helpful to the widow's case, and correspondingly damaging to that of the board.

The judge seems to have been under the impression on occasions that counsel for the widow was asking a misleading question. We do not gain that impression ourselves. It seems to us that the case was conducted by counsel on both sides with complete propriety.

Counsel for the board asked us to say that the decision reached by the judge was the inevitable decision, but we cannot say that. We have not the material for the purpose. We have some of the primary facts, but not all of those necessary to a decision. We have an adequate description of the state of affairs in this mine before and after the first fall, and before and after the second fall; but we have not sufficient evidence to be sure whether further precautions might not have been taken to avoid the accident. It seems to us that the widow made a strong case which calls for an answer. She showed that in the middle of December there was a big fall of roof at the roadhead notwithstanding that all the Support Regulations were observed, and every normal precaution was taken. The fall disclosed a dangerous condition of the strata at this point. Seven weeks later her husband was killed by a second fall at near enough the self-same place by the self-same danger. Her counsel makes on her behalf this strong plea: If this known danger could have been avoided by taking extraordinary precautions, why did the board not take those precautions? If the danger

- A could not be avoided by any known precautions, why was her husband sent to work there? Better stop getting coal at that point than send him to his death. The board made answer that they put up many more props than usual. The widow's counsel asked: why did not they use chocks instead of props, since chocks give much better support than props. The board answered that they knew that it was most desirable to use chocks whenever possible, but that
- B they could not get them in. The judge seems to have regarded that as a sufficient answer, though there is little doubt that chocks could have been used if the conveyor belt had been shortened. The judge gave, as part of his reason for accepting the board's answer, his view that it was good mining practice not to use chocks, and that it would have been inconvenient to curtail the conveyor belt; but such considerations carry little if any weight when extreme measures
- C for safety are called for. Again, he wrongly assumed that the shortening of the conveyor belt would involve exposing more men to the same risk. We are not saying that the judge was necessarily wrong in accepting the board's answer, but we would like to have more facts before accepting it as sufficient. In the absence of them, we do not think it would be fair to either party to pronounce on it.
- D In these circumstances, we think we must grant the widow a new trial. There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge. The widow and the National Coal Board stand in this respect on the level. No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it.
- E Counsel for the widow urged us in any event to give a ruling on the true interpretation of s. 49 of the Act and of the Support Regulations; but we do not think it desirable so to do. If there was a breach of the section or regulations there is still the question under s. 102 (8) whether it was reasonably practicable to avoid or prevent the breach. This is closely allied to the issue at common law whether the board took every reasonable precaution that the situation demanded.
- F So close indeed are these issues that we think that, if the board are exempt from liability at common law, they will be exempt under s. 102 (8) also; and if they are liable at common law, there is no need to consider whether they are also liable by statute.

We have come to the conclusion with much regret that the only thing we can do in this case is to order a new trial. We allow the appeal accordingly.

G

Appeal allowed: new trial ordered.

Solicitors: *Jaques & Co.*, agents for *Cyril Jones, Son & Williams*, Wrexham (for the widow); *Donald H. Haslam*, agent for *P. E. Lissant*, Manchester (for the National Coal Board).

[*Reported by* HENRY SUMMERFIELD, Esq., *Barrister-at-Law.*]

RICHARDS v. HIGHWAY IRONFOUNDERS (WEST BROMWICH), LTD.

[QUEEN'S BENCH DIVISION (Pearson, J.), February 25, 26, 27, 28, March 1, 4, 5, 7, 1957.]

Factory—Dust—“ All practicable measures ” to be taken—Substantial quantity of dust of any kind—Dust not known at date of accident to be dangerous—Masks not provided—Effective masks if supplied would not have been used by workmen—Provision of effective masks not a practicable measure—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 67), s. 47 (1).

The plaintiff was employed by the defendants as an iron-moulder in their factory from 1929 to 1952. In the course of the knocking-out process at which he worked a substantial quantity of visible dust was given off to which he was exposed. Exhaust appliances or respirators were not provided. In 1946 the plaintiff contracted silicosis. Before 1950 it was not known that invisible particles of dust, produced in the knocking-out process, were dangerous for men to inhale. A particular form of respirator, the Mark IV mask, provided protection against fine invisible particles of dust. Other types of mask, which were lighter and easier to use, provided protection against the larger visible particles but not against the fine invisible particles. It was unlikely that men in the factory, working as iron-moulders, would have used the Mark IV respirator at that time if it had been provided. The plaintiff sued the defendants for damages for breach of statutory duty under s. 47 (1)* of the Factories Act, 1937, for failing to take all practicable measures to protect their employees against inhalation of dust.

Held: the provision of a particular form of protection, viz., the Mark IV respirator, to protect employees against “ any substantial quantity of dust ” was not at the time (1940-50) a “ practicable measure ”, such as the defendants would have been bound to take under s. 47 (1), since, having regard to the lack of knowledge at that time of the danger from invisible particles of sand emitted in foundries, iron-moulders employed at the factory would have been unlikely to have worn the Mark IV respirator if it had been provided.

[As to the obligation to protect employees in a factory against dust, see 17 HALSBURY'S LAWS (3rd Edn.) 120, 121, para. 201.]

For the Factories Act, 1937, s. 47 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1038.]

Cases referred to:

- (1) *Ebbs v. Whitson (James) & Co., Ltd.*, [1952] 2 All E.R. 192; [1952] 2 Q.B. 877; 3rd Digest Supp.
- (2) *Carmichael v. Cockburn & Co., Ltd.*, [1956] S.L.T. 241.
- (3) *Nichols v. Hall*, (1873), L.R. 8 C.P. 322; 42 L.J.M.C. 105; 28 L.T. 473; 37 J.P. 424; 2 Digest 302, 705.
- (4) *Sherras v. de Rutzen*, [1895] 1 Q.B. 918; 64 L.J.M.C. 218; 72 L.T. 839; 59 J.P. 440; 14 Digest (Repl.) 39, 90.
- (5) *Harding v. Price*, [1948] 1 All E.R. 283; [1948] 1 K.B. 695; [1948] L.J.R. 1624; 112 J.P. 189; 2nd Digest Supp.
- (6) *Gregson v. Hick Hargreaves & Co., Ltd.*, [1955] 2 All E.R. 860; *reversd.*, C.A., [1955] 3 All E.R. 507; 3rd Digest Supp.

* The relevant part of s. 47 (1) provides: “ In every factory in which, in connexion with any process carried on, there is given off . . . any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust . . . and to prevent its accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust . . . so as to prevent it entering the air of any workroom.”

- A (7) *Crookall v. Vickers-Armstrong, Ltd.*, [1955] 2 All E.R. 12; 3rd Digest Supp.
 (8) *Bonnington Castings, Ltd. v. Wardlaw*, [1956] 1 All E.R. 615; [1956] A.C. 613.

Action.

- B This was a new trial of an action, originally tried before DEVLIN, J., in March, 1955, and remitted, by order of the Court of Appeal made on July 26, 1955, reported [1955] 3 All E.R. 205, for re-trial on one question, viz., whether the defendants failed to comply with the statutory obligation under s. 47 (1) of the Factories Act, 1937, by failing to supply masks, and, if so, what damage the plaintiff suffered by reason thereof.

- C The plaintiff was employed from Easter, 1929, until 1952 as a moulder at the defendants' factory where iron-founding operations were carried on. The operation of iron-moulding in this factory involved the hot knock-out process and the factory practised green sand moulding. In the course of the knock-out dust was emitted. Until about 1950 the dust was not known to be dangerous. By about 1946 the plaintiff was seriously affected with silicosis and by 1948 was incurably ill. In about 1950 it was established that among the dust given off in the knocking-out process were small invisible particles which were liable to cause silicosis after being inhaled over years; according to medical evidence at the original trial it would take about fifteen years of exposure to the dust in the factory to render a man dangerously and incurably afflicted. Exhaust appliances were not installed and masks were not provided for the moulders. At the new trial the plaintiff did not seek to re-open the question whether dust had been given off "of such a character and to such an extent as to be likely to be injurious or offensive" within s. 47 (1) of the Factories Act, 1937, and accordingly the decision that, having regard to the state of knowledge at the time, there was no breach of that branch of s. 47 (1), stood. The defendants sought to re-open the question, which they had formerly conceded against themselves, whether any substantial quantity of dust had been emitted, and they were permitted to re-open this question. The court further held that the defendants were not estopped from adducing any relevant evidence which bore on the suitability or unsuitability of the Mark IV mask either absolutely or in comparison with other masks for regular use by moulders in foundry conditions at the relevant time. The types of masks on which evidence was before the court were the Mark IV, the Martindale and the Pulsafe.

- G *Marven Everett, Q.C.*, and *G. Green* for the plaintiff.
F. W. Beney, Q.C., and *P. M. O'Connor* for the defendants.

- H PEARSON, J., after referring to the previous proceedings and defining the scope of the new trial before him, said: Now I must say something about the construction of s. 47 (1) of the Factories Act, 1937. If either of the two conditions there stated is fulfilled, the occupier has to take practicable measures. It is not practicable for the occupier to take measures in relation to something of which he neither is nor ought to be aware. Therefore the phrase "likely to be injurious or offensive to the persons employed" has to be interpreted and has been interpreted in a subjective sense, as meaning likely to be injurious or offensive according to the estimation of a reasonably well-informed factory occupier, or which the actual occupier knew or ought to have known to be likely to be injurious or offensive. This matter is dealt with in *Ebbs v. James Whitson & Co., Ltd.* (1) ([1952] 2 All E.R. 192 at pp. 194, 195) where SINGLETON, L.J., and perhaps also DENNING, L.J., impliedly accepted MCNAIR, J.'s interpretation. There is also *Carmichael v. Cockburn & Co., Ltd.* (2) ([1956] S.L.T. 241).

- I Counsel for the defendants contends that the same principle applies, when the facts make it applicable, to the second condition, viz., when a substantial quantity of dust is given off. It is not practicable for the occupier to take measures in relation to dust, of the existence of which he neither is nor ought

to be aware. The words "substantial quantity of dust" should be interpreted as meaning a substantial quantity of dust of which the occupier is or ought to be aware. Counsel supported this argument by citing *Nichols v. Hall* (3) ((1873), L.R. 8 C.P. 322), where the word "practicable" was used in the relevant provision; *Sherras v. de Rutzen* (4) ([1895] 1 Q.B. 918); and *Harding v. Price* (5) ([1948] 1 All E.R. 283), where again the word "practicable" was used in the relevant provisions. Counsel also cited a passage from the judgment of JENKINS, L.J., in *Gregson v. Hick Hargreaves & Co., Ltd.* (6) ([1955] 3 All E.R. 507). JENKINS, L.J., referring to the decision in the court of first instance said (*ibid.*, at p. 514):

"The learned judge, taking the view that all practicable measures had been taken against the dust which the defendants could see, or of the existence of which they knew, came to the conclusion that they could not be held liable for damage done by the silica dust, which was treated by him as a distinct and invisible cloud of minute particles. With due respect to him, I think it is wrong for the present purpose to treat the silica dust as separate from the rest. No one, I apprehend, would suggest that under s. 47 (1) employers such as the defendants are required to guard against elements the existence of which is unknown and the presence of which cannot be detected. The defendants' duty under the second branch of the sub-section is to protect against dust so far as practicable. That, as it seems to me, means to protect against the ordinary, visible, dust arising in the course of the foundry operations. Once it became known that there was some other noxious element produced by the process, it would be their duty under the first branch of the section to guard against it; but, *prima facie*, as matters stood at all events in 1938, their duty was simply to prevent so far as practicable the inhalation of dust, that is to say, the dust manifestly produced by their moulding operations. In my judgment, however, if they had taken all practicable measures to prevent the inhalation of that dust, the result in all probability would have been to protect the plaintiff against the injurious element in that dust in the shape of free silica, even though the presence of that injurious element may not have been known."

I would say with respect that I think that that passage is right, and that it brings out clearly the somewhat artificial nature of the issue in this case as it now arises. The plaintiff is contending that it is quite true that he did not know and the defendants did not know and nobody knew at the relevant period that this special element of free silica risk was contained in the factory operations, and that the factory operations gave rise to invisible dust which could not be seen and was not known, and about which the defendants could not be expected to take any measures in order to protect the plaintiff. But, so the plaintiff contends, there was a substantial quantity of ordinary visible dust, and measures ought to have been taken against that; and if the defendants had taken measures against that they would have provided, for instance, the Mark IV mask, and that would accidentally and incidentally have had the effect of protecting the plaintiff against the unknown invisible particles. That is really what the issue now is, and it is an odd and rather artificial issue, but still it has to be faced.

It follows from what I have said that I accept counsel for the defendants' argument, and there are two points that arise: first, in deciding whether there was a substantial quantity of dust arising, particularly from the knocking-out operations, one has to consider only the visible dust, because the invisible dust which was at the relevant time unknown has to be disregarded: secondly, in considering whether the Mark IV mask was a practicable measure at the relevant time and likely to be preferred to other masks such as the Martindale or the Pulsafe, one has to remember that both employers and employees would have

A in mind only the visible dust and not the invisible dust, and that they would be unaware of the silicosis risk involved.

[HIS LORDSHIP, having considered the evidence on the question whether a substantial quantity of dust was given off, found that a substantial quantity of ordinary visible dust was given off by the operations in question but that it was not an enormous quantity, not a very substantial quantity, although B he had no doubt that it was substantial. HIS LORDSHIP then considered the history of the discovery of the danger from the invisible particles of dust and continued:] Now I come to the main questions in this trial, which relate to the Mark IV mask. There is the question of practicability: whether in the 1940s provision of the Mark IV masks and exhortations of the man to wear them would have been practicable measures to protect the men against inhalation of C dust. There is also the question of probability, affecting causation: in the 1940s, if the defendants had decided to supply suitable masks to protect the iron-moulders against inhalation of the visible dust which was known to exist, would the defendants probably have provided, and would the plaintiff, if given the choice probably have chosen, the Mark IV mask rather than a mask of one of the other types which were then on sale and in use?

D I should at this stage refer to the passage in the judgment of SIR RAYMOND EVERSHED, M.R., in which he set out one of the matters to be investigated in this new trial. The most material passage is ([1955] 3 All E.R. at p. 211):

E “Has then the plaintiff shown that at the relevant dates . . . the Mark IV mask was regarded by competent persons, including technicians qualified to speak on these matters, as what I will call the best all-purpose mask; so that in the natural course of events an obligation to take all practicable measures would inevitably involve, or properly and naturally involve, a supply of Mark IV masks?”

That seems to me to be the question. [HIS LORDSHIP then reviewed the evidence concerning the Mark IV mask and two other types of mask which F were lighter, the Martindale and the Pulsafe. HIS LORDSHIP found that the Mark IV respirator could be worn by a person doing heavy work and was efficient to protect the wearer against the dangerous invisible particles of dust; and that the two lighter types of mask were easier to wear, were efficient against visible dust but not against the invisible particles. HIS LORDSHIP reviewed the evidence concerning the probability whether the men would have worn the G Mark IV masks, if provided, referring in the course of his review to *Crookall v. Vickers-Armstrong, Ltd.* (7) ([1955] 2 All E.R. 12), and continued:] The question is not altogether easy to decide. One has to consider practicability, and what would have been likely to happen as a matter of causation. I think that the right finding on the first point is that the Mark IV was, on the state of information or knowledge prevailing in the 1940s, probably not a practicable measure H for dealing with dust which was only substantial in quantity and which was not known to contain fine particles and was not known to be dangerous. In that state of knowledge the men would reasonably refuse to wear it, and so there would be no protection; I think that that is the probable view. If the mask was not worn in practice, in ordinary workshop conditions and in daily use, then it would not be a practicable measure for protecting the men against I inhalation of dust, because, if they did not wear it, the inhalation of dust would continue. Secondly, I think that it is clear that the Mark IV is in effect a special purpose respirator and not an all-purpose respirator. If all that is needed is to keep out the ordinary visible dust, something much less uncomfortable, something much lighter and less restrictive to breathing, can be worn. Therefore, the Mark IV would not be the natural or reasonable mask to use for dealing with ordinary visible dust in the 1940s. At that period the reasonable and natural mask to be used for this purpose would be the Martindale or the Pulsafe. If the defendants had decided in the 1940s to supply suitable masks to protect

the iron-moulders against inhalation of the visible dust which was known to exist, the defendants would not have been likely to supply the Mark IV; and the plaintiff, if given a choice between different masks, would not have been likely to choose the Mark IV. Therefore the likely choice by both sides would have been the Martindale for that purpose at that time. I do want to emphasise that one has to perform the operation of projecting one's mind back to the 1940s, and one has to consider the question on a basis which is now artificial, because one has to consider the state of knowledge at that time. All that the plaintiff and defendants would have thought that they were dealing with was the substantial but not enormous quantity of visible dust. There was the Martindale mask which, according to the information available at the time, was quite adequate for the purpose, and still is adequate for the purpose of dealing with the larger particles.

For that reason it seems to me impossible to suppose that the defendants, when they had to choose, or the men, when the choice was left to them, would have chosen the heavier, hotter mask and the one more restrictive of breathing, in preference to the smaller, lighter, simpler, cheaper, and more comfortable Martindale. Therefore I hold that there was no relevant breach of s. 47 (1) of the Factories Act, 1937, because the Mark IV was not then a practicable measure for protection of employees against inhalation of the dust. Secondly, if the Mark IV was a practicable measure, nevertheless it would probably not have been supplied, and, if supplied, it would probably not have been used, and therefore the alleged causation has not been proved.

I should mention counsel for the plaintiff's argument on the vital issue of causation. He said that he had proved that there was a substantial quantity of dust, and therefore a duty to take all practicable measures, and that he had proved the failure of the defendants to take the practicable measure of supplying the Mark IV mask. Then, he contended, the onus shifts to the defendants to absolve themselves from liability. I do not believe, however, that there is any shifting of the burden of proof. [HIS LORDSHIP referred to *Bonnington Castings, Ltd. v. Wardlaw* (8) ([1956] 1 All E.R. 615) and quoted a passage from the speech of LORD REID (*ibid.*, at p. 618) and referred to a similar passage in the speech of LORD TUCKER (*ibid.*, at pp. 620, 621) and continued:] I think that the plaintiff has to prove a breach causing the damage. He has to show that there was a duty to take all practicable measures; therefore, that the defendants had a duty to provide suitable masks; that if they had performed their duty, they would probably have done so by providing a Mark IV mask, and that the plaintiff, if given a chance, would probably have chosen the Mark IV mask; that the Mark IV mask, if worn, would have retarded the progress of the disease; and, therefore, that there was a breach causing damage. That is the plaintiff's chain of proof, and in my view the middle links of the chain are missing. For that reason the misfortune in this case falls on the plaintiff, and he is not entitled to recover anything in this action.

[HIS LORDSHIP considered the question what damage would have been recoverable by the plaintiff if the decision on liability had been in his favour.]

Judgment for the defendants.

Solicitors: *Beckingsales*, agents for *Wm. Bache & Sons*, West Bromwich (for the plaintiff); *Clifford-Turner & Co.* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

R. v. SPECIAL COMMISSIONERS OF INCOME TAX, *Ex parte* LINSLEY'S (ESTABLISHED 1894), LTD.

[COURT OF APPEAL (Jenkins, Hodson and Sellers, L.JJ.), February 11, 12, 13, March 6, 1957.]

Surtax—Investment company—Directions and apportionments—Compellability of direction—Profits tax, if payable, exceeding actual income from all sources—Appeal against profits tax—Meaning of “payable”—When profits tax “falls to be computed”—Right of election relieving from profits tax—Power dependent on issue of surtax direction—Mandamus to commissioners to issue direction—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 245, s. 262 (1)—Finance Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 33), s. 68 (1)—Finance Act, 1947 (10 & 11 Geo. 6 c. 35), s. 31 (3).

A company which, in the previous year of assessment for tax purposes, had admittedly been an investment company within the meaning of s. 257 of the Income Tax Act, 1952, had an actual income from all sources (an investment income) of £8,920 in the relevant period (Apr. 6, 1953, to May 7, 1953) and was assessed to the profits tax in the sum of £16,421. If a direction were given by the Special Commissioners of Income Tax under s. 245* and s. 262* of the Income Tax Act, 1952, the income of the company for the period would be deemed to be the income of its members and would subsequently be apportioned among them for purposes of surtax. By s. 68 (1)† of the Finance Act, 1952, the grossed amount (i.e., £29,856) of the profits tax “payable” by the company would be deductible in computing its actual income when that should “fall to be computed” for apportionment for surtax on its members. But on the direction being made under s. 245 and s. 262 the company and such of its members as were not individuals would have been entitled to make an election under s. 31 (3)‡ of the Finance Act, 1947, the effect of which would have been that the company would not have been chargeable to the profits tax. The commissioners refused to give such a direction, contending that they were under no duty and had no power to do so, since the company had no income to which their direction could apply and since in the relevant period the company was not an investment company within the meaning of s. 262, as it had no income in that period. The company had appealed against the assessment to profits tax, which appeal was still pending. The company obtained an order of mandamus requiring the commissioners to give a direction under s. 245 and s. 262. On appeal from that order,

Held: (i) the order of mandamus was rightly granted because the company had an actual income for the period, to which income a direction under s. 245 of the Income Tax Act, 1952, could apply, since—

(a) although profits tax was by s. 68 (1) of the Finance Act, 1952, deductible in computing the company's income for income tax purposes, yet the income of the company did not “fall to be computed” within the meaning of those words in s. 68 (1) until a direction had been given by the Special Commissioners, and

(b) when a direction was given, a right of election under s. 31 (3) of the Finance Act, 1947, arose, and if this were exercised no profits tax would be payable by the company, and

(c) until a direction had been given, the amount of the profits tax was not a sum that was certainly and presently payable, and thus was not an

* The relevant terms of s. 245 and s. 262 of the Income Tax Act, 1952, are printed at p. 173, post.

† The terms of s. 68 (1) of the Finance Act, 1952, are printed at p. 171, letter G, post.

‡ The terms of s. 31 (3) of the Finance Act, 1947, are printed at p. 172, letters E to I, post.

amount "payable" within the meaning of that word in s. 68 (1); and therefore the amount of the grossed profits tax (£29,856) was not deductible from the actual income (£8,920) of the company.

(ii) even if the question whether the profits tax were payable fell to be determined before any direction under s. 245 were given, the tax was not "payable" within the meaning of that word in s. 68 (1) of the Finance Act, 1952, having regard particularly to para. 5 of Part 2 of Sch. 5 to the Finance Act, 1937, under which profits tax in dispute was not payable pending an appeal.

Decision of the QUEEN'S BENCH DIVISIONAL COURT ([1956] 3 All E.R. 577) affirmed.

[For s. 245, s. 262 of the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 232, 252; for s. 68 of the Finance Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 224; and for s. 31 (3) of the Finance Act, 1947, see 12 HALSBURY'S STATUTES (2nd Edn.) 776.]

Cases referred to:

- (1) *Whitney v. Inland Revenue Comrs.*, [1926] A.C. 37; 95 L.J.K.B. 165; 134 L.T. 98; 10 Tax Cas. 88; 28 Digest 105, 649.
- (2) *Cockerline (W. H.) & Co. v. Inland Revenue Comrs.*, (1930), 144 L.T. 84; 16 Tax Cas. 1; Digest Supp.
- (3) *Williams v. Henry Williams*, (Nov. 3, 1926), not reported.
- (4) *Inland Revenue Comrs. v. John Dow Stuart, Ltd.*, [1950] 1 All E.R. 1; [1950] A.C. 149; 1950 S.C. (H.L.) 31; 31 Tax Cas. 274; 2nd Digest Supp.
- (5) *F.P.H. Finance Trust, Ltd. v. Inland Revenue Comrs.*, [1944] 1 All E.R. 653; [1944] A.C. 285; 113 L.J.K.B. 339; 171 L.T. 17; 26 Tax Cas. 131; 2nd Digest Supp.

Appeal.

The Crown appealed against an order of a Queen's Bench Divisional Court (LORD GODDARD, C.J., HALLETT and DONOVAN, JJ.), made on Oct. 19, 1956, and reported [1956] 3 All E.R. 577, directing that an order of mandamus be issued to the Special Commissioners of Income Tax, requiring them to give a surtax direction under s. 245 and s. 262 of the Income Tax Act, 1952, in respect of the applicant company in respect of the period Apr. 6 to May 7, 1953.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Sir Reginald Hills and E. Blanshard Stump for the appellants, the Special Commissioners of Income Tax.

Cyril King, Q.C., and H. H. Monroe for the respondents.

Cur. adv. vult.

Mar. 6. JENKINS, L.J., read the following judgment of the court: This is an appeal by the Special Commissioners from an order of mandamus made by the Queen's Bench Divisional Court on Oct. 19, 1956, whereby the Special Commissioners were ordered and commanded to give a direction under s. 245 and s. 262 of the Income Tax Act, 1952, in respect of the period from Apr. 6, 1953, to May 7, 1953 (both dates inclusive), in relation to the applicant (now respondent) company, Linsley's (Established 1894), Ltd., which went into voluntary liquidation on the latter date.

To begin with a broad statement of the nature of the case, the effect of such a direction (which, according to the company, the Special Commissioners are bound to make under the mandatory provisions of s. 262) would be (a) to make the actual income of the company from all sources for the relevant period apportionable amongst its members for surtax purposes; and (b) to give under

- A the somewhat complicated provisions of s. 31 (3) of the Finance Act, 1947, a right of election exercisable jointly by the company and any of its members other than individuals (that is to say, bodies corporate as distinct from natural persons) which if exercised would (to put the matter very shortly) operate to relieve the company from a substantial liability in respect of profits tax, while on the other hand rendering apportionable amongst its members for surtax
- B purposes the income which, but for the election, would have been absorbed by the profits tax.

The case at first sight seems to involve what DONOVAN, J., in delivering the judgment of the Divisional Court, described as an unusual reversal of rules. It must be seldom that taxpayers seek to compel the Special Commissioners to tax them, and as a general rule the Special Commissioners need no compulsion

C in that regard. But the figures are in fact such that the liability in respect of profits tax far exceeds the amount of income which on cancellation of that liability would be apportionable for surtax purposes.

- It is vital to the company's contention that the company should be held to be an "investment company" within the meaning of s. 262 of the Income Tax Act, 1952, for it is only in relation to companies of that character that the
- D Special Commissioners are enjoined in mandatory terms to give a direction of the nature sought. The Attorney-General for the Special Commissioners presented a subsidiary argument to the effect that the company was not at the material time an investment company within the meaning of s. 262, but without prejudice to that subsidiary contention we propose to deal with the main arguments in the case on the assumption that it was, reserving for later
- E examination the Attorney-General's submission to the contrary.

- The main argument for the Special Commissioners was to the effect that, even if the company was an investment company within the meaning of s. 262 at the material time, they are under no statutory duty, and indeed have no power, to give the direction in question, because s. 68 (1) of the Finance Act, 1952, requires them, in computing the company's actual income from all sources for the purposes of s. 262, to make a deduction in respect of the profits tax liability which when made has the effect of reducing such actual income to a minus quantity. There is thus no income in respect of which any direction or apportionment can be given or made, and the mandatory terms of s. 262 of the Income Tax Act, 1952, cannot be construed as obliging the Special Commissioners to give a direction or make an apportionment in respect of income which amounts
- F to nil, or in other words non-existent income; *lex non cogit ad impossibilia*. It follows, according to the argument for the Special Commissioners, that, as no direction or apportionment can be given or made, the right of election conferred by s. 31 (3) of the Finance Act, 1947, can never be exercisable; for that right of election only arises when there has been a direction and apportionment. Thus the submission made on behalf of the Special Commissioners would, if
- G accepted, lead inevitably to the conclusion that the liability in respect of profits tax must stand, and is not to be exchanged under the provisions of s. 31 (3) of the Finance Act, 1947, for the less onerous liability to surtax which the relief from the liability in respect of profits tax afforded by that sub-section would, if applicable, entail.
- H

- On the other hand, it is argued for the company that on the true construction
- I of the relevant legislation, and in particular s. 68 (1) of the Finance Act, 1952, any deduction in respect of profits tax enjoined by s. 68 (1) only falls to be made, at earliest, when a direction has been given; that apart from such deduction there is actual income from all sources of the company for the relevant period in respect of which a direction can, and in view of the mandatory terms of s. 262 of the Income Tax Act, 1952, must, be given; and that when a direction has been given and the earliest time at which it may be proper to make any deduction enjoined by s. 68 (1) of the Finance Act, 1952, has consequently arrived, the

question of deduction must still remain in suspense, inasmuch as s. 68 (1) only enjoins the deduction in respect of any amount "payable" by way of profits tax, and the amount here in question does not answer that description, because it is not an amount certainly payable, but an amount which will become payable in one contingency, i.e., the non-exercise of the right of election conferred by s. 31 (3) of the Finance Act, 1947, but which will not become payable in another contingency, i.e., in the event of such right of election being exercised.

The argument for the company is also put on the more general ground that, apart from the submission made in regard to the necessity of a direction by the Special Commissioners as a condition precedent to any deduction in respect of profits tax under the provisions of s. 68 (1) of the Finance Act, 1952, the amount claimed by the Special Commissioners to be deductible was not "payable" within the meaning of that sub-section, in view of the potential right of election conferred by s. 31 (3) of the Finance Act, 1947, which if exercised would prevent it from ever becoming payable, and also in view of a pending appeal by the company against the relevant assessment or assessments to profits tax.

It is further submitted on the company's side, though somewhat faintly, that it is not impossible for the Special Commissioners to give a direction and make an apportionment in respect of a nil amount of income. The company also puts forward an argument rather in the nature of a plea ad misericordiam, to the effect that the Special Commissioners ought not to manipulate the legislation so as to defeat the right of election conferred in clear terms by s. 31 (3) of the Finance Act, 1947. This argument may perhaps be regarded as offset by the retort made by counsel for the Special Commissioners to the effect that the broad intention of s. 31 (3) of the Finance Act, 1947, and s. 68 (1) of the Finance Act, 1952, is to protect persons who suffer surtax under the legislation taxing the undistributed profits of companies from suffering profits tax as well, rather than to enable persons on whom no liability to surtax would otherwise fall to exchange a liability to profits tax for a less onerous liability to surtax.

The decision of the Divisional Court in favour of the company was, as we understand the judgment of the court delivered by DONOVAN, J., founded wholly on the view that the amount of profits tax in respect of which the Special Commissioners claimed to make the deduction prescribed by s. 68 (1) of the Finance Act, 1952, was not "payable" within the meaning of that sub-section, in view of the right of election conferred by s. 31 (3) of the Finance Act, 1947. We may note that, without deciding the point, the judgment of the court expressed the opinion that there were "formidable difficulties" in the way of the argument submitted by counsel for the company to the effect that the Special Commissioners were bound to "direct" even if the income was nil, and to make an apportionment of nil.

We hope that this outline of the nature of the case, in which we have referred in general terms to the more relevant statutory provisions, will aid appreciation of the bearing on the question to be decided of the various enactments to which we must next refer in some detail.

The law relating to surtax on the undistributed profits of companies was consolidated by the Income Tax Act, 1952, and accordingly the earlier enactments so consolidated require no more than a brief reference. As is well-known, this line of legislation began with s. 21 of the Finance Act, 1922, which may perhaps be described as the ancestor of s. 245 of the Income Tax Act, 1952. The short effect of sub-s. (1) of the former section was to empower (not enjoin) the Special Commissioners, where it appeared to them that a company to which the section applied (defined by sub-s. (6), so far as material for the present purpose, as any company under the control of not more than five persons) had not distributed a reasonable part of its income in such a way as to make it part of the income of the members for surtax (or as it was then super-tax) purposes, to direct that the income of the company should for those purposes be deemed

A to be income of the members and the amount thereof should be apportioned among the members.

Section 20 of the Finance Act, 1936, singled out for special treatment companies termed "investment companies", and therein defined as companies whose income consisted mainly of

B "investment income, that is to say, income which, if the company were an individual, would not be earned income as defined in s. 14 (3) of the Income Tax Act, 1918."

C Section 14 (1) of the Finance Act, 1939 (which may perhaps be described as the ancestor of s. 262 (1) of the Income Tax Act, 1952) introduced a system of automatic direction and apportionment with respect to every investment company (as defined by the Act of 1936) to which s. 21 of the Act of 1922 applied. The short effect of this new provision was that with respect to every such investment company the Special Commissioners were enjoined to give a direction and make the consequential apportionment under s. 21 (1) of the Act of 1922, however much or however little of the income of the company had been distributed. That is the origin of the mandatory provision now contained in D s. 262 (1) of the Income Tax Act, 1952, on which the company in the present case relies.

E Before passing to the Income Tax Act, 1952, and the Finance Act of the same year, it will, we think, be convenient to refer to some of the provisions in regard to profits tax contained in the Finance Acts, 1937 and 1947. Profits tax was imposed under the name of national defence contribution by s. 19 of the Finance F Act, 1937, and it was originally charged on the profits arising in each chargeable accounting period (as therein defined) from any trade or business carried on in the United Kingdom (with immaterial exceptions) at the rate of five per cent. in the case of a corporation and four per cent. in other cases. Section 24 of the Act of 1937 has some bearing on the question whether the profits tax in respect of which the Special Commissioners in the present case claim that the disputed deduction from the company's actual income from all sources falls to be made under s. 68 (1) of the Finance Act, 1952, is "payable" within the meaning of that sub-section. It provides as follows:

G " (1) The national defence contribution shall be assessed and collected by the Commissioners of Inland Revenue in accordance with the provisions of Part 1 of Sch. 5 to this Act, and shall be due and payable at the expiration of one month from the date of the assessment, and shall be recoverable as a debt due to His Majesty from the person on whom it is assessed.

" (2) Any person who is dissatisfied with any such assessment may appeal subject to and in accordance with the provisions of Part 2 of the said Schedule.

H " (3) The provisions of Part 3 of the said Schedule shall have effect for the purpose of carrying into effect the provisions of this section and of Parts 1 and 2 of the said Schedule and otherwise for supplementing those provisions."

I We also note, as bearing on the same question, para. 1 of Part 1 of Sch. 5 to the Act of 1937, which provides as follows:

" The national defence contribution payable in respect of any chargeable accounting period shall be assessed on the person carrying on the trade or business in that period ";

and para. 5 of Part 2 of the same Schedule, which provides as follows:

" Notwithstanding that an appeal is pending against an assessment to the national defence contribution, such part of the contribution assessed

as appears to the Commissioners of Inland Revenue not to be in dispute shall be collected and paid in all respects as if it were a contribution charged by an assessment in respect of which no appeal was pending, and on the determination of the appeal any balance chargeable in accordance with the determination shall be paid, or any amount over-paid shall be repaid, as the case may require."

Section 25 of the Act of 1937 made profits tax a deductible expense for income tax purposes.

Radical alterations in relation to profits tax were introduced by the Finance Act, 1947. It is fortunately unnecessary to refer in detail to the highly complicated provisions of this Act. By s. 30, the rate of tax was increased by twenty-five per cent. reducible by relief for non-distribution, and on the other hand increasable by distribution charges, in the events and manner therein provided. By s. 31 (1) individuals were exempted from the tax, and by sub-s. (2) of the same section it was provided as follows:

"The said s. 19 shall not apply to any trade or business carried on by a body corporate during any chargeable accounting period if, for a year or period which includes, or for years or periods which together include, the whole of the chargeable accounting period, the actual income of the body corporate from all sources is apportioned under or for the purposes of s. 21 of the Finance Act, 1922, and all the persons to whom it is apportioned are individuals."

Section 31 (3) is important as conferring the right of election on which the company in the present case relies. It is in these terms:

"If, for a year or period which includes, or for years or periods which together include, the whole of a chargeable accounting period of a trade or business carried on by a body corporate, the actual income of the body corporate from all sources is apportioned under or for the purposes of the said s. 21, and some (but not all) of the persons to whom the income is apportioned are individuals, then if by notice in writing given to the commissioners within six months from the end of that chargeable accounting period, or such longer time as the commissioners may in any case allow, the body corporate and the persons other than individuals to whom the income is apportioned jointly so elect as respects that chargeable accounting period and each subsequent chargeable accounting period the whole of which is included in a year or period or years or periods for which the said actual income is so apportioned to those persons and persons who are individuals, the provisions of this Part of this Act shall apply as if—(a) the trade or business had been carried on, during that and each such subsequent chargeable accounting period, in partnership by the persons to whom the income is apportioned, and the share of any one of them of the profits and losses of the trade or business therefor had been equal to the proportion of the income apportioned for the year or period or years or periods in question which is apportioned therefor to that one of them; and (b) any payment which is received from the body corporate during that or any such subsequent chargeable accounting period by any of the persons to whom the income is apportioned, and which is not allowable as a deduction in computing the profits of the trade or business therefor, had not been made; and the body itself shall not be chargeable to profits tax for that or any such subsequent chargeable accounting period."

Finally, so far as the Act of 1947 is concerned, s. 35 (1) (c) has, as we understand it, the effect of making distributions in the winding-up of a company other than distributions of capital rank as distributions for the purposes of the tax.

A We now come to the Income Tax Act, 1952. That Act replaced s. 21 (1) of the Finance Act, 1922, by s. 245, which, as one of the sections directly relevant in this case, we had better read verbatim:

B “With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members.”

D The Income Tax Act, 1952, also by s. 248 (1) and (2) (again substantially replacing earlier legislation) provided as follows:

E “(1) Where a direction has been given under s. 245 of this Act with respect to a company, the apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interests of the members.

F “(2) Notice of any such apportionment shall be given by serving on the company a statement showing the amount of the actual income from all sources adopted by the Special Commissioners for the purposes of the said s. 245 and either the amount apportioned to each member or the amount apportioned to each class of shares, as the commissioners think fit.”

It also replaced s. 14 (1) of the Finance Act, 1939, by s. 262 (1), which again is one of the immediately relevant provisions and is in these terms:

G “Subject to the provisions of this section with respect to companies with estate or trading income, the whole of the actual income from all sources, for every year of assessment, of every investment company to which s. 245 of this Act applies shall, however much or however little thereof has been distributed to its members, be deemed for the purposes of assessment to surtax to be the income of the members of the company, and accordingly the Special Commissioners shall give a direction under the said s. 245 in respect of each year of assessment in relation to every such company without considering whether or not the company has distributed a reasonable part of its said income.”

H We think the only other provisions of the Income Tax Act, 1952, to which we need refer at length are para. (a) of the proviso to s. 262 (2), which is in these terms:

I “Provided that—(a) no deduction shall be allowed in computing the actual income from all sources of the company which would not be allowable in computing the total income of an individual for the purposes of this Act, other than deductions for any profits tax payable by the company or for any such sums disbursed by the company as expenses of management as the Special Commissioners consider reasonable, having regard to the requirements of the company's business and, in the case of directors' fees

or other payments for services, to the actual services rendered to the company"; A

and s. 255 (3) which reproduces in substantially identical terms para. 6 of Sch. 1 to the Finance Act, 1922, and is in these terms:

"In computing, for the purposes of this Chapter, the actual income from all sources of a company for any year or period, the income from any source shall be estimated in accordance with the provisions of this Act relating to the computation of income from that source, except that the income shall be computed by reference to the income for such year or period as aforesaid and not by reference to any other year or period." B

We should, however, mention that s. 256 (1) provides, so far as material, that s. 245 shall (as did s. 21 of the Finance Act, 1922) apply to any company which is under the control of not more than five persons; that s. 257 (2) preserves (mutatis mutandis) the old definition of an "investment company"; and finally that s. 25 of the Finance Act, 1937, which as we have said made profits tax a deductible expense for income tax purposes, was repealed by the Income Tax Act, 1952, but re-enacted in substantially identical terms by s. 141 of that Act. C D

The Finance Act, 1952, repealed s. 141 of the Income Tax Act, 1952, and by s. 33 (1) provided as follows:

"The profits tax payable for any chargeable accounting period ending after the end of the year 1951 shall not be allowed as a deduction in computing the profits or gains or losses of a trade or business for the purposes of income tax for the year 1951-52 or any subsequent year of assessment, and sums disbursed in discharge of profits tax for any such period shall not be treated as sums disbursed as expenses of management for the purposes of any income tax relief for any such year of assessment in respect of expenses of management." E

We come at length to s. 68 of the Finance Act, 1952, sub-ss. (1) and (2) of which are in these terms: F

"(1) Where for the purposes of s. 21 of the Finance Act, 1922, or Ch. III of Part 9 of the Income Tax Act, 1952 (which provide for the payment of surtax, in certain cases, on undistributed income of companies), the actual income from all sources of a body corporate for a year or period ending after the end of the year 1951 falls to be computed under para. 6 of Sch. 1 to the said Act of 1922 or s. 255 (3) of the said Act of 1952, then, if any amount is payable by the body corporate by way of the profits tax or the excess profits levy, respectively, for any chargeable accounting period falling wholly or partly within that year or period, a deduction shall be allowed, in computing the said actual income, of such an amount as would, after deduction of income tax at the standard rate in force for the year of assessment during which the said year or period ends, be equal to so much of the amount so payable by the body corporate as is apportionable to the said year or period: Provided that this sub-section does not apply in relation to any chargeable accounting period ending at or before the end of the year 1951. G H I

"(2) Paragraph (a) of the proviso to s. 262 (2) of the Income Tax Act, 1952 (which relates to the deductions allowable in computing the actual income from all sources of an investment company in relation to which a direction is in force under sub-s. (1) of that section), shall have effect as if instead of authorising a deduction for profits tax payable by the company it authorised a deduction, in relation to any amount payable by the company by way of profits tax or the excess profits levy, of such an amount as would, after

- A deduction of income tax at the standard rate in force for the year of assessment in respect of which the direction is given, be equal to the first-mentioned amount."

As to the facts, the company was admittedly an investment company within the meaning of s. 257 of the Income Tax Act, 1952, during the year of assessment, Apr. 6, 1952, to Apr. 5, 1953. We are, as we have said earlier in this judgment, for the time being assuming that the company was also an investment company within the meaning of that section from Apr. 6, 1953, down to the commencement of its voluntary liquidation on May 7, 1953. The relevant chargeable accounting period of the company for the purposes of profits tax is the period from Apr. 1, 1953, to May 7, 1953, and the company has been assessed to profits tax for that period in the sum of £18,987. The company has agreed that figure in point of amount but not in point of liability, which is the subject of a pending appeal by the company.

In order to ascertain the amount which ought, if and when deductible, to be deducted in respect of profits tax under s. 68 (1) of the Finance Act, 1952, in computing the company's actual income from all sources for the purposes of s. 245 and s. 262 of the Income Tax Act, 1952, it is necessary to calculate the proportion of the profits tax assessment of £18,987 for the period Apr. 1, 1953, to May 7, 1953, attributable to the part of the year of assessment 1953-54 which had elapsed at the date of the company's liquidation, i.e., the period from Apr. 6, 1953, to May 7, 1953. That proportion is £16,421 3s. 9d., which when "grossed up" as required by s. 68 (1) of the Finance Act, 1952, comes to £29,856 14s. 1d.

The amount of the company's actual income from all sources for the period from Apr. 6, 1953, to May 7, 1953, computed without any deduction in respect of profits tax does not exceed £8,920. It is thus apparent that, if the Special Commissioners are right in their submission that the deduction in respect of profits tax required by s. 68 (1) of the Finance Act, 1952, must be made before giving any direction in respect of the company under s. 245 and s. 262 (1) of the Income Tax Act, 1952, it necessarily follows that any such direction subsequently given would be in respect of a nil amount of income, for the deduction of £29,856 14s. 1d. from £8,920 produces a minus quantity.

Returning to the arguments summarised earlier in this judgment, we will for convenience of discussion term a company to which s. 245 of the Income Tax Act, 1952, applies, but which is not an investment company, "a 245 company"; and a company to which that section applies and which is an investment company "a 262 company".

It seems to us that the first matter for determination is the time at which the actual income from all sources of a 245 company or a 262 company does, within the meaning of s. 68 (1) of the Finance Act, 1952, "fall to be computed" under para. 6 of Sch. 1 to the Finance Act, 1922, or s. 255 (3) of the Income Tax Act, 1952, for it is only when the income of the company concerned does fall to be so computed that the deduction in respect of profits tax is to be made. The Attorney-General submits that the income of the company concerned falls to be so computed before any direction is given. He does not fix any exact moment of time, but he says that it must be before any direction is given, on the ground that the Special Commissioners must compute the income of a 245 company before they can form the opinion that it has not distributed a reasonable part of its income from all sources, and must likewise compute the income of a company before they can conclude that it is a 262 company and as such amenable to automatic direction. We think that this is wrong.

No doubt the Special Commissioners must necessarily make calculations, or obtain from the company concerned calculations, of the actual income from all sources of the company concerned, before they can decide whether to give a direction or not in the case of a 245 company, or whether a company is a 262 company in respect of which they must automatically give a direction. But

such calculations are provisional and preliminary only, and cannot of themselves have any effect on the liability (if any) of the company concerned to surtax. We think "falls to be computed" means "is required by law" or "is required by the relevant statutory provisions to be computed"; and that meaning of the phrase can only be satisfied by the giving of a direction. Take the case of a 245 company. The Special Commissioners here have a discretion whether to give a direction or not. They may be thinking of giving a direction or may even have decided to give a direction, but, unless and until a direction is actually given, the company's income does not "fall to be computed" in any way other than the ordinary method applicable in cases to which s. 245 does not apply. We would test this by reference to the very deduction which is in question here. It will be remembered that s. 141 of the Income Tax Act, 1952, which allowed profits tax as a deduction for income tax purposes, was repealed by the Finance Act, 1952, which by s. 33 (1), cited at length above, prohibits any such deduction. There could, therefore, as it seems to us, be no question of a 245 company in respect of which no direction had been given making or being allowed any deduction on that account. If "falls to be computed" has the meaning we suggest, all is clear. The case is taken out of the ordinary rule, and a special deduction is allowed. If, on the other hand, "falls to be computed" means, as the Attorney-General would have it, "is computed by the Special Commissioners with a view to deciding whether to give a direction or not", it seems to us that a mere computation by the Special Commissioners with a view to deciding whether to give a direction or not would, although not in fact followed by any direction, entitle the 245 company concerned to be assessed in the special way, and claim the special deduction, allowed by s. 68 (1).

If we are right as to the effect of s. 68 (1) of the Finance Act, 1952, in relation to a 245 company, we think the same result follows in relation to a 262 company. Section 68 (1) of the Finance Act, 1952, draws no distinction between them, and the machinery of direction and apportionment is common to both cases. Moreover, although in the case of a 262 company the whole of its actual income from all sources is, by s. 262 (1) itself, deemed to be income of its members irrespective of the amount of any distributions, and the Special Commissioners are accordingly required to give a direction under s. 245 in any such case, the giving of such a direction is nevertheless a necessary step for the purpose of bringing into operation in any particular case the general principle which s. 262 (1) lays down, and the consequences as to computation of income referred to in s. 68 (1) of the Finance Act, 1952. But the matter does not rest there, for it is, as we think, abundantly plain that s. 68 (2) treats the deduction in the case of a 262 company as authorised only when a direction is in force. It seems to us also that s. 248 (2) of the Income Tax Act, 1952, points in the same direction, as the language of that sub-section would appear to indicate the taking by the Special Commissioners of the following steps in the following order: (a) direction; (b) computation of actual income from all sources; and (c) notice of apportionment in the form of a statement showing the amount of the actual income from all sources adopted by the Special Commissioners and the amount apportioned to each member or to each class of shares. We should add that, to our minds, the very "grossing up" of the amount of the deduction allowed in respect of profits tax strongly suggests that the deduction is intended for cases in which the income of the company concerned has been made—or in the case of a 262 company perhaps we should say effectively made—income of its members for surtax purposes, that is to say, cases in which a direction has been given.

It follows that in our opinion there was actual income of the company from all sources for the period Apr. 6, 1953, to May 7, 1953, amounting to or provisionally estimated at £8,920, in respect of which the Special Commissioners can give a direction under s. 262 (1) of the Income Tax Act, 1952, and if they

A can give such a direction then in view of the mandatory terms of the sub-section they are clearly bound to give it.

On this footing it seems to us impossible, once the Special Commissioners have given the direction which in our view they are bound to give, to hold that the profits tax in respect of which they have sought to make the deduction mentioned in s. 68 (1) of the Finance Act, 1952, is "payable" within the meaning
B of that sub-section. Once the direction is given (and for the present purpose it should be treated as having been given) the way is clear for an exercise of the right of election conferred by s. 31 (3) of the Finance Act, 1947. We understand it is not in dispute that apportionment follows as a necessary consequence of the direction. Accordingly, all the conditions precedent to an exercise of the right of election will have been fulfilled. The actual income of the company
C from all sources for the period Apr. 6 to May 7, 1953, will have been apportioned. There has also admittedly been an apportionment of such income for the period from Apr. 1 to 5, 1953. These two periods together include the whole of the chargeable accounting period from Apr. 1, 1953, to May 7, 1953. Admittedly some, but not all, of the persons to whom the income has been or is to be apportioned are individuals. There remains only the question of time. The right
D is expressed to be exercisable by notice in writing to the commissioners (i.e., according to s. 74 (5) of the Finance Act, 1947, the Commissioners of Inland Revenue) within six months from the end of the relevant chargeable accounting period, or such longer time as the commissioners may in any case allow. We assume that in the circumstances of this case, in which the refusal, and as we hold the wrongful refusal, of the Special Commissioners to give a direction has
E made it impossible to exercise the right of election at any earlier date, a reasonable time within which it may now be exercised will be allowed.

Accordingly, the amount of profits tax in question is not, in our opinion, an amount certainly and presently payable, but an amount which will become payable only in the contingency of the right of election not being exercised, and which will never become payable in the event of the right of election being
F exercised. Such an amount, in our view, clearly cannot be an amount which is "payable" within the meaning of s. 68 (1) of the Finance Act, 1952, or within any reasonable meaning of the word. It is a sum which may or may not be payable according to the course of events.

Therefore, it cannot, in our view, be said that a direction would merely have the effect of reducing the company's actual income from all sources to nil on the
G ground that, the profits tax being "payable" within the meaning of s. 68 (1) of the Finance Act, 1952, the amount calculated in accordance with s. 68 (1) thereof would thereupon become forthwith deductible under that sub-section. The actual income of the company from all sources for the relevant period would stand at £8,920 or whatever the exact figure may be, though no doubt reducible to nil in the event of the profits tax becoming payable. We see no
H insuperable difficulty in framing the consequential apportionment or apportionments (for the Attorney-General, as we understood him, agreed that supplementary apportionments could, if necessary, be made) in such a way as to meet this state of affairs.

This reasoning suffices, in our judgment, to dispose of the appeal, subject to the Attorney-General's submission to the effect that the company was not
I at the material time an investment company within the meaning of s. 262 of the Income Tax Act, 1952. Before passing to that, however, we should perhaps say a word about the more general aspect of the argument on the issue as to whether the profits tax is "payable" within the meaning of s. 68 (1) of the Finance Act, 1952, on the assumption that the question whether it is payable, and consequently gives rise to the deduction prescribed by s. 68 (1) of the Finance Act, 1952, falls to be determined before any direction is given. On this assumption, the circumstances in which that question must be answered are these: (i) It is

not in dispute that the profits tax if payable at all is, in point of amount, correctly assessed at £16,421 3s. 9d.; (ii) the profits tax will, however, not be payable at all in the event of the right of election under s. 31 (3) of the Finance Act, 1947, being exercised; and (iii) the assessment or assessments to profits tax is or are the subject of a pending appeal by the company on the ground indicated in (ii) above, which we understand to be the sole ground of appeal; but (iv) the right of election on which the appeal is based can, having regard to the terms of s. 31 (3) of the Act of 1947, only arise if and when a direction is given and the consequential apportionment is made, an event which has not happened and, if the Special Commissioners have their way, will never happen.

In these circumstances, it is contended for the Special Commissioners that the profits tax is "payable" within the meaning of s. 68 (1) of the Finance Act, 1952. In support of this argument, reliance is placed on s. 24 (1) of the Finance Act, 1937, which provides that the tax

"... shall be due and payable at the expiration of one month from the date of the assessment, and shall be recoverable as a debt due to His Majesty from the person on whom it is assessed."

Reliance is also placed on para. 1 of Part 1 of Sch. 5 to the same Act, which provides that the tax "payable" in respect of a given period shall be assessed on the persons carrying on the trade or business in that period. It is pointed out, further, that s. 68 (4) of the Finance Act, 1952, refers to the amount "payable" by a body corporate for a given period in respect of the excess profits levy and goes on to provide that the amount so described may be reduced in the event of a deficiency of profits for a subsequent period.

We do not think the use of the word "payable" in these statutory provisions really assists the Special Commissioners' case. The word "payable" has more than one meaning, and must be construed in any given case by reference to the exact context in which it appears. More to the point, as we think, is para. 5 of Part 2 of Sch. 5 to the Act of 1937, on which counsel relied on the company's behalf. That paragraph provides that, where an appeal is pending against an assessment to profits tax, such part of the tax as appears to the Commissioners of Inland Revenue not to be in dispute shall be collected and paid in all respects as though no appeal was pending. This seems to us to mean, as a matter of necessary implication, that any amount which is in dispute is not to be collected or paid, or in other words is not to be payable pending the appeal; and where the appeal challenges in toto the alleged liability to tax it is obvious that the dispute extends to the whole amount.

The Attorney-General also relied on this well-known passage from the speech of LORD DUNEDIN in *Whitney v. Inland Revenue Comrs.* (1) ((1925), 10 Tax Cas. 88 at p. 110):

"My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

But these observations related to a wholly different case concerning the liability of a non-resident to super-tax (as it was then) on profits arising in this country.

A Here the question is not whether the liability to tax depends on the charge imposed by the taxing legislation or on the assessment made pursuant to such legislation, but whether the taxing legislation itself has imposed a certain, as distinct from a merely contingent, liability to tax.

In *W. H. Cockerline & Co. v. Inland Revenue Comrs.* (2) ((1930), 16 Tax Cas. 1 at pp. 18 and 19), to which the Attorney-General also referred, LORD HANWORTH, M.R., cited the above passage from the speech of LORD DUNEDIN together with a passage in a similar sense from the judgment of SARGANT, L.J., in an unreported case of *Williams v. Henry Williams* (3) (Nov. 3, 1926), and applied the law as therein laid down to repel an argument presented on behalf of a taxpayer who was seeking to reopen a final settlement of his tax liability to the effect that a certain payment made by him on account of tax was invalid because there had been no assessment. This again appears to us to be very far removed from the present case.

Finally, on this part of the case, the Attorney-General referred to *Inland Revenue Comrs. v. John Dow Stuart, Ltd.* (4) ([1950] 1 All E.R. 1), in which it was held that under s. 18 (1) of the Finance (No. 2) Act, 1939, the excess profits tax "payable" in respect of a trade or business for any chargeable accounting period, and consequently deductible for income tax purposes as an expense incurred in that period, was the excess profits tax as assessed and not the reduced amount which might ultimately become payable in consequence of subsequent deficiencies. But that case only shows that a tax may be said to be payable in respect of a given period when it has been quantified by assessment, although the legislation provides that the amount as originally assessed may be reduced on account of losses sustained in subsequent periods.

We do not think it follows from this that, where the legislation charging a particular tax gives taxpayers a right of election which if exercised will exempt them from liability for such tax, references in the legislation to the tax as "payable" are to be understood as meaning that the tax must be treated as payable notwithstanding the existence of the right of election. Nor, in our view, can it be right in such a case to hold that, where under the relevant legislation the Special Commissioners are bound to take a certain step if the tax is not payable, and that step is a necessary preliminary to any exercise of the right of election, which if exercised will prevent the tax from being payable, the Special Commissioners are entitled to refrain from taking that step and claim that because they have not taken it, and have thus precluded any exercise of the right of election, therefore the tax is beyond a peradventure payable inasmuch as the right of election can never be exercised.

We need say no more than that we agree with the conclusion of the Divisional Court on this aspect of the case, though, as appears from what we have said above, it is in our view unnecessary for the purposes of the present appeal to form any decided opinion on the question whether these more general grounds in themselves suffice to make good the company's contention that the profits tax with which we are here concerned is not "payable" within the meaning of s. 68 (1) of the Finance Act, 1952, even if (contrary to our view) that point falls to be determined before a direction is given. It follows that we need express no view one way or the other on the question whether the procedure of direction and apportionment can be applied to a company whose income is nil as distinct from a company that has income which is contingently liable to be reduced to nil in a particular event.

It remains finally to consider the Attorney-General's submission to the effect that the company was not, during the relevant period, an investment company within the meaning of s. 262 (1) of the Income Tax Act, 1952. The Attorney-General invites us so to hold by the following process of reasoning: The income of the company for the relevant period, i.e., the period from Apr. 6, 1953, to May 7,

1953, was (subject to profits tax) £8,920 or thereabouts, the whole of which was admittedly investment income. From this, however, the profits tax for the like period, i.e., £16,421 3s. 9d., must be deducted. Consequently the income of the company for the relevant period was nil. But a company which has no income cannot be an investment company; for, having no income at all, it obviously cannot be said to have investment income. He relies on *F.P.H. Finance Trust, Ltd. v. Inland Revenue Comrs.* (5) ([1944] 1 All E.R. 653), where it was held that a company which had income derived from investments and also carried on a trade was not an investment company with respect to a period in which it made losses on trading far exceeding its income from investments and so during the relevant period had no income at all. It seems to us that, if we are right in thinking that the other submissions made by the Attorney-General fail, this final submission necessarily fails with them, for, if the profits tax is not payable within the meaning of s. 68 (1) of the Finance Act, 1952, so that the deduction prescribed by that sub-section does not fall to be made, then the company did during the relevant period have income estimated at £8,920 and admittedly consisting wholly of investment income. It is no doubt true that, in the event of the right of election not being exercised, that income will by reason of the profits tax deduction ultimately be reduced to nil, but that possibility does not, as it seems to us, afford any answer to the company's contention that the company, as matters now stand, is an investment company in respect of which a direction can and ought to be given. On the other hand, if, contrary to our view, the other submissions made by the Attorney-General should prevail, the question whether the absorption of the whole of the company's actual income for the relevant period by the profits tax deduction would have the effect of excluding it from the category of investment companies so far as that period was concerned becomes purely academic. We therefore need not pause to consider whether that deduction would be truly comparable for this purpose to the trading loss which absorbed the whole of the investment income of the company concerned in *F.P.H. Finance Trust, Ltd. v. Inland Revenue Comrs.* (5).

For the reasons we have endeavoured to state, we would dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Smith & Hudson, agents for Rollit, Farrell & Bladon, Hull* (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

R. v. THOMAS.

[CENTRAL CRIMINAL COURT (Pilcher, J., and a Jury), January 23, 24, 1957.]

B

Criminal Law—Vagrancy—Living on earnings of prostitution—Room let nightly to prostitute at inflated rent—Whether landlord guilty of offence—Vagrancy Act, 1898 (61 & 62 Vict. c. 39), s. 1, as amended by the Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5 c. 20), s. 7 (1), (5).

C

The accused was charged with living on the immoral earnings of a prostitute contrary to the Vagrancy Act, 1898, s. 1, as amended by the Criminal Law Amendment Act, 1912, s. 7. It was alleged that he, knowing a woman to be a convicted prostitute, agreed to let her have the use of a room between the hours of 9 p.m. and 2 a.m., and that he charged her £3 a night for the accommodation.

D

Held: where, as in the present case, there was evidence that an accused person had let a room at a grossly inflated rent to a prostitute for the express purpose of allowing her to ply her immoral trade, it was for the jury to determine whether the accused was in fact knowingly living wholly or in part on the earnings of prostitution.

R. v. Silver ([1956] 1 All E.R. 716) not followed.

[As to the crime of living on the earnings of prostitution, see 10 HALSBURY'S LAWS (3rd Edn.) 676, para. 1294.

For the Vagrancy Act, 1898, s. 1, as amended by the Criminal Law Amendment Act, 1912, s. 7 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 923.]

E

Case referred to:

(1) *R. v. Silver*, [1956] 1 All E.R. 716; 40 Cr. App. Rep. 32.

Trial on indictment.

F

The accused, Andrew Babatunde Thomas, was tried on indictment with living on the immoral earnings of a prostitute and also with another offence. After the case for the prosecution had been closed, counsel for the accused, stating that he did not propose to call evidence, submitted that by reason of the direction given to the jury in *R. v. Silver* (1) ([1956] 1 All E.R. 716) it was not open to the jury to find that the accused had committed any offence against the Vagrancy Act, 1898, s. 1, as amended by the Criminal Law Amendment Act, 1912, s. 7 (1), and that therefore there was no case to answer. It is only on this point that the case is reported. The judgment of PILCHER, J., was given in the absence of the jury, HIS LORDSHIP stating that he would direct the jury accordingly when they returned. The accused was convicted of both offences and sentenced to imprisonment.

G

Victor Durand for the Crown.

H. S. Grannum for the accused.

H

PILCHER, J.: In this case the accused is charged on one of the two charges against him, under s. 1 of the Vagrancy Act, 1898, with knowingly living wholly or in part on the earnings of prostitution. Evidence was given on behalf of the prosecution from which the following facts emerged. These are not in dispute, because I have been told by counsel for the accused that he does not propose to call evidence. At the conclusion of the case for the prosecution, counsel for the accused made a submission to me that in the circumstances, in so far as the charge of knowingly living wholly or in part on the earnings of prostitution was concerned, that I ought to direct the jury that, on the facts of this case, it was not open to them to find that this man was knowingly living on the earnings of prostitution.

I

The undisputed facts are as follows. A prostitute now aged twenty-one, with some fifty-seven previous convictions for prostitution, made an arrangement with the accused that she should have the use of a room which he rented in a

house at Bayswater, between certain hours, roughly, I think, between 9 p.m. in the evening and round about 2 a.m. in the morning. A certain amount of bargaining took place, and eventually the prostitute agreed to pay the accused £3 a night for the facilities which she enjoyed. He knew she was a prostitute, and knew that her purpose in securing the use of this room was to bring her clients there, and I think it is probably almost certain that he knew that she did a very satisfactory trade in this room. On her own evidence, she was earning round about £80 to £90 a week from her professional activities. A

Counsel for the accused, in support of his submission that I ought to direct the jury to acquit the accused, cited to me *R. v. Silver* (1) ([1956] 1 All E.R. 716), which was a decision of His Honour JUDGE MAUDE at this court in February, 1956. That was a case in which the defendants, Silver and others, were landlords and estate agents, who let, or were concerned with letting flats at high rents, each flat to one prostitute, knowing that she was a prostitute, and that she intended to use the flat for the purpose of prostitution. They were accordingly charged under s. 1 of the Vagrancy Act, 1898. The judge directed the jury to return a verdict of not guilty on this particular count. The jury returned that verdict and the defendants were discharged. The reasoning of the judge is set out in [1956] 1 All E.R. at pp. 717 to 720. I will read one passage (*ibid.*, at p. 719): B C D

"The question now arises, for the second time so far as is known, what is meant by the words 'knowingly lives wholly or in part on the earnings of prostitution'. It might seem to those who did not give careful consideration to the question, that anybody who received money earned by a prostitute would be committing an offence. For instance, the chemist who sells medicines and other things to a prostitute knowing that she is a prostitute would in part be living on the earnings of prostitution, in one sense, the broadest sense; the doctor who attends her, the lawyer who appears for her, if those persons know that she is in fact a prostitute, would appear to be committing an offence. That cannot be the intention of the Act, for if it were, the state of the prostitute in this world would be simply appalling; she would be able to get no services, or to get them only with the utmost difficulty, and the same would apply to the food she wanted to buy. E F

"It has been said in argument before me, by both sides, that the doctor, for instance, who treats the prostitute knowing that she is a prostitute is not really living on her earnings, although the money that is handed over is her earnings; what he is doing is, in fact, living on his own earnings. The doctor has earned his money. The shopkeeper, the grocer and the baker and so on, they earn their money. On the one hand, the doctor gives his services, and on the other, in the case of the shopkeepers, they give their goods in exchange for money: they, in fact, are earning their living. They are not, therefore, knowingly living in part on the earnings of prostitution at all. But it is said now—and it seems to be the only instance to which I should be directing my attention—that where a landlord lets his premises for the purpose of prostitution and gets what I propose to call a prostitute rent, a wholly different situation arises; viz., since the ordinary moral rent is less than the prostitute rent, then to the extent of the excess of the prostitute rent over the moral rent he is living on the earnings of prostitution. I do not think he is. I think that what the landlord is doing is living on his own earnings, just like the shopkeeper. A shopkeeper who grossly overcharged a prostitute because she was a prostitute would, nevertheless, be living on his own earnings—utterly, completely and disgustingly immoral, but they are his earnings. G H I

I don't think that I need read any more. With the greatest respect to the learned judge, I am sorry to say that I do not agree with that last passage which I have read. It seems to me that if there is evidence that the accused has let a room,

A or a flat, at a grossly inflated rent to a prostitute for the express purpose of allowing her to ply her immoral trade, then it is for the jury to determine on the facts of each particular case, whether the accused is in fact knowingly living wholly or in part on the earnings of prostitution. I take the view that anyone who acts in that fashion, is acting as it were as a coadjutor of the prostitute, and is in quite a different position from the shopkeeper, doctor or anyone else who performs services or sells goods in the ordinary way to a prostitute, and, this argument having been addressed to me in the absence of the jury, when the jury return I propose to direct them on the lines which I have indicated, and not in the fashion in which JUDGE MAUDE directed the jury in *R. v. Silver* (1).

Solicitors: *Solicitor, Metropolitan Police* (for the Crown); *Nehra Emerson Naylor & Co.* (for the accused).

[Reported by T. J. KELLY, Esq., Barrister-at-Law.]

D GATEHOUSE v. VISE (INSPECTOR OF TAXES).

[COURT OF APPEAL (Lord Goddard, C.J., Jenkins and Sellers, L.J.J.), March 14, 15, 22, 1957.]

E *Income Tax—Person assessable*—"House . . . divided into distinct properties"—*"House or building let in different apartments or tenements"*—*Flats in single building—Income Tax Act, 1918* (8 & 9 Geo. 5 c. 40), Sch. A, No. VII, r. 12, r. 8 (c).

F Premises found by General Commissioners of Income Tax to be a single house or building comprised four garages on the ground floor and five self-contained flats on the first floor. Access to the flats was obtained by two common staircases and along a balcony on to which the front door of each flat opened. The premises were held by a common landlord who leased the five flats to different occupying tenants. The landlord was responsible for the repair of the balcony and staircases and the maintenance of the three wall lights which lighted them. The tenant of one of the flats paid a premium of £2,750 and a rent of £1 per annum under his lease which was for twenty-two years. He was assessed to income tax for 1951-52 under r. 12 of No. VII of Sch. A to the Income Tax Act, 1918, in the sum of £201, as being the occupier of part of a "house . . . divided into distinct properties, and occupied by distinct owners or their respective tenants". On appeal, the tenant contended that the assessment should have been made on the landlord under r. 8 of No. VII on the ground that the premises were a "house or building let in different apartments or tenements, and occupied by two or more persons severally" within para. (c) of the rule.

G **Held:** the assessment must be discharged since it ought to have been made on the landlord under r. 8 (c) of No. VII of Sch. A (*A.-G. v. Mutual Tontine Westminster Chambers Association, Ltd.*, (1876), 1 Ex.D. 469, applied).

I Per JENKINS, L.J.: the desirability of amending r. 8 (c) and r. 12 is a matter which merits the early consideration of the legislature (see p. 190, letter E, post).

Per LORD GODDARD, C.J.: I entirely agree that the rules with which this case is concerned urgently require reconsideration in the light of modern conditions (see p. 192, letter E, post).

Decision of DANCKWERTS, J. ([1956] 3 All E.R. 772) affirmed.

[As to the assessment of tenement buildings and flats under Sch. A to the Income Tax Act, 1918, see 17 HALSBURY'S LAWS (2nd Edn.) 39, paras. 67, 68; and for cases on the subject, see DIGEST SUPP.]

For r. 8 and r. 12 of No. VII of Sch. A, see 12 HALSBURY'S STATUTES (2nd Edn.) 137 and 138; and for the corresponding provisions in the Income Tax Act, 1952, s. 109 (1), (5) and s. 113, see 31 HALSBURY'S STATUTES (2nd Edn.) 102, 103, 105.] A

Case referred to:

- (1) *A.-G. v. Mutual Tontine Westminster Chambers Association, Ltd.*, (1875), L.R. 10 Exch. 305; *affd.* (1876), 1 Ex.D. 469. B

Appeal.

The taxpayer appealed against an assessment for 1951-52 made on him as occupier of No. 3, Kinnerton Yard, Knightsbridge, London, S.W.1, under Sch. A to the Income Tax Act, 1918, in the sum of £201. There were also appeals in respect of similar assessments made on the occupiers of Nos. 1, 2, 4 and 5, Kinnerton Yard, which it was agreed should be governed by the decision in respect of No. 3. C

The property known as Kinnerton Yard was built to the order of one person. The ground floor comprised four garages. The first floor comprised five flats known as Nos. 1, 2, 3, 4 and 5, Kinnerton Yard. There was no means of communication through the garages to the first floor. The only means of access to the flats was by two common staircases and by proceeding along the balcony on to which the front door of each flat opened. It was impossible to distinguish from the outside where one flat began and another ended. The roof was a flat slab covering all the flats and there was nothing to tell where the roof of one flat ended and that of another began. To light the staircases and balcony there were three wall lights which were maintained by the landlord, who was responsible for the repair of the balcony and staircases. The entrance to the garages and flats was by a common approach from Kinnerton Street through a narrow opening between two buildings into Kinnerton Yard, which was covered with tarmac. The yard sloped down from all sides to a central drain for car-washing. D

The premises Nos. 1-5, Kinnerton Yard, together with certain other premises, were comprised in a lease dated July 31, 1935, from the Duke of Westminster to Mr. Charles Henry Ford for 37½ years from June 24, 1935. On Mar. 25, 1938, the lease was assigned by Mr. Ford's personal representatives to Mr. A. H. Wright, and Mr. H. V. Maltby, who, by a contract of sale dated July 31, 1939, contracted to sell the leasehold premises and other leasehold properties to Kinnerton Estate Co., Ltd., the landlord at the relevant times for the purposes of the appeal. The landlord was at all such times entitled to possession of the properties and to receipt of the rents and profits therefrom and could have called for an assignment of the premises to him. The premises were destroyed by enemy action in May, 1941, and were rebuilt to new specifications in 1950-51. E

The garages, with the passageway from Kinnerton Street and the yard, were let by Mr. Maltby for twenty-one years on May 9, 1952, and, on the surrender of that lease, to Kinnerton Garage, Ltd., for 19½ years (less three days) from Sept. 29, 1953, in each case at a rent of £1,250 per annum. For 1952-53 and 1953-54 the garages and 31, Kinnerton Street were included in one Sch. A assessment in the sum of £1,312 gross, £1,090 net, made on the landlord as owner-occupier, the inspector of taxes not being aware of the new lease to Kinnerton Garage, Ltd. For rating purposes the garages were assessed as follows: Nos. 1 and 2 together £155 gross. No. 3 £167 gross, No. 4 £75 gross. The flats were assessed for rating purposes at £80, £65, £80, £65 and £60 gross value respectively. F

All the five flats in Kinnerton Yard were leased for terms of 22½ years (less three days) from Dec. 25, 1950, to tenants at rents of £1 per annum and fire insurance premium, the tenants in each case paying a premium of £2,500 (Nos. 2, 4 and 5) or £2,750 (Nos. 1 and 3). It was agreed that the taxpayer was in occupation of No. 3 Kinnerton Yard, and paid the rent therefor and for the purposes of the appeal should be regarded and treated as if he had been the lessee named in the lease (instead of his mother). It was also agreed for the same purpose that G

- A the persons named in the lease as landlords had entered into the lease on behalf of Kinnerton Estate Co., Ltd. Under the lease the landlord demised the flat, comprising one reception room, three bedrooms, bathroom and kitchen, to the lessee who undertook to pay the rents reserved without any deduction whatsoever, except landlord's property tax, and to do internal repairs. The landlord undertook to keep the exterior of the premises in good and sufficient repair.
- B The taxpayer contended that the five flats, Nos. 1, 2, 3, 4 and 5, Kinnerton Yard (or alternatively the flats together with the garages on the ground floor), comprised a building let in different tenements and were at all relevant times occupied by two or more persons severally and consequently that an assessment for 1951-52 in respect of the flats, or of the flats together with the garages, should have been made on the landlord under r. 8 (c) of No. VII of Sch. A to the
- C Income Tax Act, 1918, and that the assessment on the taxpayer should be discharged.

- The Crown contended: (i) that each of the flats on the first floor Nos. 1, 2, 3, 4 and 5, Kinnerton Yard, constituted a separate house separately assessable for the purposes of income tax, Sch. A, and the taxpayer was properly assessed as the occupier of No. 3; (ii) alternatively that, notwithstanding any decision
- D that the flats together constituted a single house or building or formed part of a single house or building: (a) the occupation by the taxpayer of No. 3 at a rent which was less than the rackrent, conferred on him a benefit of part of the annual value of the property, which benefit was chargeable to income tax under the charging provisions of Sch. A as "property" and represented his income for tax purposes; (b) since the remaining tenants possessed similar benefits which
- E were similarly chargeable, the house was divided "into distinct properties, and occupied by distinct owners" within the meaning of the Income Tax Act, 1918, Sch. A, No. VII, r. 12, which in the circumstances excluded the operation of Sch. A, No. VII, r. 8; (c) the taxpayer was, therefore, properly assessed and charged in respect of No. 3, Kinnerton Yard, as occupier.

- The commissioners found that No. 3, Kinnerton Yard, was part of a single
- F house or building, but they accepted the alternative contention of the Crown and accordingly confirmed the assessment.

On Nov. 8, 1956, DANCKWERTS, J., allowed the taxpayer's appeal by way of Case Stated against that decision, [1956] 3 All E.R. 772.

The Crown appealed to the Court of Appeal.

- G *Cyril King, Q.C.*, and *Sir Reginald Hills* for the Crown.
F. N. Bucher, Q.C., and *H. H. Monroe* for the taxpayer.

Cur. adv. vult.

Mar. 22. The following judgments were read.

- H **LORD GODDARD, C.J.:** I will ask JENKINS, L.J., to read the first judgment.

- JENKINS, L.J.:** In this case, the respondent taxpayer, Mr. Robert Alexander Gatehouse, was assessed to Sch. A income tax for the year 1951-52 in the sum of £201 in respect of his occupation of a dwelling known as flat No. 3, Kinnerton Yard, London, S.W.1. After an unsuccessful appeal to the appropriate General Commissioners of Income Tax, he appealed to the High
- I Court by way of Case Stated, and by an order dated Dec. 10, 1956, DANCKWERTS, J., allowed his appeal. From that order the Crown now appeal to this court.

The edifice in which the taxpayer's flat is situated contains four other dwellings known respectively as flats Nos. 1, 2, 4 and 5 Kinnerton Yard, and it has been agreed that the fate of similar assessments made on the occupiers of these other four flats, involving as they do the same question of principle, shall abide the result of the present appeal.

The edifice containing five flats, which was constructed to the order of one person to replace premises destroyed by enemy action, is built round a courtyard which was formerly a mews. It consists of four garages at ground level with the five flats constituting a second storey above them. Access is had to the flats from the yard by means of outside staircases which communicate with an uncovered gallery or balcony on to which the front doors of the flats open. The flats are entirely self-contained with no means of internal communication between them, or between the flats and the garages. They are roofed with one continuous slab covering all of them, and there is nothing to show from outside where one flat ends and another begins. The occupier of each of the five flats is the immediate tenant of a common landlord, Kinnerton Estate Co., Ltd., which is the lessee of the entire structure and holds it under a lease from the Duke of Westminster. The landlord is responsible for the repair of the staircases and balcony and maintains three wall lights to light them. The lease under which the landlord holds is dated July 31, 1935, and is for a term of $37\frac{3}{4}$ years from June 24, 1935, expiring on Mar. 25, 1972. The legal estate in this leasehold interest is outstanding in the survivor of two vendors to the landlord, but nothing turns on that.

The sub-lease from the landlord under which the taxpayer occupies flat No. 3, which is in all material respects identical in its terms with the sub-leases granted by the landlord to the respective occupants of the other four flats, is dated Feb. 20, 1951, and was actually granted to his mother, but it has been agreed that for the purposes of the present case he is to be treated as the lessee therein named. This sub-lease is for a term of $22\frac{1}{4}$ years from Dec. 25, 1950, less the last three days, thus leaving the landlord with a nominal leasehold reversion of three days only. It was granted for a premium of £2,750 paid on completion, together with a yearly rent of £1 and a further yearly sum of £1 4s. by way of fire insurance premium.

The lessees' covenants included covenants to pay the rent without any deduction "except for landlord's property tax"; to pay rates and taxes as therein mentioned ("landlord's property tax only excepted"); and to repair the interior of the demised premises. The landlord's covenants included a covenant to repair the exterior of the demised premises.

On these facts, the Crown seek to justify the assessment by reference to r. 12 of the group of rules applicable to Sch. A headed, "No. VII, Rules as to persons chargeable". That rule is in these terms:

"Where a house is divided into distinct properties, and occupied by distinct owners or their respective tenants, such properties shall be separately assessed and charged on the respective occupiers thereof."

On the taxpayer's side it is claimed that the Sch. A tax on the entire building comprising the five flats should be assessed on the landlord to the exclusion of the taxpayer and the other four occupants, and he calls in aid r. 8 of the same group of rules. That rule is in these terms:

"The assessment and charge shall be made upon the landlord in respect of—(a) any dwelling-house in the occupation of a tenant which, with the buildings or offices belonging thereto, and the land occupied therewith, is of less annual value than £10; and (b) any lands and tenements which are let for a period less than one year; and (c) [which is the directly material provision] any house or building let in different apartments or tenements, and occupied by two or more persons severally. Any such house or building shall be assessed and charged as one entire house or tenement: Provided that in each of the above cases in default of payment by the landlord, the tax may be levied upon the occupier or occupiers respectively."

It will be convenient next to refer to the contentions of the parties as set out in the Case Stated. Those are to be found in para. 6 and 7 of the Case Stated.

- A "6. It was contended on behalf of the [taxpayer] that the five flats Nos. 1, 2, 3, 4 and 5 Kinnerton Yard (or alternatively the said flats together with the garages on the ground floor) comprised a building let in different tenements and that the said flats were at all relevant times occupied by two or more persons severally and consequently that an assessment for the year 1951-52 in respect of the said flats or the said flats together with the
- B said garages should have been made on the landlord under r. 8 (c) of No. VII, Sch. A, Income Tax Act, 1918, and that the assessment on the [taxpayer] should be discharged. 7. It was contended on behalf of the [Crown]: (i) that each of the flats on the first floor numbered respectively 1 to 5 Kinnerton Yard, constitutes a separate house separately assessable for the purposes of income tax Sch. A, and the [taxpayer] is properly assessed as the
- C occupier of No. 3; (ii) alternatively, that notwithstanding a decision that the said flats together constitute a single house or building, or form part of a single house or building: (a) the occupation by the [taxpayer] of No. 3 at a rent which is less than the rackrent, confers upon him a benefit of part of the annual value of that property, which benefit is chargeable to income tax under the charging provisions of Sch. A as 'property' and represents his income for tax purposes; (b) since the remaining tenants possess similar
- D benefits which are similarly chargeable, the house is divided 'into distinct properties, and occupied by distinct owners' within the meaning of the Income Tax Act, 1918, Sch. A, No. VII, r. 12 which in these circumstances excludes the operation of Sch. A, No. VII, r. 8; (c) the [taxpayer] is therefore properly assessed and charged in respect of No. 3, Kinnerton Yard, as
- E occupier."

The commissioners found that No. 3, Kinnerton Yard, was part of a single house or building, but "accepted the alternative contention of the Crown and accordingly confirmed the assessment". In view of the commissioners' finding of fact the Crown did not pursue their first contention before DANCKWERTS, J., or in this court, and in both courts it was agreed that for the purposes of the argument

F the five flats (meaning, I understand, the five flats considered apart from the garages) should be taken as constituting a "house" within the meaning of r. 8 (c) and r. 12. Whatever may be thought of the view of the facts implicit in this agreement, we must, I think, accept it for the purposes of the present appeal, and at all events I think that there was evidence to support the commissioners' finding so far as it was to the effect that the five flats constituted "a

G building" within the meaning of r. 8 (c), "building", in my view, being a term of wider import than "house". In other respects, the arguments submitted to us are substantially as summarised in the commissioners' statement of the contentions of the parties at the hearing before them.

- H Counsel for the taxpayer relies on the express and literal terms of r. 8 (c). Here, he says, is a landlord (namely, Kinnerton Estate Co., Ltd.) owning as lessee a house or building (namely, the house or building comprising the five flats); and this landlord has let this house or building in different tenements (in that he has let one of the five flats to each of the five occupying tenants); and this house or building is occupied by two or more persons severally (i.e., by the five occupying tenants each occupying severally and apart from the others his or her particular flat). Thus, says counsel, the requirements of the rule are literally fulfilled, with
- I the result that the landlord is assessable in respect of this house or building, which must be "assessed and charged as one entire house or tenement". It may be said with force that the argument of counsel for the taxpayer on construction is not displaced by the circumstances that the sub-leases here in question were for terms of upwards of twenty years, and granted for a premium and a nominal rent, and not of the type heretofore more usual in relation to premises of this character, where the term would be likely not to exceed, say, seven years, and the consideration would be a rackrent without premium; for r. 8 (c) is

perfectly general in its terms, and uses the word "let" simpliciter without any qualifying words to indicate that it is only applicable where the different parts of the house or building are let for a term not exceeding some maximum period, or are let at a rackrent. A

To this argument on construction counsel for the Crown opposes a submission based on the statutory principles by which the incidence of Sch. A income tax is regulated. He points out that the tax is assessed in the first instance on the occupier, whose ultimate liability is, however, commensurate with his beneficial interest. If he is the freeholder, he bears the whole tax, for the whole beneficial interest is his. If he holds under a lease at a rackrent he has for tax purposes no beneficial interest, and accordingly is allowed to recoup himself the whole of the Sch. A tax paid by him in the first instance by deducting it at the appropriate rate from the rent he pays. In the intermediate case where the occupier holds under a lease at less than a rackrent, he is allowed to recoup himself part of the tax he pays in the first instance by deducting it at the appropriate rate from the rent he pays, which in this case represents a part only of the entire beneficial interest. A similar right of passing on a due proportion of the tax is allowed to a mesne landlord as against his immediate superior. This machinery is designed to produce the result that in the end the owner of each part or share (if I may so describe it) of the entire taxable beneficial interest bears the proportion of the entire tax liability corresponding to his part or share of the entire taxable beneficial interest. B C D

From this statement of general principles counsel for the Crown adduces (in effect) the propositions: (i) that on these principles the taxpayer has for tax purposes a beneficial interest in flat No. 3, to the extent of the difference between the full annual value of the flat less the £1 per annum rent reserved by his sub-lease; (ii) that on these principles the taxpayer is liable to be assessed to, and liable to pay, Sch. A tax on the entire annual value of the flat, subject to his nominal right to deduct tax at the appropriate rate from the yearly rent of £1 which he pays; (iii) that, as liability to tax and beneficial interest go together, it follows from the foregoing that the taxpayer is the owner within the meaning of r. 12 of a distinct property in the shape of his flat carved out of the "house" constituted by the five flats together; (iv) that the same reasoning applies to the other four occupying tenants; and (v) finally, that the case accordingly falls within r. 12, because the house is physically divided into five distinct properties in the shape of the five flats, and each of the five flats is occupied by a distinct owner in the shape of the occupying tenant, each occupying tenant thus becoming assessable to tax by the terms of the rule. E F

I cannot accept the argument that, because under the general principles governing the incidence of Sch. A tax each of the occupying tenants would be liable to tax on his beneficial interest as above described, therefore they are the owners, within the meaning of r. 12, of the distinct properties into which the house is divided and which they severally occupy. It seems to me that this reasoning inverts the process appropriate to the determination of the question whether r. 12 is or is not applicable. I should have thought the first thing to do is to see whether the five occupying tenants are owners within the meaning of r. 12 of their respective distinct properties, in other words their respective flats. If they are, then r. 12 applies, and they are taxable accordingly. If they are not, then r. 12 does not apply, in which case they are not taxable under that rule, and grounds for their liability (if any) to the tax must be sought elsewhere. G H I

I think the treatment of the five occupying tenants as owners of their respective flats within the meaning of r. 12 presents great difficulties of construction. It is to my mind reasonably plain from the language of r. 12 that it contemplates two or more distinct owners each owning one of the distinct properties into which the house is divided, each such distinct property being occupied either by its distinct owner himself or by the immediate tenant of its distinct owner. I find it impossible to hold that these requirements are fulfilled in the circumstances

A of the present case, where the occupying tenant of each of the five flats holds it, not as the immediate tenant of a distinct owner of that flat, but as the immediate tenant of the owner of the leasehold interest in the house or building comprising all five flats, who is the common immediate landlord of all five occupying tenants.

As appears from what I have said above, counsel for the Crown would have it that, in circumstances such as those of the present case, where a house is divided into two or more distinct flats severally occupied by the immediate tenants of a common landlord who owns the entire house, the occupying tenant of each flat is, within the meaning of r. 12, a distinct owner occupying one of the distinct properties into which the house is divided if the lease under which he holds reserves less than a rackrent, but not if the lease under which he holds reserves a rackrent. I can find nothing in the language of r. 12 to support this distinction.

We were referred, as was the learned judge, to *A.-G. v. Mutual Tontine Westminster Chambers Association, Ltd.* (1) ((1875), L.R. 10 Exch. 305, and in the Court of Appeal, (1876), 1 Ex.D. 469). This case was concerned with inhabited house duty and not with income tax. Nevertheless, it appears to me to provide powerful support for the argument of counsel for the taxpayer in the present case. The court there had to construe certain regulations contained in Sch. B to the Act of 1808 (48 Geo. 3 c. 55), and in particular reg. 6 and reg. 14, which were in these terms:

“Rule 6. Where any house shall be let in different storeys, tenements, lodgings, or landings and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to, and shall in like manner be charged to the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house, and shall be charged to the said duties: Provided that where the landlord shall not reside within the limits of the collector, or the same shall remain unpaid by such landlord for the space of twenty days after the same is due, the duties so charged may be levied on the occupier or occupiers respectively; and such payments shall be deducted and allowed out of the next payment on account of rent.

“Rule 14. Where any dwelling-house shall be divided into different tenements being distinct properties, every such tenement shall be subject to the same duties as if the same were an entire house, which duty shall be paid by the occupiers thereof respectively.”

It will be seen that of these regulations or rules, No. 6 broadly resembled in intent the present r. 8 (c), while No. 14 was in terms substantially similar to the present r. 12, but, as it seems to me, less explicitly adverse to the contention of counsel for the Crown than the last-mentioned rule. I will not repeat the whole of the learned judge's discussion of this authority, but will confine myself to the following quotation made by him from the judgment of SIR GEORGE JESSEL, M.R., in the Court of Appeal. The Master of the Rolls said this (1 Ex.D. 480): “It is necessary now to read s. 14”, and then he read the rule, and continued:

“It has been suggested that that rule applied to the present case. But the point, I think, is very plain indeed—‘different tenements being distinct properties’. Rule 6 contemplates tenements which are not distinct properties. What is the meaning of ‘distinct properties’? Here, again, you must apply the same rules of construction. ‘Divided into different tenements in distinct ownerships’, is the primary meaning. Are these distinct ownerships? It is plain they are not, because there is only one landlord and one tenant for each of the tenements; there is a direct letting from the landlord, the owner, to the one tenant below him. If the tenements had been sold to different people, and there had been several demises, it would have been a different thing; there would then have been different landlords,

and perhaps intermediate tenants, and I do not say what our decision would have been; but that is not the case here; it is a mere letting; it is not within r. 14, because in no sense can there be distinct properties, there being but one landlord throughout.

"There was another argument as to 'distinct properties' which I was not quite able to follow. It appears to have been suggested that the word 'property' may be used not in its ordinary sense as showing ownership, but as showing some distinction of structure, that is, not as describing the proprietorship but as describing the structural character of the building. I think that is not the true meaning, but even if it were, looking at the word 'divided' and looking at the word 'distinct', I should say these tenements were not within r. 14. I do not think that these properties are distinct in the sense of any severance of that kind; we should want a physical distinction which everybody could see. Therefore, taking the Act of Parliament and the rules together, for the reasons I have given, I think that these seven buildings are properly described and charged as houses within 48 Geo. 3 c. 55."

That case provides cogent support for the construction of r. 8 (c) and r. 12 which, apart from any authority, I would myself be disposed to adopt as their true construction, and in my opinion we should follow it.

Counsel for the Crown complained of the unfairness of making the landlord liable for the Sch. A tax on a flat in respect of which he was recovering a rent of only £1 a year. On the other hand, counsel for the taxpayer complained of the unfairness of making the tenant liable without right of recoupment for the Sch. A tax on a flat in respect of which he has paid the capitalised equivalent of a rackrent in the form of a premium, especially where, as in the present case, the terms of the letting in regard to "landlord's property tax" appear to indicate an intention that the Sch. A tax is to be borne by the landlord.

These and other difficulties discussed in the course of the hearing lead me respectfully to suggest that the desirability of amending r. 8 (c) and r. 12 is a matter which merits the early consideration of the legislature. The united efforts of counsel and the court failed to discern any satisfactory line of demarcation between the two rules, and it seems probable that the wide terms of r. 8 (c) have brought within its scope under modern conditions cases which can hardly have been in contemplation when it was originally framed. One might hazard a guess that r. 8 (c) was in origin designed to facilitate the collection of Sch. A tax in cases in which the landlord of an entire house let it off in different "apartments or tenements" on periodic tenancies or short leases at rackrents. In such cases it might well be difficult or impossible to collect tax from the numerous, and it may be frequently changing, tenants of different parts of the building, and the assessment of the entire tax on the landlord might be the only practicable method of collecting it at all. If confined to lettings of parts of a house or building at rackrents, r 8 (c) would affect collection only and not ultimate incidence, and the gravamen of the argument of counsel for the Crown is that it ought only to affect the former and not the latter.

Be that as it may, we can only construe the rules as they stand, with reference to the facts of this particular case as they stand, and having done so I find that, inasmuch as the five flats in the present case are now respectively occupied by the immediate tenants of a common landlord owning a leasehold interest which comprises the entire building, the case as matters now are falls within r. 8 (c). I say nothing as to the possible effect of future changes of interest, which I leave to be dealt with if and when occasion arises.

In conclusion, I would express my regret that the nature of this litigation has, from a procedural point of view quite properly, resulted in a decision adverse to the landlord's interest being reached in the landlord's absence. I suppose (subject to any further appeal) the next step will be an assessment on the landlord. In that event, the landlord would be entitled to appeal, and would

- A not be bound by the agreement between the present parties to the effect that the five flats together constituted a house, or by the General Commissioners' findings of fact in this case. For the rest, he would be entitled to argue the whole matter over again, but in so doing would find himself embarrassed, not by way of *res judicata* but by way of precedent, by the adverse decision of this court on the construction of r. 8 (c) and r. 12. It would be well if in cases of this kind some
- B method could be devised of enabling the question at issue to be determined in the presence of all parties interested.

For the reasons I have endeavoured to state, I am of opinion that this appeal fails and should be dismissed.

- SELLERS, L.J.: The commissioners held that No. 3, Kinnerton Yard, the premises in respect of which this appeal is brought, were part of a single house or building. That finding was accepted by the Crown before the learned trial judge and before us, and this appeal must be decided on that basis. The learned judge applied r. 8 of the "Rules as to persons chargeable" in the Rules applicable to Sch. A No. VII. On the basis that the premises were in fact part of a building, as has been agreed, then they would appear to fall within r. 8 (c).
- D The rule, I understand, is accepted as operating in the case of large blocks of flats, whether humble or luxurious, where a rackrent is paid to the landlord together with generally, but perhaps not invariably, a sum for rates. The difference between those accepted cases and this case, the Crown allege, is that in this case the occupier does not pay a rackrent but holds the premises on a twenty-two years' lease from Kinnerton Estates, Ltd., which he obtained by agreeing to pay £2,750 on entering into the lease, and a yearly rent of £1 payable on June 24, the tenant to pay all rates and taxes assessed or imposed on the premises (landlord's property tax only excepted).
- E

- The Crown allege, and the commissioners accepted: (a) that the occupation by the tenant of No. 3 at a rent which is less than the rackrent confers on him a benefit of part of the annual value of that property, which benefit is chargeable to income tax under the charging provisions of Sch. A as "property" and represents his income for tax purposes; (b) since the remaining tenants possess similar benefits which are similarly chargeable, the house is divided "into distinct properties, and occupied by distinct owners" within the meaning of the Income Tax Act, 1918, Sch. A, No. VII, r. 12, which in these circumstances excludes the operation of Sch. A, No. VII, r. 8 (c); (c) the taxpayer is therefore properly assessed and charged in respect of No. 3, Kinnerton Yard, as occupier.
- G Rule 12 refers only to a house, and it has been accepted by both sides that the whole building consisting of Nos. 1 to 5, Kinnerton Yard, constituted a "house".

- No. 3 is a distinct property in the sense that it is self-contained. All the five residences in Kinnerton Yard would appear to be "distinct properties", and in the course of the argument it appeared to the court that they closely resembled a terrace of houses and might have been regarded as five separate and distinct
- H houses and not part of a house or building at all.

But if they have to be regarded as "distinct properties" into which a house has been divided and r. 12 is sought to be applied, the question arises whether they are occupied by distinct owners (or their respective tenants).

- The rule appears to me to be complementary to r. 8 (c). Rule 8 deals with machinery for collection of the property tax, and, where there is a common landlord of a house or building separately let in different apartments or tenements and occupied by two or more persons severally, the assessment and charge is to be made on him, in the first instance with recourse to the occupier if the landlord defaults. Rule 12 appears to recognise that even in one house there may be distinct properties and distinct owners (or their tenants), in which case there would not be a common landlord or owner from whom to collect the tax in respect of all the house or building, and therefore such properties must be separately assessed and charged on the respective occupiers thereof.
- I

I would regard r. 12 as of much more restricted application than the Crown has contended here. Even assuming that the taxpayer is to be regarded as having a benefit of part of the annual value of the property, it does make him of necessity "distinct owner" of the property. He and all the other occupiers derive their titles to their distinct properties within the building directly from the common landlord, Kinnerton Estates, Ltd., and these facts to my mind fit r. 8 rather than r. 12. A

The assessment of £201 as the annual value of the premises is in fact based on the terms of the lease. Although the rent is only £1 annually, the landlord has had £2,750 at the commencement of a tenancy for twenty-two years. Modern circumstances may have prompted or necessitated this kind of financial arrangement. Its effect seems to be that the landlord enjoys the benefit of part of the annual value appropriated to any "distinct property" and has the bulk of the benefit in advance. If r. 12 can be invoked, it would work harshly against the tenant, for, although he has paid £2,750 to the landlord, he only has £1 rent annually from which to deduct the tax, in the manner provided by the tax law. B

It is unfortunate that the view of the Kinnerton Estates, Ltd., the landlord, has not been, and could not be as the law stands, heard in this case, but in my judgment the learned judge came to the right conclusion that the assessment should have been made on the landlord under r. 8 (c). I would dismiss the appeal. C

LORD GODDARD, C.J.: I agree with the judgments which have been delivered. We were told that it was hoped that this would be a test case, but we have not been able to hear an argument by the landlord, and I should not be surprised if other commissioners regarded these dwellings as indistinguishable from ordinary terrace houses. It seems, however, inescapable that r. 8 (c) must apply, and I entirely agree with JENKINS, L.J., that the rules with which this case is concerned urgently require reconsideration in the light of modern conditions. They seem to me in many respects to be out of date. In 1842, when a rule corresponding to r. 8 first appeared*, flats were, I believe, unknown. The rule was designed to apply to houses let as lodgings or tenements. A tenement house is a well-known term applied to premises which are shared by two or more families and the dwellers therein are often of a transient class, so that it would be impossible to assess anyone to tax except the landlord. Nowadays, more especially since the war, it has become quite common to let flats on long leases in consideration of a lump sum payment and a ground rent instead of on a rackrent, and I can see no difference between a flat let on these terms and the long leasehold house which is bought for occupation. The occupier pays the Sch. A tax and pays ground rent to the landlord under covenant, deducting tax at the standard rate. Whether r. 12 can ever apply except where the freeholder divides up the house and sells the freeholds of the divided parts to separate purchasers we need not now decide, but it is remarkable that there seems to be no case which illustrates the application of that rule. I agree with the order proposed. D

Appeal dismissed. Leave to appeal to the House of Lords granted. E

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Alexander Rubens & Co.* (for the taxpayer). F

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*] G

* See the Income Tax Act, 1842, s. 60, Sch. A, No. IV, r. 3. H

Re GOUGH (*deceased*).
 PHILLIPS v. SIMPSON AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), April 15, 17, 1957.]

Will—Rule in Howe v. Dartmouth—Residuary bequest including leasehold property held for more than sixty years unexpired at testator's death—Successive life interests and gift over of "my property"—Whether leasehold property settled land or held on trust for sale—Settled Land Act, 1925 (15 & 16 Geo. 5 c. 18), s. 73 (1) (xi).

By his will, dated May 8, 1934, the testator appointed his wife his sole executrix and gave to her the residue of his estate real and personal, whatsoever and wheresoever, on trust for her lifetime. He then declared: "On the demise of my wife I bequeath to [my sister, M.A.S.] or her issue the residue of my property real and personal, and after their demise to " a named charity. The testator died on Aug. 27, 1935. His residuary estate included leasehold premises held under a lease for a term of which about sixty-five years had remained unexpired at his death. The testator's sister died on May 1, 1953, leaving issue, a son and three grandchildren, two of whom were infants. The testator's widow died on Apr. 29, 1954, and on her death the leasehold premises vested in her executor. The question having arisen whether the premises were settled land or were held on trust for sale,

Held: the leasehold premises were settled land since no trust for sale ought to be implied, for the following reasons—

(i) on the true construction of the testator's will, he intended the beneficiaries in the residue of "my property" to enjoy it in specie, and

(ii) the rule in *Howe v. Dartmouth* (*Earl*) ((1802), 7 Ves. 137) did not apply to leasehold premises held for a term of which more than sixty years remained unexpired, as they were an authorised investment within s. 73 (1) (xi) of the Settled Land Act, 1925.

[**Editorial Note.** Under the rule in *Howe v. Dartmouth* such parts of a testator's residuary personal estate as are of a wasting nature ought, where he has given the estate in trust for persons in succession, to be converted and invested in investments having a permanent character, so that the property is preserved for successive beneficiaries. The rule is stated in 16 HALSBURY'S

LAWs (3rd Edn.) 381, para. 743.

As to the exceptions from the rule in *Howe v. Dartmouth*, see 16 HALSBURY'S LAWs (3rd Edn.) 381, 382, para. 744; and for cases on the subject, see 44 DIGEST 197-210, 265-382.

For the Settled Land Act, 1925, s. 1 (7), s. 2, and s. 73 (1) (xi), see 23 HALSBURY'S STATUTES (2nd Edn.) 21, 22, 162.]

Cases referred to:

(1) *Howe v. Dartmouth* (*Earl*), *Howe v. Aylesbury*, (1802), 7 Ves. 137; 32 E.R. 56; 44 Digest 197, 265.

(2) *Re Nicholson, Eade v. Nicholson*, [1909] 2 Ch. 111; 78 L.J.Ch. 516; 100 L.T. 877; 44 Digest 206, 355.

(3) *Re Berton, Vandyk v. Berton*, [1938] 4 All E.R. 286; [1939] Ch. 200; 108 L.J.Ch. 139; 159 L.T. 566; Digest Supp.

(4) *Re Brooker, Brooker v. Brooker*, (1926), 70 Sol. Jo. 526; 44 Digest 200, 295.

(5) *Re Wareham, Wareham v. Brewin*, [1912] 2 Ch. 312; 81 L.J.Ch. 578; 107 L.T. 80; 44 Digest 205, 345.

(6) *Re Trollope's Will Trusts, Public Trustee v. Trollope*, [1927] 1 Ch. 596; 96 L.J.Ch. 340; 137 L.T. 375; 44 Digest 200, 296.

(7) *Re Jefferys, Finch v. Martin*, [1938] 4 All E.R. 120; [1939] Ch. 205; 108 L.J.Ch. 123; 159 L.T. 542; Digest Supp.

Adjourned Summons.

The plaintiff, who was the executor of Eva Gough, deceased, widow of the testator George Gough, deceased, and was also the executor by representation of the testator's estate, issued an originating summons for the determination of the question whether, in the events which had happened, the leasehold property known as 51, Bernard Street, Swansea, in the County of Glamorgan, which formed a part of the residuary estate of the testator, was now held by the plaintiff (a) on trust for sale, or (b) on trust to vest the same in the first and second defendants as the persons for the time being constituting the tenant for life thereof for the purposes of the Settled Land Act, 1925*.

The facts and the terms of the will appear in the judgment.

D. H. M. Davies for the plaintiff, the executor of the testator's widow and the executor by representation of the testator's estate.

J. Monckton for the first four defendants, a son and three grandchildren of the testator's sister, beneficiaries under the will.

E. I. Goulding for the fifth defendant, St. Dunstan's, entitled to the testator's residuary estate expectant on the deaths of the first four defendants.

Cur. adv. vult.

Apr. 17. **VAISEY, J.**, read the following judgment: The testator, George Gough, described as of No. 51, Bernard Street, Swansea, was a schoolmaster. He made his will on May 8, 1934. After some specific gifts in favour of his sister, Mary Ann Simpson, and other persons, he gave to his wife, Eva Gough, the residue of his estate real and personal whatsoever and wheresoever "on trust for her lifetime", and appointed her sole executrix. He then proceeded, somewhat tautologically, as follows:

"I give to my dear wife, Eva Gough, absolutely my war loan and any cash I possess, and the residue of my estate real and personal whatsoever and wheresoever situate I leave to my said wife in trust for life. On the demise of my wife I bequeath to the aforesaid Mary Ann Simpson or her issue the residue of my property real and personal, and after their demise to the St. Dunstan's Home for Blinded Soldiers. If necessary for my wife's comfort she is entitled to sell Brook College [sic, meaning "Cottage"] Llangennith, and retain proceeds."

The testator died on Aug. 27, 1935, and his wife Eva Gough (whom I will call "the widow") proved his will on Nov. 6, 1935. His estate included Brook Cottage, which was a freehold valued at £350, some small items of personalty of little value, and 51, Bernard Street aforesaid, which was held under a lease for ninety-nine years less one day from Mar. 25, 1902, at a rental of £3 10s. per annum and was valued at £525. At the death of the testator, therefore, the said leasehold premises were held on a term of which more than sixty-five years were unexpired. Mary Ann Simpson died on May 1, 1953, leaving issue four persons and no more; that is to say, a son, Alfred William Simpson, and three grandchildren, two of whom are infants. All four of them are defendants to this action. All were born in the lifetime of the widow. It is agreed that the ultimate gift to the fifth defendant, St. Dunstan's, will not take effect until the death of the last survivor of the four defendants previously mentioned. *

The widow died on Apr. 29, 1954, and the plaintiff, Charles Wilfrid Phillips, is her legal personal representative. Brook Cottage was sold and the proceeds received by the widow as provided in the will, and the testator's estate now consists of the said leasehold property, 51, Bernard Street, and a small quantity of furniture. After the testator's death St. Dunstan's agreed that the widow should continue to live at No. 51, Bernard Street, which she did, but has now suggested that the property ought to be sold and the proceeds invested in authorised trust securities. On the other hand, the two adult defendants [the first

* See s. 7 (1) and s. 19 (3) of the Settled Land Act, 1925.

- A and second defendants], who are presently interested in the income to the extent of a moiety, wish the property to be retained. It is apprehended that the leasehold property was vested in the widow at the date of her death either (a) as a trustee for sale by virtue of a trust for sale to be implied in the testator's will, or (b) as a tenant for life for the purposes of the Settled Land Act, 1925. In either case the property is now vested in the plaintiff as the widow's executor. The
- B plaintiff is the widow's brother and, in fact, lived in the property with her ever since 1935.

- The question now arises whether the property is for the purposes of the Settled Land Act, 1925, settled land, or whether it is held on trust for sale. In the latter case it cannot be settled land: see the Settled Land Act, 1925, s. 1 (7)* and s. 2. First, on the construction of the will, I incline to the view that the testator
- C intended the beneficiaries to enjoy his estate in specie, and that when he refers to "my property" he is thinking of his property as existing at the time of his death. Secondly, I think that the rule in *Howe v. Earl of Dartmouth*, *Howe v. Aylesbury* (1) ((1802), 7 Ves. 137) can no longer apply to leaseholds held for a term exceeding sixty years, they being now authorised investments under s. 73 (1) (xi) of the Settled Land Act, 1925, and, incidentally, also under s. 28 (1) of the Law of Property Act, 1925, although this last-mentioned section does not,
- D in my judgment, apply. Thirdly, in so far as the rule in *Howe v. Dartmouth* (1) is based on an implied intention of the testator, I can find no foundation for such an intention. Fourthly, it by no means follows that the purchase of a long leasehold investment would be proper in all cases of settlements, or in this case at the present time; but this is not, in my view, relevant to the question which I
- E have to decide, as the property was part of the testator's residuary estate at his death.

- On the authorities, I think that this is settled land and that no trust for sale can in the circumstances be implied. See *Re Nicholson*, *Eade v. Nicholson* (2) ([1909] 2 Ch. 111); *Re Berton*, *Vandyk v. Berton* (3) ([1938] 4 All E.R. 286), and *Re Brooker*, *Brooker v. Brooker* (4) ((1926), 70 Sol. Jo. 526). See also JARMAN ON WILLS (8th Edn.), Vol. 2, p. 1225, and THEOBALD ON WILLS (11th Edn.), p. 456.
- F I was also referred to *Re Wareham*, *Wareham v. Brewin* (5) ([1912] 2 Ch. 312), *Re Trollope's Will Trusts*, *Public Trustee v. Trollope* (6) ([1927] 1 Ch. 596), and *Re Jefferys*, *Finch v. Martin* (7) ([1938] 4 All E.R. 120), which are not, in my view, in point.

- I will declare that in the events which have happened the leasehold property
- G 51, Bernard Street, Swansea, in the County of Glamorgan, forming part of the residuary estate of the testator George Gough is not subject to any trust for sale but is held by the plaintiff on trust to vest the same in the first and second defendants, Alfred William Simpson and Michael Simpson, as the persons for the time being constituting the tenant for life thereof for the purposes of the Settled Land Act, 1925.

Declaration accordingly.

Solicitors: *Chamberlain & Co.*, agents for *Beor, Wilson & Lloyd*, Swansea (for the plaintiff); *David Morris & Co.*, agents for *Cyril Goldstone & Co.*, Swansea (for all the defendants other than the fifth defendant); *Ranger, Burton & Frost* (for the fifth defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

* Section 1 (7) of the Settled Land Act, 1925, was added by the Law of Property (Amendment) Act, 1926, s. 7 and Schedule.

Re KILVERT (*deceased*).
MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. v.
KILVERT AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), March 22, 27, 1957.]

Will—Gift to three persons equally or their “heirs and successors”—Ascertainment of class comprising “heirs and successors”—Shares in which persons within the class are entitled—Relevance of intestate succession.

A testator by his will bequeathed specific articles to his wife and continued “The above to be returned to my brothers and sister or their heirs and successors at her death”. After making other bequests, the testator provided: “The residue of my estate to be equally divided between my brothers [E.] and [W.] and my sister [S.] or their heirs and successors after all debts, funeral expenses and duties are paid”. The testator’s brother W. predeceased the testator, who died on Sept. 27, 1954. The testator’s widow died on Mar. 4, 1955. The testator’s sister S. died on Oct. 29, 1955. The residue comprised both real and personal property. On the construction of the gift of specific articles taking effect after the death of the testator’s widow, and the gift of the residue,

Held: under both gifts the property was to be divided into equal one-third shares between E., S., and a class comprising the persons who at the death of W. were entitled to succeed to W.’s property under the law of intestate succession, applicable at the date of the death of the testator, this latter class of persons taking as joint tenants between them the one-third share which W. would have taken had he survived the testator.

Re Gansloser’s Will Trusts ([1951] 2 All E.R. 936) applied.

Rowland v. Gorsuch ((1789), 2 Cox Eq. Cas. 187) criticised.

Quaere whether *Re Porter’s Trust* ((1857), 4 K. & J. 188) and *Jacobs v. Jacobs* ((1853), 16 Beav. 557) are by implication overruled by *Re Gansloser’s Will Trusts*, *supra* (see p. 203, letter H, and p. 204, letter E, post).

[As to ascertainment of class by reference to Statutes of Distribution, see 34 HALSBURY’S LAWS (2nd Edn.) 317-320, paras. 367-369; and for cases on the subject, see 44 DIGEST 875-879, 7315-7363.]

Cases referred to:

- (1) *Re Whitehead, Whitehead v. Hemsley*, [1920] 1 Ch. 298; 89 L.J.Ch. 155; 122 L.T. 767; 44 Digest 869, 7249.
- (2) *Re Gansloser’s Will Trusts, Chartered Bank of India, Australia & China v. Chillingworth*, [1951] 2 All E.R. 936; [1952] Ch. 30; 3rd Digest Supp.
- (3) *Eagles v. Le Breton*, (1873), L.R. 15 Eq. 148; 42 L.J.Ch. 362; 44 Digest 973, 8276.
- (4) *Booth v. Vicars*, (1844), 1 Coll. 6; 13 L.J.Ch. 147; 2 L.T.O.S. 307; 63 E.R. 297; 44 Digest 897, 7564.
- (5) *Rowland v. Gorsuch, Price v. Gorsuch*, (1789), 2 Cox Eq. Cas. 187; 30 E.R. 86; 44 Digest 999, 8563.
- (6) *Thomas v. Hole*, (1728), Cas. temp. Talb. 251; 1 Dick. 50; 2 Eq. Cas. Abr. 368; 25 E.R. 762; 44 Digest 890, 7476.
- (7) *Stockdale v. Nicholson*, (1867), L.R. 4 Eq. 359; 36 L.J.Ch. 793; 16 L.T. 767; 44 Digest 897, 7559.
- (8) *Withy v. Mangles*, (1843), 10 Cl. & Fin. 215; 8 E.R. 724; 40 Digest 580, 1148.
- (9) *Re Porter’s Trust*, (1857), 4 K. & J. 188; 27 L.J.Ch. 196; 32 L.T.O.S. 86; 70 E.R. 79; 44 Digest 500, 3199.
- (10) *Jacobs v. Jacobs*, (1853), 16 Beav. 557; 22 L.J.Ch. 668; 21 L.T.O.S. 97; 51 E.R. 895; 44 Digest 868, 7241.
- (11) *Bullock v. Downes*, (1860), 9 H.L. Cas. 1; 3 L.T. 194; 11 E.R. 627; 44 Digest 876, 7328.

A Adjourned Summons.

The plaintiffs, Midland Bank Executor and Trustee Co., Ltd., as one of the trustees of the will of Richard Kilvert, deceased, applied to the court by originating summons for the determination of the following questions:

- (1) Whether, on the true construction of the said will, the bequest therein contained of the testator's silver and of such of his furniture as his widow might desire made in reversion expectant on the determination of the life interest therein bequeathed to such widow and in the terms "The above to be returned to my brothers and sister or their heirs and successors at her death" (a) constituted a valid bequest in favour of Elisha Kilvert and Sarah Eliza Norton (in the said will called Sarah Elisa Norton) the surviving brother and sister of the said deceased; (i) as tenants in common in equal shares, or (ii) as joint tenants; or (b) constituted a valid bequest in favour of some other and if so what person or class of persons; and if so, for what respective interests; or (c) was void for uncertainty and failed.

- (2) Whether on the true construction of the said will, the residuary bequest made in the terms "The residue of my estate to be equally divided between my brothers Elisha Kilvert and William Kilvert and my sister Sarah Elisa Norton or their heirs and successors after all debts, funeral expenses and duties are paid" (a) constituted a valid bequest in favour of Elisha Kilvert and Sarah Eliza Norton the surviving brother and sister of the said deceased as tenants in common in equal shares; or (b) constituted a valid bequest in favour of some other and if so what persons or class of persons; and if so for what respective interests; or (c) was void for uncertainty and failed.

- The testator by his will dated June 4, 1948, bequeathed to his wife Alice Kilvert £1,000 free of duty and an annuity of £400 for life and also the use of his silver and such of his furniture as she might desire for her life, and the testator provided:

- "The above to be returned to my brothers and sister or their heirs and successors on her death."

After certain other bequests the testator provided by the last sentence of his will:

- "The residue of my estate to be equally divided between my brothers Elisha Kilvert and William Kilvert and my sister Sarah Elisa Norton or their heirs and successors after all debts, funeral expenses and duties are paid."

- The testator's brother W. died on July 26, 1953, leaving surviving him his widow, the fifth defendant, and two children, the third and fourth defendants. The testator died on Sept. 27, 1954. His widow died on Mar. 4, 1955, intestate, the plaintiff becoming administrator of her estate. The persons beneficially entitled to her estate on her intestacy were her brothers and sister, and the issue of a deceased brother; her brother, Charles Downes, one of this class, was the sixth defendant. The testator's sister Sarah died on Oct. 29, 1955; letters of administration with the will annexed to her estate were granted to the plaintiff and her residuary legatee was Richard John Norton, the second defendant, who also was the person who would be her heir at law under the law of intestate succession before 1926. The testator's brother Elisha was the first defendant. The testator's will, and two codicils thereto not material to the questions raised by the originating summons, were proved by the plaintiff and the testator's brother Elisha, they being those of the executors therein named who survived the testator.

I. Edward-Jones for the plaintiff, one of the trustees of the will.

D. A. Ziegler for the first defendant, Elisha Kilvert, the testator's surviving brother.

T. L. Dewhurst for the second defendant, the residuary legatee under the will of Sarah Eliza Norton, the deceased sister of the testator. **A**

P. A. Goodall for the third defendant, a son of William Kilvert, the brother who predeceased the testator.

J. L. Knox for the fourth defendant, a daughter of William Kilvert.

N. Micklem for the fifth defendant, the widow of William Kilvert.

B. J. H. Clauson for the sixth defendant, one of the next of kin of the widow of the testator. **B**

ROXBURGH, J.: I shall first of all construe, in part, the residuary clause. In this clause the word "equally" appears, and therefore, if all three residuary legatees had been alive at the date of the death of the testator or his widow (because I am not going to decide which is the material date, as in the circumstances of the case it does not matter), there would have been obviously a division into equal third parts, since "equally" is a word of division. There is in my judgment no doubt, therefore, that the words "or their heirs and successors" mean "or their respective heirs and successors"; or, putting it in another way, "the heirs and successors of each of them respectively." **C**

I now go back to the earlier gift which relates to the use of the silver and the furniture. It is to be noted that there are no words of division; but, in my judgment, the words "or their heirs and successors" could not be reasonably construed if the brothers and sister were to be treated as joint tenants. In my judgment, in spite of the absence of any word of division, I am compelled by the use of the words "or their heirs and successors" to assume that that gift means the same as the gift of the residue, that is to say, that the gift is to be returned (and I do not pause to think what that exactly means) to the brothers and sister in such a way that if they were all alive at the death of the widow they would take in equal third shares, and that the words "or their heirs and successors" mean "or the heirs and successors of them respectively". That is the first point. **D**

The next point is this: What is the meaning of the phrase "or their heirs and successors"?—because it is obvious that, as William predeceased the testator, anything given to him must lapse unless somebody can take under the words "or their heirs and successors". If somebody can take, then, of course, the next question is: Who can take under those words? This point is not the subject-matter of any reported decision. **E**

The property in question consists in part of real estate and in part of personal estate, and there is nothing to convert the real estate into personal estate for the purposes of distribution. Therefore, three different views have been put before me. One is that the person entitled is the person who would have been the heir on an intestacy before Jan. 1, 1926. Another view is that there is no differentiation to be made in these days between real and personal estate, and that the persons entitled are those who are entitled to property undisposed of under the existing law of intestate succession. The third view is that the words "and successors" introduce such a degree of uncertainty as to vitiate the gift, and thus produce an intestacy. I may say that before counsel for the sixth defendant quite properly drew my attention to a passage in STROUD'S JUDICIAL DICTIONARY* which led me to discover a good many other passages in the near neighbourhood, I had thought it possible that the word "successors" might introduce that degree of uncertainty; but I have discovered (though the matter has not been explored below the surface) that the court, both in this country and in Scotland, has never failed to construe the word "successors", though no doubt it is true that it has received varying meanings in varying contexts. That circumstance is not material for the present purpose, because if the word can be construed in other contexts, I have no doubt that it can be construed in this context. I think that it would be a disaster if the court felt itself unable to **G** **H** **I**

* (3rd Edn.) Vol. 4, p. 2908.

A construe the word "successors" at all. That it does present some difficulties is true, but it has been said over and over again that the fact that a judge finds the point difficult does not entitle him to adopt the counsel of despair and say "I cannot reach a decision".

I must now, in order to pursue the question whether under this will realty and personalty travel different courses, refer as a starting point to the decision of SARGANT, J., in *Re Whitehead, Whitehead v. Hemsley* (1) ([1920] 1 Ch. 298). That case does not contain the words "and successors". Therefore, it has no bearing on the point that I have just decided, and it has no binding authority in connexion with the point which I am about to decide, but it does, I think, provide me with a good starting point. The testatrix, who died in 1895, by her will gave her residuary personalty and realty, after the death of an annuitant, to her brothers and sister, F., W., J., E. and X. "or their heirs in equal shares and proportions". SARGANT, J., held that where, as in that case, the words "or their heirs" were referable to a mixed fund, they were words of substitution and not words of limitation, both in regard to realty and in regard to personalty, and accordingly that personalty went to the statutory next of kin and (as far as I can make out) that the realty went to the heir at law, though that is not, I think, expressly stated. That, at any rate, I think would be the position as it was in 1920; but what I have to consider is first of all whether that would be true today and, secondly, even if it would be true of a gift to a class or their heirs, whether it would be equally true of a gift to a class or their heirs and successors. The important thing that has happened since 1920 is the assimilation of the devolution of real and personal property on an intestacy. It seems to me most probable that today, in the case of a gift to a class of persons or their heirs, both realty and personalty would be distributed in accordance with the present law of intestate succession, making no distinction between realty and personalty. That, I think, is most probable, but I must not put it higher, because that is not the position here. I have the words "and successors"; and, in my view, the words "and successors" are words of a much wider and more general application than the word "heirs". There is about them no flavour or savour of realty. The word "heirs", of course, historically and in a legal vocabulary has a very strong flavour of realty, though no doubt lay people often use it and have used it in connexion with personalty; but the word "successors" has no such flavour. It is no more akin to realty than to personalty; and the phrase is "heirs and successors". In my judgment, that does not mean the same as "heirs or successors", which might have suggested a different construction. I think that the words "heirs and successors" should be construed as referring to the persons entitled to the real and personal estate under the law of intestate succession applicable at the date when the testator died. I have carefully not put those words "law of intestate succession" into a more concrete shape, because I am about to hear argument whether or not a widow is entitled to participate. What I have decided is that the real and personal property are treated as one fund for this purpose, i.e., for the purpose of devolution, and that the law applicable is the law as it has stood since Jan. 1, 1926. (His LORDSHIP then heard further argument.)

ROXBURGH, J.: The words which I read for the first part of my judgment are: "The residue of my estate to be equally divided between my brothers Elisha and William and my sister Sarah or their heirs and successors". I have held that the words "heirs and successors" are not void for uncertainty, but indicate the class of persons who would be entitled to take the property under the law of intestate succession as it stood at the date of the death of the testator, i.e., the legislation of 1925, as since amended. The point that I have now to determine is: In what shares and proportions do the members of the class take? In other words, do they take as joint tenants (because the words "to be equally divided" obviously refer only to the first three named persons and there is no

indication of any severance as between the heirs and successors) or do the heirs and successors take in the shares and proportions indicated by the law of intestate succession? A

This subject has been illuminated, but not entirely clarified, by a recent decision of the Court of Appeal, *Re Gansloser's Will Trusts, Chartered Bank of India, Australia & China v. Chillingworth* (2) ([1951] 2 All E.R. 936). The word in question there was "relations". SIR RAYMOND EVERSHED, M.R., having first of all discussed and decided the meaning of the word "relations", says (*ibid.*, at p. 941): "Having found this class of person, how is the distribution to take effect?" Then he says (*ibid.*, at p. 942): "It all depends on the extent and significance of the reference that the rule", i.e., the rule of construction which confines the word "relations" to an ascertainable class, "instructs one to make to the Statutes of Distribution". After referring to a number of cases, the Master of the Rolls cites from the judgment of LORD ROMILLY, M.R., in *Eagles v. Le Breton* (3) (1873), 42 L.J.Ch. 362, which contained these words (*ibid.*, at p. 363): B
C

"It was true that when there was an express reference to the statutes, they would take as tenants in common in the shares in which they would have taken on an intestacy. But when there was no express reference to the statutes the case was different. There was nothing then to prevent the ordinary rule from applying, that under a gift to a class without words of severance, all the members of the class take as joint tenants." D

I must observe, as regards that passage, that it is very broadly stated and was certainly at variance with a large number of cases which had been decided prior to the date of LORD ROMILLY's judgment; but the passage, as distinct from the statement of previous authority, is unambiguous. An express reference to the statutes is needed to oust the general rule that the members of the class take as joint tenants. I think that it seems quite clear that SIR RAYMOND EVERSHED, M.R., adopts that statement of principle, because he says ([1951] 2 All E.R. at p. 944): E

"There is here, according to the language of the testator himself, no reference to the Statutes of Distribution. The statutes are introduced because a court, to save the will, is compelled so to construe the word 'relations'." F

May I say that it seems to me that those words are precisely applicable to the present case. Plainly there is, according to the language of the testator himself, no reference to the Statutes of Distribution or the law which has been substituted for those Acts. The statute was introduced because I, in order to save the will, had to place a restriction on the meaning of the word "successors". I stress that word "successors", because the phrase is not "heirs" simpliciter, in which case I should have had to make up my mind how far the Court of Appeal had overruled certain earlier authorities; but the words are "heirs and successors", a composite phrase, and one in which both words must receive a proper interpretation. In order that the phrase shall not be void for uncertainty, I have to put a restriction on the meaning of the word "successors", and therefore I should say without hesitation, but for certain considerations with which I am going to deal, that this case is covered by the decision of the Court of Appeal in *Re Gansloser's Will Trusts* (2). G
H

Before I leave that decision, I would like to refer to the way in which JENKINS, L.J., states the problem, though it does not, as far as I can see, differ in any material way from the way in which the Master of the Rolls stated it. First of all JENKINS, L.J., refers to *Eagles v. Le Breton* (3) and cites the passage which I have already cited (see letter D, *supra*). He then says ([1951] 2 All E.R. at p. 946): I

"That decision commends itself to me as being in accordance with common sense and with the basic principles of the construction of wills."

- A The rule, whether it be called a rule of construction or a rule of convenience, under which the word 'relations' is held to be limited to the next of kin of the *propositus* according to the statutes, is an artificial rule which the court in its benevolence has adopted to prevent a testator's disposition failing from uncertainty. That was considered sufficient justification for imputing a wholly conventional and artificial intention to the testator
- B by limiting his meaning of the word 'relations', or the meaning he might attach to the word 'relations', to the next of kin according to the statutes. The alternative of uncertainty was the justification for the procedure. But, that procedure having been gone through and the problem of uncertainty thus resolved, I cannot see what justification there can be for going on to impute to the testator a further entirely artificial intention
- C that the fund, or subject-matter of the gift, should be divided amongst the next of kin according to the statutes in the shares and manner provided for by the statutes. That is a matter with which uncertainty has nothing to do, and in a case of this kind, where there is a gift to 'relations', and the reference to the Statutes of Distribution is imported simply and solely by force of the benevolent rule of the court, I think there is no sufficient justification for applying it beyond the point necessary to avoid uncertainty."
- D

Faced with that authority, counsel for the fifth defendant has submitted that there is a lot more in this problem than would appear on the face of the judgment of the Court of Appeal, and so far I think that he is undoubtedly right. He has submitted further that the true distinction is between cases in which the words that have to be curtailed refer to the relationship of the class to the testator and cases in which the words which have to be restricted refer to the succession of the class to the testator. There certainly is a good deal of authority to support that distinction. SIR RAYMOND EVERSHED, M.R., makes some reference to a part of that distinction, where he says (*ibid.*, at p. 943):

- E ". . . in the class of case in which the persons to take are next of kin as distinct from next of kin according to the statutes, it is conceded that the general rule would apply, namely, that the class take as joint tenants."
- F

But no member of the court makes any reference to the further elaboration of that argument, i.e., that where the words do not relate to the consanguinity of the class but to their qualifications as successors to the *propositus*, some different rule applies. Any such different rule would, I think, plainly be inconsistent with the general statement of principle enunciated by LORD ROMILLY, M.R., LORD EVERSHED, M.R., and JENKINS, L.J., though it is true to say that the precise point was not relevant for the determination of the appeal in question, because I do not think anybody would doubt that the word "relations" referred rather to consanguinity than to succession. Mr. Micklem's argument (and, indeed, the whole of the argument on this point) has been of a very high order.

- H I looked to see how far this suggested modification of the principles enunciated in the Court of Appeal is supported by authority, and the result of my investigation is certainly singular. It is stated in JARMAN ON WILLS (8th Edn.), Vol. 3, at p. 1609:

- I "Where 'representatives' means the statutory next of kin, the manner and proportions in which they take are regulated by the statute, unless they are expressly directed to take equally. Where 'representatives' means the true next of kin, they take as joint tenants."

That passage is germane because the word "representatives" imports some kind of succession. It was a very good starting point for counsel, because if that were really consistent with authority and with the most recent decision of the Court of Appeal, it would indicate that in a case like the present, where the reference is plainly to persons who take by succession, they would take in the proportions indicated in the statute, though it does not say so in terms. But

where does all that come from? First of all, there is *Booth v. Vicars* (4) ((1844), 1 Coll. 6) which is a decision of SIR JAMES KNIGHT BRUCE, V.-C. The words there in question were "next legal representatives". He thought (and I must say I should have taken the same view) that that was a reference to persons who succeeded the propositus. He seems to have thought that in that case the persons in question, the class, took according to the Statutes of Distribution. A

The matter had been much more fully discussed long before that in *Rowland v. Gorsuch*, *Price v. Gorsuch* (5) ((1789), 2 Cox Eq. Cas. 187). What the Master of the Rolls there said is extremely interesting, because it is the earliest record known to me of the sort of argument which has ultimately prevailed in the Court of Appeal, though, curiously enough, the Master of the Rolls in *Rowland v. Gorsuch* (5) seems to have arrived at a somewhat different conclusion. SIR R. P. ARDEN, M.R., says (*ibid.*, at p. 188): B

"We all know that in the meaning of the statute of distributions, descendants ad infinitum are representatives of the persons who, if alive, would be next of kin of the intestate. Where bequests have been made to 'kindred' or 'relations', [I stress the word 'relations'] these have been considered as being so wide, as to make it impracticable to adopt it literally, and therefore it was necessary to find some rule to go by; and that rule has been to confine such a bequest to persons who would take as next of kin. I agree with the case of *Thomas v. Hole* (6) ((1728), *Cas. temp. Talb.* 251) that no greater restriction than is absolutely necessary should be put upon the testator's disposition, and therefore that although the next of kin only can take in the cases alluded to, yet they may still take per capita where the testator has directed an equal distribution." D E

I must pause to point out that he is there actually dealing with the word "relations" and that that proposition is wholly irreconcilable with the decision of the Court of Appeal in *Re Gansloser's Will Trusts* (2), because, as was there clearly laid down, the rule in such a case is not that prima facie the distribution is in the proportions fixed by the statute. I emphasise that, because though this particular case did not deal with the word "relations", yet, as the judgment is based on a general proposition which has now been held to be inaccurate, its weight must be very small. The Master of the Rolls in *Rowland v. Gorsuch* (5) considers then the words with which he has to deal, and he says (2 Cox Eq. Cas. at p. 188): F

". . . the testator after giving some legacies, gives all the residue to the 'descendants or representatives of each of my first cousins, deceased, in equal shares and proportions with my cousins now alive'. If the word 'descendants' had been made use of without the word 'representatives', there would have been no difficulty, for the propagation of mankind does not run on so fast as to make the execution of such a bequest impracticable, and there is no case which would prevent all the descendants from taking a share. But the difficulty arises on the words added to 'descendants', namely, 'or representatives'. Now, if they take as representatives, they must take per stirpes; if any person is under the necessity of making his claim as representative, he must take the share in the same manner as the person he represents . . . I have had a little doubt whether they are to take per capita or per stirpes; but upon the whole I think no person taking as representative can take otherwise than as statute gives it to representatives, i.e., per stirpes." G H I

That case looks very well for counsel for the fifth defendant, because he truly says that taking as representative is very like taking as successor, and it is; but, unfortunately, not only is that based on a wrong statement of principle, but also that decision appears to be quite inconsistent with the decision in *Stockdale v. Nicholson* (7) ((1867), L.R. 4 Eq. 359) to which I am going to make further reference; and, as *Booth v. Vicars* (4) seems to be based (so far as it

A is based on anything in particular) on *Rowland v. Gorsuch* (5), it presumably will stand or fall with *Rowland v. Gorsuch* (5).

In *Stockdale v. Nicholson* (7) (L.R. 4 Eq. 359) the words were "to the next personal representatives". There SIR RICHARD MALINS, V.-C., held (*ibid.*, at p. 371):

B "My view of the case is, that the 'next personal representative' means
 'nearest of kin'; they take as a class, and, for want of words of division,
 they take as joint tenants . . . There is one point to which I wish to direct
 counsel's attention. In that case of *Booth v. Vicars* (4), KNIGHT BRUCE,
 L.J., held that it was the next of kin, according to the statute, who took;
 but I think the authorities since that decision are so clear that a gift to the
 C next of kin, as a class, gives a joint tenancy to the nearest of kin, that that
 is my interpretation of this will. But as that part of the case was very
 slightly argued—only adverted to by Mr. Glasse—if any party desires to
 speak to that matter again, upon that point alone, I shall be very happy
 that he should do so. Mr. Baily considered that the question had been so
 clearly settled by *Withy v. Mangles* (8) ((1843), 10 Cl. & Fin. 215), and other
 D cases, that it would be hopeless to argue it. Mr. Glasse concurred in this
 view."

If counsel for the fifth defendant had been arguing that case, he might well have succeeded, because he would have said that no doubt the class is construed as meaning next of kin by consanguinity; that there was nothing to exclude the principle of joint tenancy, yet the word "representative" contained
 E another element, namely, the element of succession, which was lacking in the word "relations"; that it was on that element that *Rowland v. Gorsuch* (5) was decided and presumably that was the element on which *Booth v. Vicars* (4) was decided, and that there was no reason why *Stockdale v. Nicholson* (7) should not be decided in the same way. However, the fact remains that counsel in *Stockdale v. Nicholson* (7) were not prepared to argue it and that case is an
 F authority which to my mind is quite inconsistent with the authority of those two earlier cases.

Next, there are two cases where the word is "heirs". There again, there is no express reference in those cases to the Statutes of Distribution and therefore one would have expected, applying the doctrine stated by the Court of Appeal, that the distributions would be on the basis of joint tenancies, but in at least
 G two cases they were not. Though I have different words here, I still feel that they do afford some basis for the argument that counsel for the fifth defendant put before me, because the word "heirs" does, I think, connote an idea of succession as well as an idea of consanguinity. The two cases, unfortunately, are lacking in reasoning. The first is *Re Porter's Trust* (9) ((1857), 4 K. & J. 188), where SIR WILLIAM PAGE WOOD, V.-C., gives no reason for his conclusion, but
 H it is quite plain that he did decide that where the words were "or his heirs" the heirs took in proportions. He decided what was meant by the word "heirs" and then decided that that class took in the proportions fixed by the Statutes of Distribution. There was no reference to the Statutes of Distribution, and that decision seems to be inconsistent with the principle enunciated by the Court of Appeal in *Re Gansloser's Will Trusts* (2). I do not know whether it would now
 I stand or not; but, for my part, even if that particular case can stand, it does not seem to me that it is a sufficiently good foundation for the ingenious doctrine which counsel for the fifth defendant has evolved in his argument. The second case is *Jacobs v. Jacobs* (10) ((1853), 16 Beav. 557). There again, the words were "or his heirs", and it was held that the class took in the proportions fixed by the statute, no reasons for that decision being given. But—and it is a most curious circumstance—some members of the House of Lords seem to have taken a different view in *Bullock v. Downes* (11) ((1860), 9 H.L. Cas. 1) because LORD BROUGHAM first of all states the rule in the way in which the Court of Appeal

have recently re-stated it (in *Re Gansloser's Will Trusts* (2)). He says (*ibid.*, A at p. 16):

"The rule is, that where a testator gives a direction for a class of persons to take according to the Statutes of Distributions, that is to be regarded not merely as a direction to point out or discover the persons who are to take, but as affecting the interests so to be taken."

Then he goes on to say (*ibid.*, at p. 17): "I rely upon *Jacobs v. Jacobs* (10) and [a certain other case] as laying down clearly this principle". The truth appears to be, however, that no principle of any sort is laid down by *Jacobs v. Jacobs* (10) and, on analysis, there does not appear to have been any direction in that case for a class of persons to take according to the Statutes of Distribution. Therefore, I cannot feel that the authority of *Jacobs v. Jacobs* (10) can be established by a reference to LORD BROUGHAM's observation about it. There is another reference to the same case by LORD CRANWORTH in his speech. He states the principle in this way (*ibid.*, at p. 21):

"The authorities seem to establish, that where there is a bequest to the persons who would have been entitled under the Statute of Distribution, those persons are to take as they would have taken if there had been an intestacy."

That is not, of course, so specific as the statement by LORD BROUGHAM. Then he says later (*ibid.*, at p. 22):

"The same principle was acted on in the subsequent cases of *Jacobs v. Jacobs* (10) [and others]."

It is not for me to decide whether, if I were faced with the words "or heirs" simpliciter, I should feel that those cases, *Re Porter's Trust* (9) and *Jacobs v. Jacobs* (10) had been by implication overruled by the decision of the Court of Appeal in *Re Gansloser's Will Trusts* (2). I hold that, whether or not any limitation ought to be put on the general propositions enunciated by the Court of Appeal, there is enough in those judgments to justify me in holding that this hitherto unconstrued collocation of words, "heirs and successors", is not such a reference to the Statutes of Distribution as would oust the general rule that the members of the class take as joint tenants; and I so decide.

Order accordingly.

Solicitors: *Drake, Sturton & Co.*, agents for *G. H. Morgan & Sons*, Ludlow, Salop (for all parties other than the sixth defendant); *Kingsford, Dorman & Co.*, agents for *Eddowes, Perry & Osbourne*, Sutton Coldfield (for the sixth defendant).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A ADDISCOMBE GARDEN ESTATES, LTD. AND ANOTHER *v.*
CRABBE AND OTHERS.

[QUEEN'S BENCH DIVISION (Hilbery, J.), April 10, 11, 1957.]

B *Landlord and Tenant—Recovery of possession—Business premises—Defence of absence of notice under Landlord and Tenant Act, 1954—Tennis courts and premises let to a tennis club—Club a registered society under Industrial and Provident Societies Act, 1893—Whether club carried on business—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 23 (1), (2).*

C A lawn tennis club, which was previously a members' club, was registered as a society under the Industrial and Provident Societies Act, 1893, on Mar. 31, 1950. The objects of the club, as stated in its rules, were "to carry on the business of a lawn tennis club." By an agreement dated Apr. 12, 1954, and purporting to be a licence, the landlords of certain property, comprising a club house and tennis courts, authorised the club to occupy and enjoy the property for a period of two years from May 1, 1954. The club continued to occupy the premises after the period had expired. In an action by the landlords, claiming (as well as other relief) possession of the premises, the club contended that the agreement was not a licence but a tenancy agreement and this contention was upheld by the court. The club further contended that the Landlord and Tenant Act, 1954, Part 2, which provides security of tenure for business tenants, applied to the tenancy, because the premises comprised in the tenancy were occupied by the club for the purposes of a business carried on by the club, within s. 23 (1)* of the Act; and that, as no notice terminating the tenancy had been served by either party under the Act, the tenancy continued.

E **Held:** Part 2 of the Landlord and Tenant Act, 1954, applied to the tenancy because the premises comprised in the tenancy were occupied by the club for the purposes of an activity carried on by a body corporate, viz., the club, and therefore for the purposes of a business within s. 23 (2)* of the Act; accordingly, the landlords' claim failed.

F *Hills (Patents), Ltd. v. University College Hospital Board of Governors* ([1955] 3 All E.R. 365) applied.

G [For the Landlord and Tenant Act, 1954, s. 23, see 34 HALSBURY'S STATUTES (2nd Edn.) 408; and for the Industrial and Provident Societies Act, 1893, s. 4, see 12 HALSBURY'S STATUTES (2nd Edn.) 878.]

Cases referred to:

(1) *Facchini v. Bryson*, [1952] 1 T.L.R. 1386; 3rd Digest Supp.

(2) *Hills (Patents), Ltd. v. University College Hospital Board of Governors*, [1955] 3 All E.R. 365; [1956] 1 Q.B. 90; 3rd Digest Supp.

H **Action.**

I On Apr. 12, 1954, the plaintiff company, Addiscombe Garden Estates, Ltd., which was the owner of Shirley Park Hotel, Croydon, entered into an agreement in writing with the defendants as the trustees of the Shirley Park Lawn Tennis Club, Ltd., in regard to certain premises (including a club house) and tennis courts in the hotel grounds. The club was originally a members' club, but on Mar. 31, 1950, it was registered as a society under the Industrial and Provident Societies Act, 1893. By the terms of the agreement, which purported to be a licence, the plaintiff company licensed and authorised the defendants to enter on, use and enjoy the premises and tennis courts and to use certain chattels in connexion therewith for a period of two years from May 1, 1954. On the expiry of the term granted by the agreement, the club continued to occupy and use the premises and tennis courts, although negotiations for a further agreement between the parties had been unsuccessful. By a specially indorsed writ issued

* The terms of s. 23 (1) and (2) are printed at p. 206, letter G, post.

on May 9, 1956, the plaintiff company claimed (i) an injunction restraining the defendants from further trespassing on the premises and tennis courts; (ii) an injunction ordering the defendants to quit and yield up the premises and tennis courts and to remove therefrom all chattels and effects which were the property of the defendants or of the club; and (iii) if necessary and as appropriate, orders for delivery up of possession of the premises and tennis courts and the chattels and effects belonging thereto. A

By an agreement dated July 31, 1956, the plaintiff company sold the premises and tennis courts, and the chattels and effects belonging thereto, to the second plaintiff, Alan Percy Smith, who completed the purchase on or about Aug. 1, 1956. The writ was thereupon amended by adding the name of the second plaintiff. B

By their defence the defendants alleged that the agreement of Apr. 12, 1954, was a tenancy agreement; that the tenancy was subject to Part 2 of the Landlord and Tenant Act, 1954, as the property included in the tenancy was at all material times occupied by the defendants for the purpose of a business carried on by them, namely, the activity of running a tennis club; and that, as no notice terminating the tenancy had been served by any party under the Act, the tenancy continued in force*. C

The action having come on for hearing before HILBERY, J., HIS LORDSHIP, applying the principle laid down by the Court of Appeal in *Facchini v. Bryson* (1) ([1952] 1 T.L.R. 1386), held that, on the true construction of the document of Apr. 12, 1954, the agreement was a tenancy agreement, and not a licence. The case is reported only on the question whether the property comprised in the tenancy was occupied by the tenant for the purposes of a business carried on by the tenant, within s. 23 (1) of the Landlord and Tenant Act, 1954. D

L. A. Blundell for the plaintiffs.

C. F. Fletcher-Cooke for the defendants. E

HILBERY, J., stated the facts and the relevant terms of the contract of Apr. 12, 1954, and held that the contract was a tenancy agreement. His LORDSHIP continued: The next question which arises is whether the Shirley Park Lawn Tennis Club, Ltd., carries on a "business" within the meaning of the Landlord and Tenant Act, 1954, Part 2†, which is headed: "Security of tenure for business, professional and other tenants". Section 23 of the Act is in these terms: F

"(1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes. G

"(2) In this Part of this Act the expression 'business' includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate." H

The Shirley Park Lawn Tennis Club, Ltd., is a society registered under the Industrial and Provident Societies Act, 1893. Section 4 of the Act reads:

"A society which may be registered under this Act (herein called an industrial and provident society) is a society for carrying on any industries, businesses, or trades specified in or authorised by its rules, whether whole-sale or retail, and including dealings of any description with land." I

Accordingly, r. 1 of the rules of the Shirley Park Lawn Tennis Club, Ltd., reads:

"The society (hereinafter called 'the club') shall be called the Shirley Park Lawn Tennis Club, Ltd., and its objects are to carry on the business of a lawn tennis club."

* See s. 24, s. 25 and s. 27 of the Landlord and Tenant Act, 1954.

† Part 2 of the Act of 1954 contains s. 23 to s. 46, inclusive.

- A I suppose that, in the ordinary way, no one would think of a members' tennis club or golf club as carrying on a business, even though the club had, as clubs often have, a professional shop where trade is actually done. I have to decide, however, whether the Shirley Park Lawn Tennis Club, Ltd., is a business within the meaning of s. 23 (2) of the Landlord and Tenant Act, 1954. Section 23 (2) says, in express terms, that the expression "business" includes a trade, profession or employment, and includes any activity carried on by a body of persons, whether corporate or unincorporate. Counsel for the plaintiffs contended that, since the word "business" in the sub-section was in inverted commas, indicating that the word was to be used in the ordinary sense in which it was used in everyday life, the sub-section merely enacted that the word, being used in that way, should include a trade, profession or employment and any activity of the same kind such as would ordinarily be included in the word "business". I find myself unable to give that construction to the sub-section. If the sub-section were intended to be read in that way, all that need have been said was: "The expression 'business' includes a trade, profession or employment and includes any such activity carried on by a body of persons". Parliament, however, refrained from putting the word "such" before "activity", and I am left with the words "includes any activity carried on".

I cannot overlook the fact that in *Hills (Patents), Ltd. v. University College Hospital Board of Governors* (2) ([1955] 3 All E.R. 365), where it was held that the governors of a hospital under the National Health Service Act, 1946, carried on a "business" within the meaning of s. 23 (2) of the Act of 1954, DENNING, L.J., said (*ibid.*, at p. 368):

- E "... s. 23 (2) of the Act of 1954 ... says: '... the expression "business" includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate'. Reading those words into s. 30 (1) (g) [of the Act of 1954], it seems to me plain that the governors intend to occupy these premises for the purposes of an activity to be carried on by them therein. Their activity is managing the hospital, and they intend, if they obtain possession of the premises, to occupy them for the purpose of that activity."

No one would say that a hospital carried on a business in the ordinary sense, but, none the less, the Court of Appeal have said that the governors of a hospital were engaged in an activity as a corporate body and, therefore, were carrying on a business within the meaning of s. 23 (2) of the Act of 1954.

- G Having regard to the words "and includes any activity carried on by a body of persons, whether corporate or unincorporate", in s. 23 (2), I am unable to avoid saying that they are sufficient to cover the activity carried on by this body corporate, the Shirley Park Lawn Tennis Club, Ltd. There is an "activity", and it is "carried on by a body ... corporate", and it is an activity carried on by that body corporate on the premises which are the subject of the contract of Apr. 12, 1954. I cannot find any justification for limiting the words "any activity" by inserting the word "such" between the words "any" and "activity" so as to make it read "any such activity". Therefore, I find that the plaintiffs' claim must fail in this court. I can only say that I hope that some other court will have the opportunity to consider this matter.

Judgment for the defendants.

Solicitors: *Summer & Co.* (for the plaintiffs); *Currey & Co.* (for the defendants).
[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

HART (INSPECTOR OF TAXES) v. SANGSTER.

[COURT OF APPEAL (Lord Goddard, C.J., Jenkins and Sellers, L.J.J.), March 19, 1957.]

Income Tax—Income—Acquisition of new "source" of income—Interest on sum paid by taxpayer to credit of deposit account with bank—Deposit account already in existence for several years—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. D, Case III, r. 2 (1), as substituted by Finance Act, 1922 (12 & 13 Geo. 5 c. 17), s. 17—Finance Act, 1926 (16 & 17 Geo. 5 c. 22), s. 30—Finance Act, 1951 (14 & 15 Geo. 6 c. 43), s. 21.

Bank—Deposit account—Whether payment in a fresh contract.

In March, 1951, a taxpayer paid a cheque for £2,000,000 into his deposit account at a bank which he had used for many years and on June 20, 1951, he was credited with interest thereon. He was assessed to tax on the interest under Case III of Sch. D on the basis that it arose from a new source of income within s. 21 (1) of the Finance Act, 1951.

Held: the assessment was properly made, because the taxpayer's deposit on the terms of the subsisting contract between him as customer and the bank constituted a new source of income within the meaning of s. 21 (1) of the Finance Act, 1951, although the deposit of a further sum (in the present case the £2,000,000) on the terms of a subsisting deposit account was not a new contract.

Decision of VAISEY, J. ([1956] 3 All E.R. 52) affirmed on a different ground.

[As to assessment on a new source of income, see 17 HALSBURY'S LAWS (2nd Edn.) 189, para. 388.

As to the effect of receipt of money by a banker on deposit account, see 2 HALSBURY'S LAWS (3rd Edn.) 174.

For the Finance Act, 1926, s. 30, see 12 HALSBURY'S STATUTES (2nd Edn.) 271; for the Finance Act, 1951, s. 21, see 30 HALSBURY'S STATUTES (2nd Edn.) 162; and for the Income Tax Act, 1918, Sch. D, Case III, r. 2 (1), see 12 HALSBURY'S STATUTES (2nd Edn.) 168.

For the replacing provisions of the Income Tax Act, 1952, s. 131, see 31 HALSBURY'S STATUTES (2nd Edn.) 126, 127.]

Cases referred to:

- (1) *Foley v. Hill*, (1848), 2 H.L. Cas. 28; 9 E.R. 1002; 20 Digest 268, 280.
- (2) *Joachimson v. Swiss Bank Corpn.*, [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; 21 Digest 639, 2188.

Appeal.

The taxpayer appealed to the Special Commissioners against assessments made on him to income tax, Sch. D, for the years 1951-52, 1952-53, in the amounts £7,037 and £29,371 respectively. The main ingredient in the amount assessed for each year was interest on the taxpayer's deposit account with a branch of Barclays Bank, Ltd., and the question for determination was the correct method of computing the income tax in respect of that interest.

The assessment for 1952-53 was made under the Income Tax Act, 1952, and that for 1951-52 was made under the Income Tax Acts in force before the Act of 1952 came into operation, but, as there was no material difference between the two sets of provisions the appeal was argued, and the Case was stated, by reference to the provisions of the earlier Acts as if they applied to the 1952-53 assessment in the same manner as they applied to the 1951-52 assessment.

For many years before 1951 the taxpayer had a deposit account with the Colmore Row, Birmingham, branch of Barclays Bank. No special agreement was concluded between him and the bank. Interest on deposit accounts was calculated on the principal on a day-to-day basis and was credited on half-yearly

- A rest dates, June 20 and Dec. 20 in each year. When so credited, the interest became principal and began to earn interest. It was not the practice to allow accruing interest to be withdrawn between the half-yearly rest dates unless an account was closed, in which case interest was calculated up to the date of closure and credited as principal. The rate of interest allowed varied from time to time. In 1951 the bank required fourteen days' notice of withdrawals from
- B deposit account, and, if a depositor withdrew without giving this notice, he lost fourteen days' interest on the sum withdrawn.

In the early part of 1951 the taxpayer's deposit account with the bank stood at £20,496. On Mar. 17, 1951, he paid in £2,000,000. On Mar. 30, 1951, he withdrew £250,000 without giving notice, and thus lost fourteen days' interest on this sum. On June 20, 1951, he was credited with the sum of £2,215 3s. 1d.

- C for interest.

- The assessments under appeal were made on the basis that the income in question had to be computed in accordance with the Finance Act, 1951, s. 21, which dealt with cases where a person acquired a new source, or an addition to any source, of income chargeable under Case III of Sch. D. By s. 21 (3), the section applied in relation to sources or additions to sources of income acquired
- D before Apr. 6, 1951, only where income first arose therefrom on or after that date. Where a person had acquired a new source or an addition to any source of such income and the income first arose therefrom before that date the case was governed by the Finance Act, 1926, s. 30. If the matter under appeal were governed by s. 21 of the Act of 1951, then r. 2 (1) (a) and the proviso to r. 2 (1) of the Rules applicable to Case III of Sch. D to the Income Tax Act, 1918,
- E would apply to interest on the deposit of £2,000,000 made on Mar. 17, 1951, in relation to the years of assessment 1951-52, 1952-53 and 1953-54. If the matter were governed by s. 30 of the Act of 1926, then r. 2 (1) (a) and the proviso to r. 2 (1) would apply to interest in relation to the years of assessment 1950-51, 1951-52, and 1952-53. If the matter were not within either s. 21 of the Act of 1951 or s. 30 of the Act of 1926, then r. 2 (1) (b) of the Rules applicable to Case
- F III of Sch. D to the Act of 1918 would apply in relation to all material years of assessment.

- The taxpayer contended (a) that, when he paid in the £2,000,000 to the credit of his deposit account, he did not acquire a new source, or an addition to a source of income within s. 21 of the Act of 1951 or s. 30 of the Act of 1926, and that income tax on the interest on his deposit account should be computed for 1951-52
- G and 1952-53 on the preceding year basis in accordance with r. 2 (1) (b) of the Rules applicable to Case III of Sch. D; and alternatively (b) that, if he acquired a new source, or an addition to a source, of income when he paid in the £2,000,000, income first arose therefrom prior to Apr. 6, 1951; that, therefore, s. 21 of the Act of 1951 was not applicable to the income; and that income tax for the years to which the appeal related should be computed in accordance
- H with s. 30 of the Act of 1926.

- The Crown contended (a) that the taxpayer acquired a new source, or an addition to a source, of income chargeable under Case III of Sch. D on Mar. 17, 1951; (b) that income first arose therefrom on June 20, 1951, when the interest was placed at the credit and disposal of the taxpayer; and (c) that income tax for the years to which the appeal related was properly computed by reference to
- I s. 21 of the Act of 1951.

The Special Commissioners held that the only source of the income which was the subject of the appeal was the contractual relationship between the taxpayer and the bank which came into being when the taxpayer first opened his deposit account; that the taxpayer did not acquire a new source, or an addition to a source, of income when he made the deposit on Mar. 17, 1951; and that, therefore, neither s. 21 of the Act of 1951 nor s. 30 of the Act of 1926 had any application to the income. Accordingly, it was not necessary for the Special

Commissioners to make any decision on the taxpayer's alternative contention, A
 but they indicated the opinion which they had formed that, if a new source, or
 an addition to a source, of income was acquired on Mar. 17, 1951, income first
 arose therefrom on June 20, 1951. The Special Commissioners, accordingly,
 adjusted the assessments by reducing the assessment for 1951-52 to £53, and the
 assessment for 1952-53 to £7,032 those figures having been agreed by the parties B
 as being correct on the basis of the decision of the Special Commissioners.
 The Crown appealed, by way of Case Stated. On July 3, 1956, VAISEY, J.
 ([1956] 3 All E.R. 52) allowed the appeal, holding that the taxpayer when
 making a new deposit entered into a new contract with the bank and a new
 source of income was so created. The taxpayer appealed to the Court of Appeal.

Roy Borneman, Q.C., and Sir Reginald Hills for the Crown.
Heyworth Talbot, Q.C., and G. A. Grove for the taxpayer. C

LORD GODDARD, C.J.: This is an appeal from an order of VAISEY, J.,
 who reversed the decision of the Special Commissioners, who adjusted certain
 assessments for the years 1951-52 and 1952-53 made on the taxpayer in respect
 of certain interest which he received on a deposit account which he kept at D
 Barclays Bank, Ltd. The taxpayer, who evidently had the handling of very
 large sums of money, had kept a deposit account at Barclays Bank for some
 years, and no special arrangement was entered into between him and the bank
 at the time that he opened his deposit account. The commissioners have found,
 therefore, that the contract between them was the ordinary contract common
 between English bankers and their customers in respect of deposit accounts.
 They have set their reasons out in the Case, and they find that E

"Interest on deposit accounts was calculated on the principal on a day-to-
 day basis and was credited on half-yearly rest dates, June 20 and Dec. 20
 in each year. When it was so credited, the interest became principal and
 then (and not before) began itself to earn interest. It was not the practice
 to allow accruing interest to be withdrawn between the half-yearly rest dates, F
 save that if an account was closed at any time, interest was calculated up
 to the date of closure, credited and withdrawn as principal. The rate of
 interest allowed varied from time to time."

In 1951 £2,000,000 was paid into the deposit account, which even then had a
 substantial sum of money in it, and this appeal arises in respect of interest
 earned by this very large sum. The court has to decide what was the source
 of the income. The Special Commissioners held that the contract was the G
 source of the income. VAISEY, J., took a different view, and I think held that
 the source of income was the deposit of the money coupled with the contract.
 I cannot agree that where a deposit account is kept between a customer and a
 banker there is a new contract every time money is paid in. I think that it
 is one continuing contract, but the contract itself yields no income at all. H
 The deposit of money would yield no income at all unless there was an agreement
 to pay interest, express or implied. The source of the income seems to me to be
 the deposit of money on certain terms. Unless the money has been deposited
 there will be no income because there will be nothing which would produce
 interest. Just as if there were only a contract to pay interest on money no
 interest would be payable until money was deposited, so it follows that, if I
 there were a deposit of money without an agreement to pay interest, there would
 be no interest arising from it. There is no difference between a deposit account
 and a current account so far as the relationship of banker and customer is
 concerned. The relationship is perfectly clear. The leading case is *Foley v.*
Hill (1) ((1848), 2 H.L. Cas. 28), mentioned in the judgment of ATKIN, L.J., in
Joachimson v. Swiss Bank Corp'n. (2) ([1921] 3 K.B. 110 at p. 130). It is that of
 debtor and creditor; the banker borrows the money from the customer under
 terms to repay it. As a general rule he does not pay interest on a current

- A account, although bankers do at times agree to allow interest on a current account if a certain credit balance is maintained. We need not consider current accounts in this case at all. We are only concerned with deposit accounts under which money is paid in at fourteen days' notice, i.e., the customer cannot withdraw the money without giving fourteen days' notice, though he may be allowed to do so if he gives up interest. Interest at the current rate is allowed
- B by the banker, and the current rate generally is regulated by the bank rate.

The taxpayer had been assessed in respect of this interest, which he had been receiving, under Case III of Sch. D, and I think that it is necessary in considering this matter to refer to s. 21 (1) of the Finance Act, 1951, which provides that:

- C "If at any time any person acquires—(a) a new source of any profits or income in respect of which he is chargeable either under r. 1 of the Rules applicable to Case III of Sch. D or under Case IV of Sch. D or under Case V of Sch. D; or (b) an addition to any source of any such profits or income, then, for the year of assessment in which income first arises from the source or addition and the two following years of assessment",

- D tax should be computed as laid down in the section.

- E It is argued here that the source of income was the contract. I cannot agree with that. I think the source of income here was the deposit of money on the terms of the contract. In my opinion, if an addition is made to the amount which is deposited, the words of s. 21 are quite wide enough to catch it. I quite agree that certain difficulties might be imposed on the Inland Revenue if they were to pursue every deposit account and find whether or not there had been an addition to the account during the course of the year. That is a matter for the inspector of taxes or those responsible for the assessment. I do not suppose that it would be worth the trouble in every case for the taxing authorities to inquire into every deposit account and find if the sum deposited had been increased, unless it had been increased by a large amount. Here the increase of £2,000,000 is very great. In my judgment there is no question but that
- F there has been a new source of income in the deposit of money, or at any rate an additional source of income here. For these reasons, which are not quite the same as those given by VAISEY, J., I think the appeal should be dismissed.

JENKINS, L.J.: I agree.

SELLERS, L.J.: I agree also.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Hale, Ringrose & Morrow*, agents for *Glaisyer, Porter & Mason*, Birmingham (for the taxpayer).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

BROWN v. LLOYD (formerly BROWN) AND LLOYD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), January 24, March 28, 1957.]

Divorce—Discretionary bars—Delay—Charge of adultery—Parties separated for sixteen years before petition presented—Wife living in adultery for nine years—Husband ignorant of, and having no reason to suspect, wife's adultery—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 4 (2), proviso (i).

A husband is not under a duty, after he and the wife have separated, to make inquiries as to the wife's conduct unless he has at least some reasonable ground, based on her past conduct or on some rumours which may have reached him, to make those inquiries.

The parties were married in 1918 and separated by mutual consent in 1940. They did not see or write to each other for sixteen years. In 1956 the husband made inquiries about the wife and discovered that she had been living in adultery with the co-respondent for the past nine years. While the husband and the wife had lived together the wife's conduct had never given rise to any suspicion in the husband's mind that she was an immoral woman or even attracted by members of the other sex; and for seven years after the separation she had lived a chaste life.

As soon as the husband discovered the wife's adultery he presented a petition for divorce. On the question whether or not he had been guilty of unreasonable delay within the meaning of s. 4 (2), proviso (i) of the Matrimonial Causes Act, 1950,

Held: the husband was not guilty of unreasonable delay since he had not known, nor had he had reason to believe, that the wife had committed adultery, and in the circumstances of the present case he had been under no duty to make any inquiry as to her conduct after the separation; accordingly he would be granted a decree.

Direction of SIR FRANCIS JEUNE, P., in *Brougham v. Brougham* ([1895] P. at p. 289) applied; *Drost v. Drost & Hanson* ([1942] 1 D.L.R. 72) not followed.

[As to delay in charging adultery, see 12 HALSBURY'S LAWS (3rd Edn.) 308, para. 614, note (p); and for cases on the subject, see 27 DIGEST (Repl.) 414, 3432.

For the Matrimonial Causes Act, 1950, s. 4 (2), proviso (i), see 29 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

- (1) *Drost v. Drost & Hanson*, [1942] 1 D.L.R. 72; 27 Digest (Repl.) 415, 1525.
- (2) *Mortimer v. Mortimer*, (1820), 2 Hag. Con. 310; 161 E.R. 753; 27 Digest (Repl.) 414, 3432.
- (3) *Binney v. Binney & Hill*, [1936] 2 All E.R. 409; [1936] P. 178; 105 L.J.P. 81; 155 L.T. 144; 27 Digest (Repl.) 414, 3439.
- (4) *Rickard v. Rickard & Bond*, (1921), 37 T.L.R. 511; 27 Digest (Repl.) 414, 3438.
- (5) *Brougham v. Brougham*, [1895] P. 288; 64 L.J.P. 125; 27 Digest (Repl.) 415, 3446.
- (6) *Nicholson v. Nicholson*, (1873), L.R. 3 P. & D. 53; 29 L.T. 108; 27 Digest (Repl.) 414, 3443.

Petition.

This was a husband's petition for divorce on the grounds of adultery and desertion.

The parties were married in 1918 and there were no children of the marriage. By the outbreak of the war in 1939 the parties were living together in London but had begun to drift apart. In 1940 the wife went to live with her mother in Northampton, where the wife had lived before the marriage.

- A From 1940 until 1956 the parties neither saw nor wrote to each other. In 1956, however, the husband went to Northampton to find out what had happened to the wife. He saw the wife's sister and made some inquiries and then he consulted his solicitors. In due course the wife and the co-respondent were interviewed and the wife made a statement admitting that she had been living with the co-respondent as his wife since 1947.
- B On Nov. 6, 1956, the husband presented a petition for divorce on the grounds of the wife's adultery with the co-respondent and desertion. The suit was undefended and came before KARMINSKI, J., on Jan. 24, 1957. Having heard the evidence HIS LORDSHIP adjourned the case for argument by the Queen's Proctor on the question of delay.
- C *P. G. Mason* for the husband.
Brian T. Neill for the Queen's Proctor.

KARMINSKI, J., stated the facts and having stated that the separation between the parties was consensual and that the charge of desertion had been wisely dropped, HIS LORDSHIP continued: I have to consider whether the interval of sixteen years between the separation and the petition, and in particular the interval of nine years between the commencement of the wife's adultery with the co-respondent and the date of the petition, amount to unreasonable delay within s. 4 (2) of the Matrimonial Causes Act, 1950. This is not a case where it is suggested by the Queen's Proctor that the husband had actual knowledge of the wife's adultery before 1956, but it is of course obvious that once he was furnished with that knowledge he commenced proceedings almost at once. The point, which is not an easy one, is whether or not his abstention from making any sort of inquiries is in itself delay. The point in the present case is that from 1940 to 1956 he made no inquiries at all. I have to consider in a case of this kind the nature of the delay and to find out whether first of all there has been delay and, secondly, whether, if there has been delay, it is unreasonable. There is the third question, if I find unreasonable delay, whether it is a case in which the discretion of the court should be exercised in favour of the husband. The Queen's Proctor argued that delay relates to the period between the separation and the presentation of the petition and that the husband's knowledge is relevant to the question of unreasonableness, but he submitted that the real question relates back to the inception of the adultery.

- There have been a good many cases decided in these courts and in the ecclesiastical courts when the whole question of delay has been considered. There is, however, no reported case in the courts where unreasonable delay has been found unless actual knowledge by the complaining party has been proved. The industry of counsel for the Queen's Proctor has, however, discovered for me a decision in the court of New Brunswick, *Drost v. Drost & Hanson* (1) ([1942] 1 D.L.R. 72). There the parties had separated in New Brunswick in 1936 and the wife respondent then left the husband petitioner with the children of the marriage and went to live at Bangor, in the same province. The husband in that case apparently made no efforts to discover or ascertain the whereabouts of the wife between January, 1936, when she left him, and April, 1941, when he journeyed to Bangor and found that the wife was living with another man and had been living with that man for some years.
- I BAXTER, C.J., the Chief Justice of New Brunswick, considered some of the English authorities, particularly *Mortimer v. Mortimer* (2) ([1820], 2 Hag. Con. 310) and some of the later cases including *Binney v. Binney & Hill* (3) ([1936] 2 All E.R. 409) and he concludes his judgment in the following terms ([1942] 1 D.L.R., at p. 74):

"The present case, of course, does not come up to the two cases last cited [*Rickard v. Rickard & Bond* (4) ([1921], 37 T.L.R. 511) and *Binney v. Binney & Hill* (3)], but I think the delay was not introduced by the [Matrimonial

Causes] Act of 1857 but was merely the expression of what had before been the practice of the ecclesiastical court. Delay, therefore, as SIR WILLIAM SCOTT says [in *Mortimer v. Mortimer* (2) (2 Hag. Con. at p. 313)] 'demands a full and satisfactory explanation'. In the present case the husband does not show a single thing that he has done to ascertain the whereabouts of his wife from Jan. 14, 1936, until April, 1941. She had not gone to a remote distance and I cannot conceive that it was impossible for him to find out the conditions of her life at a much earlier date. It seems to me that he simply waited until it was convenient for him to bring his suit and then took a journey to Bangor to ascertain facts which, if he did not actually know them previously, must have been easily capable of ascertainment by him."

The Chief Justice dismissed the petition. That case is important because so far as the industry of counsel has discovered it is the only one where the court has said that a petitioner is under a duty to make inquiries and may be guilty of delay if he fails to do so. The Queen's Proctor submits that that is a correct decision, and that in the present case there was unreasonable delay because the husband took no steps to find out where the wife was living.

There are certain similarities obviously between the case of *Drost v. Drost* (1) and the present one. In both cases there was no step taken by the husband to ascertain what his wife was doing, although in *Drost v. Drost* (1) the period was considerably shorter than in the present one. In both cases there was no great distance separating the petitioner and the respondent. In the present case the wife was living in Northampton and the husband in London, and it is not a case where she had disappeared to some remote foreign country. I have to consider whether that decision is one which I ought to follow. It is not, of course, binding on me, although the decision of that court, given by the Chief Justice, must be of persuasive authority. The English cases are silent, so far as I have been able to find out, on any suggestion as to the duty of a spouse separated from another spouse to keep the other spouse under some kind of observation. Counsel for the Queen's Proctor in his argument was rightly careful in suggesting what the duties were in circumstances such as prevailed in the present case. The husband is under no sort of duty, as I see it, to make some sort of annual investigation as to the mode of life of the wife; particularly as in the present case it is fair to say that the wife's conduct while they were living together never gave rise to any suspicion in the husband's mind that she was an immoral or promiscuous woman or even attracted by members of the other sex. Indeed on the facts as I know them now she had lived a chaste life in Northampton for seven years after the separation between the husband and herself. This is not, therefore, a case in which I should hold that the husband was put on any sort of inquiry as to the wife's probable behaviour with other men.

Returning for a moment to the reported cases in this country, counsel for the husband in his careful argument has relied on *Brougham v. Brougham* (5) ([1895] P. 288). That was a case where the parties had separated in 1871. It was proved on the hearing of the Queen's Proctor's intervention that between 1871 and 1879 the respondent's wife had given birth to no less than three illegitimate children. In 1877 the petitioner had obtained from this court a decree of restitution of conjugal rights. The respondent wife did not defend that petition but was apparently present in court at the hearing. She never returned to her husband. Certain financial consequences followed from that restitution decree, and there was evidence before the court on the Queen's Proctor's intervention that in 1880, that is after the restitution proceedings, a son of the petitioner told the petitioner that he, the son, had heard that the respondent had had a child. In fact she had had three. The intervention was heard before SIR FRANCIS JEUNE, P., and a jury, and some questions for the jury were discussed

A between counsel and the President. SIR FRANCIS JEUNE put the matter in this way ([1895] P. at p. 289):

B “Where there is an issue as to unreasonable delay, I think that there are two questions for the jury, namely, When did the petitioner first know or have reason to believe that the respondent had committed adultery? and, When did the petitioner first take action in order to obtain a divorce? These facts having been found, it is for the court to exercise its discretion.”

He referred to *Nicholson v. Nicholson* (6) ((1873), L.R. 3 P. & D. 53) as an authority for holding that a delay of two years is unreasonable, and he added (*ibid.*):

C “There is no magic in the period of two years; but, having regard to the dates in this case, I think that the two questions may, for simplicity’s sake, in the present instance, be combined, and I propose to put this question to the jury: Did the petitioner know or have reason to believe that the respondent had committed adultery two years before he took action to obtain a divorce?”

Those two questions were put to the jury and they answered both in the affirmative and the decree nisi was rescinded.

D It will be observed that the words used by the President were: “Did the petitioner know or have reason to believe that the respondent had committed adultery?” and that I believe to be the real test in these cases. If I had thought on the facts that the husband in the present case had reason to believe that the wife had committed adultery before he went to Northampton in 1956 I would have taken a different view from that which I now take. For the reasons which

E I have already given I do not think that he had any reason to believe that she had so committed adultery, bearing in mind that she had not been in the past a woman of promiscuous or immoral disposition. I therefore propose to follow the test laid down by SIR FRANCIS JEUNE in *Brougham v. Brougham* (5) although the facts of that case are widely different from the present, and the President was formulating questions for a jury; whereas I have to decide whether or not

F the conduct of the husband in the circumstances of the present case amounts to unreasonable delay. With all possible deference to the decision of the Chief Justice of New Brunswick, I do not propose to follow the test which he seems to have applied in *Drost v. Drost & Hanson* (1). I do not think that there is in a case of this kind any duty on a husband to make inquiries after a separation as

G to a wife’s conduct unless he has at least some reasonable ground based on her past conduct or on some rumours which may have reached him to make those inquiries. Undoubtedly in the present case the husband was not very energetic in the course he took, but having at last committed himself to the extent of making inquiries at Northampton, thereafter he acted with speed. I find, therefore, that there has been in this case no unreasonable delay on the part of the husband. I therefore pronounce a decree on the ground of adultery.

Decree nisi.

Solicitors: *Montagu’s and Cox & Cardale* (for the husband); *Queen’s Proctor.*
[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

Re A DEBTOR (No. 30 of 1956), *Ex parte* THE DEBTOR *v.*
HARMAN AND ANOTHER.

[CHANCERY DIVISION (Danckwerts and Upjohn, JJ.), March 18, 19, 20, 21, 22, 25, 1957.]

Bankruptcy—Bankruptcy notice—Setting aside—Debtor alleging debt satisfied—Time for issuing application to set aside—Bankruptcy Rules, 1952 (S.I. 1952 No. 2113), r. 31, r. 137 (b), r. 138.

In a proper case the court will set aside a bankruptcy notice for reasons other than those mentioned in the Bankruptcy Act, 1914, s. 1 (1) (g), and the Bankruptcy Rules, 1952, r. 137*, and in such a case the time limit specified in r. 138* (within which the application to set aside the notice must be made) does not apply.

Where, therefore, the debtor gives notice of motion to set aside a bankruptcy notice on the ground that the judgment debt on which the bankruptcy notice was founded had been satisfied, the application is not out of time by reason only of its not being made within the time specified in r. 138 (i.e., within three days of the service of the bankruptcy notice).

Dictum of VAUGHAN WILLIAMS, J., in *Re Easton, Ex p. Dixon* ((1893), 10 Morr. at p. 112) explained.

[As to setting aside a bankruptcy notice, see 2 HALSBURY'S LAWS (3rd Edn.) 282, para. 526; and for cases on the subject, see 4 DIGEST 103, 925-928.

For the Bankruptcy Act, 1914, s. 1 (1) (g), see 2 HALSBURY'S STATUTES (2nd Edn.) 325.]

Cases referred to:

- (1) *Re Howes, Ex p. Hughes*, [1892] 2 Q.B. 628; 62 L.J.Q.B. 88; 67 L.T. 213; 4 Digest 96, 871.
- (2) *Re H.B.*, [1904] 1 K.B. 94; 73 L.J.K.B. 1; 89 L.T. 592; 4 Digest 97, 872.
- (3) *Re Miller, Ex p. Furniture & Fine Arts Depositories, Ltd.*, [1912] 3 K.B. 1; 81 L.J.K.B. 1180; 107 L.T. 417; 4 Digest 94, 847.
- (4) *Re Easton, Ex p. Dixon*, (1893), 10 Morr. 111; 9 T.L.R. 408; 4 Digest 103, 925.
- (5) *Re Lennox, Ex p. Lennox*, (1885), 16 Q.B.D. 315; 55 L.J.Q.B. 45; 54 L.T. 452; 2 Morr. 271; 4 Digest 154, 1453.
- (6) *Re Cole, Ex p. Attenborough*, [1898] 1 Q.B. 290; 67 L.J.Q.B. 302; 78 L.T. 23; 4 Digest 103, 926.
- (7) *Clissold v. Cratchley*, [1910] 2 K.B. 244; 79 L.J.K.B. 635; 102 L.T. 520; 21 Digest 457, 393.

Motion in bankruptcy.

This was an appeal by the debtor for an order that the decision of the registrar of the Coventry County Court made on Jan. 7, 1957, whereby he refused to set aside the bankruptcy notice dated Nov. 5, 1956, be reversed and that the bankruptcy notice be set aside.

The bankruptcy notice was based on a judgment of Oct. 12, 1954, in the Queen's Bench Division, and was served on the debtor on Nov. 30, 1956. On Dec. 7, 1956, the debtor gave notice of motion to set aside the bankruptcy notice on the ground that by an arrangement of Aug. 2, 1956, the judgment had been satisfied. The registrar took the view that the application was out of time.

Leonard Caplan, Q.C., and *M. Finer* for the applicant, the debtor.

R. D. Sheaf for the first respondent, the judgment creditor.

Muir Hunter for the second respondent, the attorney of the first respondent.

Mar. 18. DANCKWERTS, J.: We propose to give judgment on the first point which arises in this case, which is whether the applicant's application by

* For the terms of these rules, so far as relevant, see p. 217, letters C and D, post.

- A motion to set aside the bankruptcy notice was out of time. The bankruptcy notice, which was founded on a judgment for a certain sum, was served on Nov. 30, 1956. It was not until seven days later, Dec. 7, 1956, that the notice of motion in question was launched supported by an affidavit of the same date. The point which it is desired to raise on the notice of motion is that the judgment debt on which the bankruptcy notice was founded was satisfied by a certain arrangement, which it is not necessary to go into at the present moment.

The learned registrar, who dealt with the matter, decided that that notice of motion was out of time by reason of the provisions of r. 137, r. 138 and r. 139 of the Bankruptcy Rules, 1952. Rule 137 provides:

- C “Every bankruptcy notice shall be indorsed with—(a) the name and place of business of the solicitor who is suing out the notice . . . (b) an intimation to the debtor that if he has a counter-claim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must within the time specified in the notice file an affidavit to that effect with the registrar.”

- D Rule 138 provides:

“If the notice is served in England the time for filing the affidavit referred to in the last preceding rule shall be three days, and in every other case it shall be such time as the registrar shall fix when issuing the notice.”

Rule 139 (1) provides:

- E “The filing of the affidavit referred to in r. 137 shall operate as an application to set aside the bankruptcy notice, and thereupon the registrar shall, if he is satisfied that sufficient cause is shown, fix a time and place for hearing the application, and shall give not less than three clear days’ notice thereof to the debtor, the creditor, and their respective solicitors, if known.”

- F Accordingly, the point that it is necessary to decide on these rules is whether, when the debtor wished to challenge the bankruptcy notice, he was faced with a period of only three days in which to put forward his objection by filing an affidavit in the manner mentioned by r. 137.

- The point which is taken in the present case is satisfaction, which is said to include the payment in full of the judgment debt on which the creditor relies for the purpose of his bankruptcy notice. It is contended on behalf of the debtor that satisfaction is something quite different from the three things mentioned in r. 137 (b) which are the same as the matters mentioned in the Bankruptcy Act, 1914, s. 1 (1) (g), namely, that the debtor “has a counter-claim, set-off or cross demand”. He contends that the difference is shown by the fact that the only judgment on which a bankruptcy notice can be founded is one on which execution could be levied because there is a reference in s. 1 (1) (g) to there being no stay of execution. If a debt has been satisfied, it is not a debt on which any execution could be levied. Therefore it is fundamentally different from the counter-claim, set-off or cross demand which are mentioned in s. 1 (1) (g) and r. 137 (b). He contends, on the other hand, that r. 31 is the appropriate rule. Rule 31 provides:

- I “Except where these rules otherwise provide, every application to the court shall, unless the court otherwise directs, be made by motion supported by affidavit.”

In respect of that there would not appear to be any time limit whatever.

Counsel for the debtor has referred us to a number of cases in which quite plainly bankruptcy notices have been set aside on motion on grounds other than those which are mentioned in r. 137 as it at present stands. Such cases are *Re Howes, Ex p. Hughes* (1) ([1892] 2 Q.B. 628); *Re H.B.* (2) ([1904] 1 K.B. 94); *Re Miller, Ex p. Furniture & Fine Arts Depositories, Ltd.* (3) ([1912] 3 K.B. 1). However, there are certain matters which may have induced the learned registrar

to come to the conclusion which he did that the application was out of time, because when one refers to form No. 9 appended to the Bankruptcy Rules, 1952, one finds a reference to r. 137 and r. 139, and the first of the forms of affidavit is one which contains the following example: "That I have satisfied the debt claimed . . .", and then the nature of the satisfaction has to be stated. Then as an alternative: "That I have a counter-claim [or set-off or cross demand] . . ." Those suggest apparently that an application based on satisfaction could be made under r. 137 and r. 139. There are passages (which are perhaps not very clear) in *WILLIAMS ON BANKRUPTCY* (16th Edn.), at p. 36 and in 2 *HALSBURY'S LAWS OF ENGLAND* (3rd Edn.), p. 282, which suggest rather the same thing.

There is also *Re Easton, Ex p. Dixon* (4) ((1893), 10 Morr. 111), in which *VAUGHAN WILLIAMS, J.*, made some observations which suggest that an application of this kind made on any other ground than those mentioned in the section and rules is not appropriate. *VAUGHAN WILLIAMS, J.*, said in the course of the argument (and not in his judgment) (*ibid.*, at p. 112):

"The court can go behind the judgment on the hearing of the petition.

But where is there any authority that on an application to set aside a bankruptcy notice the court has power to go behind the judgment? The earliest case on the question under the present Act [the Bankruptcy Act, 1883]—that of *Re Lennox, Ex p. Lennox* (5) ((1885), 16 Q.B.D. 315) went on the words of s. 7 (3) of the Bankruptcy Act, 1883, and was the case of a petition. Those words have no application to the case of a bankruptcy notice. Where it is a bankruptcy notice, it seems to me, the only reasons which can be entertained by the registrar are the reasons which are mentioned in s. 1 (1) (g), viz.:—that the debtor has a counterclaim, set-off or cross-demand which he could not set up in the action in which judgment was obtained."

That has been echoed by *WRIGHT, J.*, in *Re Cole, Ex p. Attenborough* (6) ([1898] 1 Q.B. 290). But it seems clear from other cases to which I have referred, in two of which* *VAUGHAN WILLIAMS, J.*, was a party to the decision, either in the Divisional Court or in the Court of Appeal, that the words used by him in *Re Easton* (4) must be treated as of limited application, because, if those words in that case be taken in their literal sense, they would mean that other applications in which a bankruptcy notice was sought to be set aside could not be entertained; and, therefore, I think that he must have been referring to the particular circumstances which were present in *Re Easton* (4).

It seems to me that it is wrong on principle and reason to treat the matter as confined within the strict limits of these rules which only allow three days in which an application to test the validity of a bankruptcy notice is to be made. Satisfaction is essentially different from either counter-claim, set-off or cross demand, and on the authorities an application of this kind can be entertained under the procedure provided by r. 31.

UPJOHN, J.: I agree. I think that the authorities make it quite plain that this court will in proper cases set aside bankruptcy notices on grounds other than those set out in s. 1 (1) (g) of the Bankruptcy Act, 1914, namely, a counter-claim, set-off or cross demand. One of them plainly must be satisfaction, because, if a judgment has been satisfied, as *FARWELL, L.J.*, pointed out in *Clissold v. Cratchley* (7) ([1910] 2 K.B. 244 at p. 250), there is no judgment left on which to found the bankruptcy notice.

The whole question, therefore, is whether the application to set aside the notice has to be given within the three days mentioned in r. 138. That rule only applies to r. 137 which is dealing with counter-claim, set-off or cross demand. Satisfaction is quite different from any of those three things. Accordingly, it seems to me that a notice to set aside a bankruptcy notice on the ground of

* *Clissold v. Cratchley* (7) ([1910] 2 K.B. 244); *Re Howes, Ex parte Hughes* ([1892] 2 Q.B. 628) in the Divisional Court; and see *Re Follows* ([1895] 2 Q.B. 521).

- A satisfaction would not have to be issued within the three days specified by r. 138, and I agree that the decision of the registrar must be reversed.
[THEIR LORDSHIPS then proceeded to hear the motion.]

Order accordingly. Application allowed.

- B Solicitors: *Saunders, Sobell, Greenbury & Leigh* (for the appellant); *Collyer-Bristow & Co.*, agents for *Band, Hatton & Co.*, Coventry (for the first respondent); *Tucker, Turner & Co.* (for the second respondent).
[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

C Re HODGE'S POLICY.

HODGE v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Harman, J.), March 13, 14, 1957.]

- Estate Duty—Passing—Property deemed to pass—Money received under policy of assurance—Policy kept up for donee—"Kept up"—Premiums paid by deceased—Policy settled on son of deceased after payment of first premium—Policy fully paid up since 1916—Mortgage to insurance company—"Money received"—Deduction for mortgage debt by insurance company—Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 11 (1)—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (c).

- E In 1912 the father of the plaintiff took out a policy of insurance on his own life for £10,000 with profits. After paying the first of the five annual premiums which were payable, the father in 1913 assigned the policy to trustees on trust for his son on attaining the age of twenty-five years. After the date of the settlement, the father paid the remaining four premiums as they fell due in 1913, 1914, 1915 and in 1916, whereupon the policy became fully paid up. In 1935 the plaintiff, then being twenty-two years old, agreed to assign the policy to the insurance company by way of mortgage to secure a loan of £5,000. The policy was deposited with the insurance company. In 1938 the plaintiff reached the age of twenty-five years, and in 1950 the father died. The gross amount then payable under the policy was £16,675 and the debt to the insurance company amounted, with interest, to £5,431.

- G The net amount receivable by the plaintiff from the insurance company was £11,244, being the proceeds of the policy after deducting the debt. On the question whether estate duty was exigible on the proceeds of the policy and, if so, whether on the gross amount (£16,675) or the net sum (£11,244),

Held: estate duty was chargeable under the Finance Act, 1894, s. 2 (1) (c), on the gross proceeds (£16,675) because—

- H (a) the policy was "kept up" by the father for the benefit of a donee, viz., the plaintiff, within s. 11 (1) of the Customs and Inland Revenue Act, 1889, notwithstanding that no premium had been paid since 1916; and

- (b) although the insurance company paid only the net sum of £11,244 to the plaintiff, the money "received" by him under the policy within s. 11 (1) of the Act of 1889 was the gross proceeds, viz., £16,675, the amount due under the mortgage being deducted by the mortgagee (the insurance company) as agent for the plaintiff.

I Dictum of LORD WRIGHT in *Barclays Bank, Ltd. v. A.-G.* ([1944] 2 All E.R. at p. 211) applied.

[As to estate duty in respect of policies kept up for a donee, see 15 HALSBURY'S LAWS (3rd Edn.) 24, 25, paras. 45, 46.

For the Customs and Inland Revenue Act, 1889, s. 11 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 344.]

Cases referred to:

- (1) *Barclays Bank, Ltd. v. A.-G.*, [1944] 2 All E.R. 208; [1944] A.C. 372; 113 L.J.K.B. 465; 171 L.T. 366; 2nd Digest Supp.
- (2) *Lord Advocate v. Inzievar Estates*, [1938] 2 All E.R. 424; [1938] A.C. 402; 107 L.J.P.C. 65; 159 L.T. 97; Digest Supp.
- (3) *Re Oakes' Settlement, Public Trustee v. Inland Revenue Comrs.*, [1950] 2 All E.R. 851; [1951] Ch. 156; 2nd Digest Supp.

Adjourned Summons.

The plaintiff, Sir John Rowland Hodge, Bart., by an originating summons dated Feb. 14, 1956, asked for the determination under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, of the following questions:

(i) Whether estate duty became payable on the death of Sir Rowland Frederic William Hodge (the assured) who died on Sept. 21, 1950, on: (a) the whole of the money received under a fully paid up policy of assurance dated Nov. 12, 1912, for £10,000 (with profits) issued by the Royal Insurance Co., Ltd. and (b) if not so payable on the whole of the money so received, whether estate duty became payable on any share or part thereof, and, if so, what share or part (Customs and Inland Revenue Act, 1889, s. 11 (1) and Finance Act, 1894, s. 2 (1) (c)).

(ii) Whether the "money received" under the said policy of assurance and chargeable with estate duty should be: (a) the whole of the said policy moneys, or (b) such policy moneys after allowing for any sum or sums paid prior to the death of the assured by the said insurance company to the plaintiff and which (in the events which happened) were not paid to, or "received" by the plaintiff under the said policy.

Jackson Wolfe and M. T. Swift for the plaintiff, Sir John Rowland Hodge, Bart.

Geoffrey Cross, Q.C., and *E. Blanshard Stamp* for the Crown.

HARMAN, J.: The late Rowland Frederic William Hodge, afterwards Sir Rowland Hodge, took out a policy on his own life on Sept. 14, 1912, with the Royal Insurance Company in a sum of £10,000 with profits. The first premium, £1,475, was duly paid by Sir Rowland on the signing of the policy. By an instrument of Sept. 12, 1913, the assured settled the policy by assigning it to trustees of a voluntary settlement in favour of his son, the plaintiff in these proceedings, Sir John Hodge. By that instrument the trustees were to get in the policy on the death of the assured and invest the proceeds, and stand possessed of the policy moneys and investments in trust for the plaintiff on his attaining the age of twenty-five years absolutely. There was a power to advance to the plaintiff while he was under twenty-five up to one moiety of the insurance moneys. The second and subsequent premiums on the policy were payable annually on Sept. 14 over the four years, 1913, 1914, 1915, and 1916 and were paid by the assured. The policy became a fully paid policy in 1916. By an agreement made between himself, his father, the trustees and the insurance company, on Apr. 17, 1935, the plaintiff agreed to assign the policy by way of mortgage to the company for a consideration of £1,000 then lent and a promise to lend a further £4,000 thereafter on demand. For that consideration the policy was deposited with the insurance company as security with the consent of Sir Rowland, he being then still interested in the policy moneys under a resulting trust in case his son should not attain twenty-five. That mortgage was duly increased to its maximum of £5,000 and was outstanding at the death of the assured in September, 1950. The gross amount then payable by the insurance company on the policy was £16,675. The mortgage debt and interest amounted to £5,431, so that the net amount receivable by the plaintiff was £11,244. The plaintiff became absolutely entitled to the policy and the moneys secured by it on May 1, 1938, when he attained the age of twenty-five years.

- A The Revenue have demanded of the trustees of the settlement payment of estate duty on the death of the assured, and this summons has been taken out by the plaintiff under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, not because a demand is made on him, but because he is a person who has reason to suppose that such a demand may be made on him. I see no reason why the summons should be entitled as it is—"In the matter of the policy" and "In the matter of the Act". It is an ordinary *inter partes* originating summons under R.S.C., Ord. 54A, r. 1 (a), and should be so entitled.

- B The claim of the Crown is for duty on the gross sum received or receivable in respect of the policy on the death of the assured, and is based entirely on the Finance Act, 1894, s. 2 (1) (c). That enactment is a piece of legislation by reference and causes to be included in property deemed to pass on the death of the deceased, property which would be required to be included in an account under the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11. The Act of 1881 was the begetter of the account duty; the probate duty existed before that, but the Act also dealt to some extent with probate duty. Probate duty was paid on probates and inventories on the Inland Revenue affidavit of personal property of which a man died possessed and which passed to his executors as such; but the account duty was intended to embrace other kinds of personal property, namely, (a) under a *donatio mortis causa*, (b) included in a joint tenancy, and (c) certain property under a voluntary settlement. Section 11 (1) of the Act of 1889 mentions these categories of property and adds a new one in these words:

- E "... money received under a policy of assurance effected by any person dying on or after June 1, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee . . ."

The money here under consideration undoubtedly is money received under a policy of assurance. The policy was certainly effected by a person dying after June 1, 1889, namely, the assured himself. It was equally certainly on his life.

- F The controversial words are "where the policy is wholly kept up by him for the benefit of a donee". There is no doubt that the plaintiff here is a donee. There is no doubt that nobody paid any premium on this policy except the assured himself. Equally there is no doubt that no premium has been paid or payable since 1916. It comes as a shock that a policy which has been fully paid for over forty years and has, therefore, not needed any keeping up during the whole of that time, and in respect of which there has been nothing to do, but wait for the death of the assured, should now attract duty although no beneficial interest in it passes from anybody to anybody else on the death. It has belonged absolutely to the plaintiff since 1938, twelve years before his father died: it is striking that duty should be exigible in such circumstances. If on the other hand this had been what is called an ordinary whole life policy and the premiums had been payable periodically at dates continuing up to the death of the assured it would come as no surprise that the last paragraph of s. 11 (1) of the Act of 1889 caught it.

- H It is said, however, that the section does not apply in this case, because at the relevant date, viz., the date when the policy was payable, it was not wholly or indeed at all kept up by the donor. As I say, nobody has kept it up for forty years. The Crown nevertheless argue that these words must be read "has been wholly kept up", and that one need only look to see who, after the date of the gift, kept the policy up. The answer, of course, is the donor. Nobody else kept the policy up after the date of the settlement constituting the gift in this case. It is argued that it cannot depend on whether premiums are paid over a long period of time or a short period of time; the question is, who kept the policy up? The retort is that a taxing Act should not be extended in favour of the Crown and that one must look only at the language it contains. Counsel for the plaintiff says, "is kept up" means what it says, and you could not postulate of this policy just before the death of the assured that it is the deceased who keeps it up, because

he had not done that for forty years. Nevertheless, I think that it cannot depend on the way in which the premiums are paid, whether in large sums for a small number of years or small sums for a large number. There is indeed an observation of LORD WRIGHT in one case analogous to this, *Barclays Bank, Ltd. v. A.-G.* (1) ([1944] 2 All E.R. 208 at p. 211), which reads:

"I think that 'keeping up' a policy according to the ordinary use of language connotes payment of the premiums which is the normal method of keeping up a policy. This involves generally periodical payments, and, though a single premium policy is not unknown, that would have the effect not so much of keeping up a policy as establishing its operation once and for all. The Act did not apparently contemplate this contingency . . ."

That is a view (obiter, I think) that a single premium policy would not be caught by the Act because it is never "kept up" at all. I think it follows that if there are periodical payments by the donor, whether two, three or twenty-five, the policy can be said to be kept up by the donor from the tax point of view. Consequently, though the language is awkward, I must come to the conclusion that this policy is within s. 11 (1) of the Act of 1889. My view is reinforced to some extent by the latter part of the sub-section, which reads:

" . . . or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him . . ."

There have been cases on that passage and it has been decided, in *Lord Advocate v. Inzievar Estates* (2) ([1938] 2 All E.R. 424), that where after the date of a gift the donor pays some premiums and thereafter the donee pays the rest, the policy comes within the section "to a proportionate part of its value", and though the House of Lords did not specifically deal with this question, they must have held in that case that the policy might be kept up partially by the settlor or donor even though he did not pay premiums or parts of premiums up to the last date but paid some of the earlier premiums. It seems to follow that, in the view of the House of Lords, as one may partially keep up the policy by paying some of the premiums although one stops long before the death, so one may wholly keep up the policy by paying all the premiums though they stop long before the death. I think that this is in accord with what I understand to be the effect of the decision of ROMER, J., in *Re Oakes' Settlement, Public Trustee v. Inland Revenue Comrs.* (3) ([1951] Ch. 156). That case is not very clearly reported and I am not convinced that the point was there really in the judge's mind, though I do find in the headnote these words (*ibid.*):

"it was not necessary in order to keep a policy alive that the periodic payment of the premiums should be continued until the policy matured."

Whether the case is exactly in point I do not know; the chief argument depended on this, that somebody had commuted future premiums by a lump sum, and it was then suggested that such a payment was not the keeping up of a policy, and, therefore, s. 11 (1) of the Act of 1889 did not apply. The judge rejected that, and it seems to have been his view that had there been no commutation of that sort the policy would have been kept up by the donor though the premiums would have ceased some time before the assured's death. Whether that was in the judge's mind or not I remain uncertain; but that case encourages me to think that my view is the correct one. Consequently I hold on the first question that s. 11 (1) does apply.

The second question is this. Money was borrowed by the plaintiff on the security of this policy and that money remained due when his father died. The lenders were the insurance company themselves, and consequently they will not pay over to the trustees or to the plaintiff the gross amount of the policy money, but will deduct the amount of their mortgage debt and hand him the balance. Therefore, says counsel for the plaintiff, he ought only to pay on the balance because what the section says is that the charge shall extend to money "received"

A under a policy of assurance; in other words, not money receivable, but the actual amount that comes in to the trustees of the settlement or the sole beneficiary, the plaintiff.

If the transaction of loan had been, as it might have been, effected by way of a mortgage of the policy to a third party I do not think that this argument would have been tenable. The third party as mortgagee would have given a receipt
 B for the whole of the policy moneys, would have deducted its mortgage debt, and accounted for the balance to the plaintiff, who when he had got that balance would be relieved of the mortgage debt and would have to give a good quittance to the insurance company for the whole sum. Indeed, the mortgagee would have given a receipt for the whole policy moneys, I think, as agent for the mortgagor, and therefore the plaintiff would have received in fact the gross amount of the
 C policy money in that way. I do not think that it can make any difference that the mortgagee is in fact the same person as the insurance company. The insurance company, although it cannot give itself a good receipt, can, I think, as agent for the mortgagor deduct its debt and get a good receipt from the plaintiff by paying him only the balance. It seems to me, therefore, that the money received by the plaintiff is the whole money payable under the policy by the
 D insurance company, notwithstanding the fact that it has been depleted by this mortgage transaction.

I ought perhaps to add that there was a power to advance the plaintiff when he was under the age of twenty-five, and that this money might have been, I think, advanced to him under that power. As to the effect of that transaction if it had been effected I reserve my opinion, but looking at the documents that
 E was not the transaction. It was an ordinary loan to the young man (with the consent of his father and the trustees, but nevertheless to him) from the insurance company and on the security of his then contingent interest. I therefore hold that duty is exigible on the entirety of the policy money.

Declaration accordingly.

Solicitors: *J. D. Langton & Passmore* (for the plaintiff); *Solicitor of Inland Revenue*.

[Reported by F. GUTTMAN, ESQ., *Barrister-at-Law*.]

NOTE.

G BETTY'S CAFÉS, LTD. v. PHILLIPS FURNISHING STORES, LTD.

[CHANCERY DIVISION (Danckwerts, J.), April 4, 1957.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to reconstruct premises on termination of current tenancy
 H *—Fidelity and genuineness of intention—Resolution of board of landlord company passed after application heard for four days—Resolution approving expenditure on work specified by architect and authorising counsel to give undertaking to court—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 30 (1) (f).*

[For the Landlord and Tenant Act, 1954, s. 30 (1) (f), see 34 HALSBURY'S
 I STATUTES (2nd Edn.) 414.]

Case referred to:

(1) *Fisher v. Taylors Furnishing Stores, Ltd.*, [1956] 2 All E.R. 78; [1956] 2 Q.B. 78.

Adjourned Summons.

This was an application by the tenants, Betty's Cafés, Ltd., for a new tenancy, under the Landlord and Tenant Act, 1954, of business premises known as 42 and 44, Darley Street, Bradford, for a period of fourteen years commencing on

June 24, 1956. The application was opposed by the landlords, Phillips Furnishing Stores, Ltd. (referred to hereafter as "the landlord company"), on the ground specified in s. 30 (1) (f) of the Act of 1954, namely, that, on the termination of the current tenancy, the landlord company intended to reconstruct the premises comprised in the holding, or a substantial part of those premises, or to carry out substantial work of construction on the holding or part thereof, and that it could not reasonably do so without obtaining possession of the holding. DANCKWERTS, J., held (as reported [1956] 2 All E.R. 497) that the landlord company had not shown the requisite intention at the material time, which was the date of the service of the notice of opposition, and, accordingly, he granted the tenants' application. The Court of Appeal (BIRKETT and ROMER, L.J.J.; LORD EVERSHERD, M.R., dissenting) reversed the decision of DANCKWERTS, J., on the law, holding (as reported [1957] 1 All E.R. 1) that the relevant time at which the landlord company must have held the intention described in s. 30 (1) (f) of the Act of 1954, if the ground of opposition provided by that paragraph were to be established, was the time of the court's decision at the hearing, and not the date when the notice of opposition was given. The Court of Appeal, therefore, remitted the matter to DANCKWERTS, J., to determine whether the company had established at the hearing such an intention as satisfied s. 30 (1) (f), having regard to a resolution of the board of the landlord company passed on Apr. 23, 1956, after the application to the court had been heard for four days. That resolution was as follows:

"(1) That in the event of the company obtaining possession of these premises from Betty's Cafés, Ltd., on the termination of the last mentioned company's current tenancy thereof the works detailed in Mr. Ovenden's [the architect's] specification dated January, 1955, and plan numbered 45/2 be forthwith carried out and that expenditure of up to £20,000 upon such works be approved. (2) That counsel appearing for the company in the application by Betty's Cafés, Ltd., now proceeding in the Chancery Division be authorised to give an undertaking either to the court or to Betty's Cafés, Ltd., that the above mentioned works will be carried out as soon as is practicable in the event of possession being so obtained."

The question remitted was thus put by ROMER, L.J. ([1957] 1 All E.R. at p. 16, letter I): "I would . . . remit the case . . . for . . . determination whether the intention at which the landlord company arrived on Apr. 23, 1956, possessed the necessary qualities of fixity and genuineness."

L. A. Blundell and *C. B. Priday* for the tenants.
J. P. Widgery for the landlord company.

DANCKWERTS, J. (having stated the facts and considered the judgments of the Court of Appeal, [1957] 1 All E.R. 1): The truth of the matter is that it is perfectly plain from an examination of the minutes of the company's directors' meetings that the company never formed any intention at all in regard to the matter of reconstruction or works to be done on the site during the period right down to the hearing of the summons. It was only after the case had been going for some days that it became apparent, it would appear, to those advising the company that they were in danger of losing the case and that the tenants were liable to get a further tenancy awarded to them.

In those circumstances counsel for the tenants does not say that the resolution passed on Apr. 23, 1956, was dishonest, but he does say that it was not a genuine resolution showing a genuine intention on the part of the landlord company to carry out the works of reconstruction which the terms of s. 30 (1) (f) of the Landlord and Tenant Act, 1954, require; and further he says that it does not show that fixity and certainty of purpose which the cases have laid down as being necessary ingredients of such an intention. I should be very much inclined to agree with him if it were not for the fact that the resolution of the

A directors was coupled with authority to counsel on behalf of the company to give an undertaking, and it seems to me that that part of the resolution makes an important difference.

In the first place, on the authorities and in particular the observations in such cases as *Fisher v. Taylors Furnishing Stores, Ltd.* (1) ([1956] 2 All E.R. 78), it is apparent that if a landlord really intends to carry out the works, it is not a valid objection that he may be impelled to that view by the fact that unless he is prepared to carry out such works he cannot obtain possession and defeat an application by a tenant for a further tenancy. Therefore I think that the mere fact that the landlord company found itself driven to adopt this position because it saw that otherwise the case would go against it is not necessarily evidence of a lack of genuine intention to carry out the works.

C Moreover, it is to be observed that in the present case the works which were adopted according to Mr. Ovenden's plans and specification were not works of the kind mentioned by ROMER, L.J.,* as indicating a lack of a genuine intention, but were precisely the kind of works which would be required by the landlord company on obtaining possession of the premises in order to use the premises for the purposes of its own business. Therefore the observations of ROMER, L.J., seem to show that the fact that the works are of this type is some evidence of a genuine intention.

I am forced to the conclusion, therefore, by reason of the decision of the majority of the Court of Appeal that the resolution may be a genuine exhibition of intention to carry out the construction as required by the terms of the Act. I think that the course the case has taken shows in an extreme manner the unfairness and undesirability of the landlords being able suddenly to alter their position at the last moment in this manner; but I am faced with the law as it is laid down for me and I have to apply it, and consequently I must hold that the resolution of Apr. 23, 1956, coupled with the authority to give the undertaking to which the resolution refers, shows a genuine intention to carry out these works.

F Furthermore, the question of fixity is important, because once the landlord has obtained possession he may, it seems, alter his intention and no remedy would then be open to the tenants who have been dispossessed and lost their occupation of the property; but the undertaking seems to me to compel fixity of intention, because, if I decide in favour of the landlord company, I shall require such an undertaking as is offered to be given to the court; and if that undertaking were neglected or broken, consequences of a serious nature, which would involve perhaps sequestration of the company's property and possibly the sending of the directors responsible to gaol, provide a sanction to see that the fixity of purpose remains and is duly carried out. Therefore it seems to me that the offer of the undertaking necessarily involves a fixity of purpose which satisfies the observations which have been made by the courts in various cases.

H Accordingly I must conclude that the passing of the resolution on Apr. 23, 1956, by the board of directors is effective and the application for a new tenancy must fail.

[On counsel for the landlord company giving the undertaking authorised by the resolution of Apr. 23, 1956, the application for a new tenancy was dismissed.]

Solicitors: *Ward, Bowie & Co.*, agents for *Booth & Co.*, Leeds (for the tenants); *Clifford-Turner & Co.* (for the landlord company).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

* [1957] 1 All E.R. at p. 15.

HULBERT v. HULBERT.

[COURT OF APPEAL (Denning, L.J., and Karminski, J.), March 21, 1957.]

Divorce—Practice—Interrogatories—Whether allowable to prove cruelty or desertion—R.S.C., Ord. 31, r. 2—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 23 (1).

Discovery—Interrogatory—Whether allowable in divorce case to prove cruelty or desertion—R.S.C., Ord. 31, r. 2—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 23 (1).

Interrogatories for the purpose of establishing cruelty or desertion are admissible in matrimonial proceedings where they are necessary either for fairly disposing of the case, or for saving costs. Rule 23 of the Matrimonial Causes Rules, 1950, must be read in conjunction with R.S.C., Ord. 31, r. 1 and r. 2.

Dicta of LINDLEY and BOWEN, L.JJ., in *Redfern v. Redfern* ([1891] P. at pp. 146, 149) applied.

Appeal dismissed.

[As to interrogatories in divorce suits, see 12 HALSBURY'S LAWS (3rd Edn.) 361, para. 776; and for cases on the subject, see 18 DIGEST 181, 1326, 1327.]

For the Matrimonial Causes Rules, 1950, r. 23, see 10 HALSBURY'S STATUTORY INSTRUMENTS 208; this rule is replaced by r. 23 of the Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), which is in the same terms.]

Cases referred to:

- (1) *Swift v. Swift*, (1832), 4 Hag. Ecc. 139; 162 E.R. 1399; 18 Digest 240, 1826.
- (2) *Harvey v. Lovekin*, (1884), 10 P.D. 122; 54 L.J.P. 1; 18 Digest 180, 1325.
- (3) *Redfern v. Redfern*, [1891] P. 139; 60 L.J.P. 9; 64 L.T. 68; 55 J.P. 37; 18 Digest 53, 99.
- (4) *E. v. E.*, (1907), 24 T.L.R. 78; 18 Digest 181, 1327.

Appeal.

This was an appeal by the husband respondent from an order of WILLMER, J., in chambers, affirming an order of Mr. Registrar TOWNLEY MILLERS, allowing the administration of interrogatories to the respondent by the wife petitioner designed to prove cruelty by the respondent. The facts appear in the judgment of DENNING, L.J.

Joseph Jackson for the respondent.

Desmond Ackner for the petitioner.

DENNING, L.J.: This case raises the question whether interrogatories are permissible in a divorce suit for cruelty. The petitioner (the wife) on Sept. 9, 1955, filed a petition on the ground of cruelty alleging assaults and violence, to which the husband respondent pleaded: not guilty of cruelty: alternatively, condonation. I cannot imagine that any question of interrogatories would arise at that stage of the case, because it all depended then on the evidence of the two parties. In October, 1956, however, the petitioner filed a supplemental petition in which she made a series of new and different allegations of cruelty. She alleged that the respondent had sent Christmas cards to mutual friends in which he defamed her character, with the object and effect of embarrassing and distressing her: that when he was visiting Holland he spoke to two ladies in Holland and made defamatory statements about her: and in addition that he went to the Law Society in London and told the Legal Aid Department that she had provided the National Assistance Board with false information. Those were new allegations of cruelty; to which the respondent simply pleaded that he was "not guilty of the cruelty as therein alleged". I pause to say that it was quite correct for the respondent simply to deny cruelty. He can plead not guilty, no matter how many paragraphs there are in the petition.

- A The petitioner (who is legally aided) now seeks to administer interrogatories for the respondent to answer. In the first interrogatory she asks the respondent to look at one of the Christmas cards and to answer the question: "Did you not send this card to Mr. and Mrs. Elbo?" Then in the next two interrogatories (concerning cases where she has not got the Christmas cards) she asks: "Did you not state in writing on a Christmas card" such-and-such? In the fourth and fifth interrogatories she asks about the conversations with the ladies in Holland: "Did you not tell them . . ." so-and-so, setting out the defamatory statements? Finally, in the sixth interrogatory, she asks: "Did you not tell the Law Society that I had given false information?"

The first five interrogatories are put for the purpose of saving costs, namely, to save the costs of calling the witnesses from different parts of this country and from Holland; and the last interrogatory, about the Law Society, is put because it is said that there may be a statutory prohibition preventing a witness from the Law Society giving that evidence. On this account it is said these interrogatories are necessary for fairly disposing of the case and for saving costs.

- C Counsel for the respondent has urged before us today that in the Divorce Division interrogatories are never allowed so as to enable a petitioner to make out a case of cruelty. She is not permitted to prove her case out of the mouth of her spouse. He says that no such interrogatories have ever been allowed: and that in this respect the Divorce Division follows the practice of the old ecclesiastical courts.

- I find myself unable to accede to that argument. It is true that interrogatories are very rarely allowed in the Divorce Division, but that is because in the great majority of cases they are not necessary for fairly disposing of the matter or for saving costs; but in a proper case I have no doubt that they are permissible. I cannot agree with what counsel for the respondent says about the ecclesiastical courts. Those courts habitually allowed interrogatories, in one shape or another, when they would never have been allowed in the common law courts. In *Swift v. Swift* (1) ((1832), 4 Hag. Ecc. 139), SIR JOHN NICHOLL pointed out that, although in the ordinary common law courts no party was bound to furnish evidence against himself, it was otherwise in the ecclesiastical courts and in the courts of equity: because a party was bound to answer there as to the facts. Those courts recognised, of course, that a party was not bound to incriminate himself. That is a privilege which is available in all the courts to this day, but it is a privilege which has to be taken in the answer. It is not a ground for disallowing the interrogatory.

- G After the Divorce Court was set up it, too, allowed interrogatories to be administered: see *Harvey v. Lovekin* (2) ((1884), 10 P.D. 122), and *Redfern v. Redfern* (3) ([1891] P. 139). The only exception is that in an adultery case a petitioner is not allowed to prove adultery by interrogatories. That exception arises from the fact that under the statute (originally s. 3 of the Evidence Act, 1869, and now s. 32 of the Matrimonial Causes Act, 1950) there is a fetter on the asking of questions which go to adultery. The statute puts adultery on a special footing. There is no such fetter on questions as to cruelty and desertion. LINDLEY, L.J., no doubt had that in mind in *Redfern v. Redfern* (3) ([1891] P. 139), when he said (*ibid.*, at p. 146) that "discovery as to these . . . matters is . . . permissible". By "discovery", I take it, he means not only discovery of documents but also discovery by way of interrogatories.

I In these circumstances I think that, in cases alleging cruelty or desertion, interrogatories are permissible where they are necessary either for fairly disposing of the case, or for saving costs. Rule 23* of the Matrimonial Causes Rules,

* Rule 23 (1) states: "Any party to a matrimonial cause may with leave deliver interrogatories in writing for the examination of an opposite party." This is now replaced by r. 23 (1) of the Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), which is in the same terms.

1950, is quite general. It must be read with Ord. 31, r. 1 and r. 2*, of the Rules of the Supreme Court. I agree that in a divorce case it is rare that interrogatories are necessary for fairly disposing of the case or for saving costs; but in this case the registrar and the judge were so satisfied, and I agree with them.

I would dismiss the appeal.

KARMINSKI, J.: I am of the same opinion; and as the matter is possibly of some interest, and also out of deference to counsel for the respondent's very careful and learned argument, I would add a very few observations of my own.

It may well be that discovery by way of interrogatories in matrimonial suits is rare. The paucity of reported cases may indicate its rarity or it may equally well indicate that no serious problems of general principle have arisen. It is likely that the nature of matrimonial proceedings has made many practitioners think in the majority of cases that interrogatories are unlikely to be profitable. That, of course, does not affect the question of principle.

So far as the practice in the ecclesiastical courts before 1857 is concerned, I myself can find very little assistance, because the nature of the taking of evidence in those courts was such, and of so different a nature from what is now practised, that the meaning of interrogatories under that practice was quite different from their present meaning. However, at any rate from 1873 onwards, I think it is clear from the few cases that have been reported that the courts in matrimonial suits have allowed interrogatories in proper cases, provided always that they were not directed to the proof of adultery—an exception which, as my Lord has pointed out, is derived from statutory protection. In 1890 when *Redfern v. Redfern* (3) ([1891] P. 139) was decided in this court, BOWEN, L.J., said (*ibid.*, at p. 149) that he did

“not doubt for a moment that the court has the power of allowing interrogatories and discovery both in ordinary cases, and even in divorce suits, upon issues which are not directed to the proof of adultery . . .”

In 1907, in *E. v. E.* (4) ((1907), 24 T.L.R. 78), questions arose as to an interrogatory dealing with the alleged communication of a venereal disease in a case where cruelty and adultery were both alleged by the wife. BARGRAVE DEANE, J., is reported to have said that interrogatories at that time were “somewhat unusual”.

The first rule in the divorce jurisdiction on interrogatories appears to have been introduced only in 1924, and that rule is now embodied as r. 23† in the Matrimonial Causes Rules, 1950. The rule is of fairly wide ambit, and has, I think, to be read in conjunction with Ord. 31, r. 2* of the Rules of the Supreme Court; but I have no doubt whatsoever that in a proper case interrogatories can be allowed in matrimonial suits to deal (as in this case) with the proof of an allegation of cruelty.

My Lord has dealt with the special nature of the matters which form the subject of the interrogatories and which relate only to the supplemental petition in this case. Once the principle is established, the rest, as I understand it, is a matter of discretion for the judge. I agree that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: Pollard, Stallabrass & George Martin (for the respondent); Herbert Oppenheimer, Nathan & Vandyk (for the petitioner).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

* R.S.C., Ord. 31, r. 1 and r. 2, prescribe general rules as to interrogatories: r. 2 provides, *inter alia*, that only such “interrogatories as shall be considered necessary either for disposing fairly of the cause or matter or for saving costs” shall be allowed.

† See the footnote to p. 227, *ante*.

A

HUDSON v. RIDGE MANUFACTURING CO., LTD.

[MANCHESTER ASSIZES (Streatfeild, J.), March 14, 1957.]

*Master and Servant—Duty of master—Provision of competent fellow servants
—Workman continually indulging in horseplay—Injury to fellow servant.*

B

The plaintiff, while at work, was injured through a foolish prank played on him by C., a fellow workman. Over a period of about four years C. had been in the habit of indulging in horseplay during his work, at the expense of the plaintiff and the other workmen. The employers knew about C.'s conduct and had frequently reprimanded him and warned him that someone might one day be hurt, but, although he paid no heed to their reprimands, he was allowed to remain in their employment. In an action by the plaintiff against the employers, claiming damages for negligence at common law,

C

Held: the employers were liable to the plaintiff in damages for breach of their duty at common law to provide competent workmen, because, if a workman, by his habitual conduct, was likely to prove a source of danger to his fellow workmen, it was the employers' duty to remove that source of danger, and the plaintiff's injury was sustained as a result of the employers' failure to take proper steps to put an end to C.'s horseplay or to remove him from their employment if he persisted in it.

D

Smith v. Crossley Brothers, Ltd. ((1951), 95 Sol. Jo. 655) considered.

[As to a master's duty at common law to provide and maintain competent fellow servants, see 22 HALSBURY'S LAWS (2nd Edn.) 188, 189, paras. 314, 317; and for cases on the subject, see 34 DIGEST 217, 218, 1790-1809.]

E

Case referred to:

(1) *Smith v. Crossley Brothers, Ltd.*, (1951), 95 Sol. Jo. 655; 2nd Digest Supp.

Action.

F

The plaintiff, who was injured while at work through a foolish prank practised on him by a fellow workman, claimed damages for personal injuries against his employers, the defendants, the claim being based on a breach by the defendants of their duty at common law to take care for the safety of their workmen.

The facts appear in the judgment.

C. T. B. Leigh for the plaintiff.

G

W. D. T. Hodgson for the defendants.

STREATFEILD, J.: This is an unusual form of action and I confess that, at the first approach, it struck me that the plaintiff, Mr. Hudson, might be in some difficulty, but, having heard the evidence in the case, I think that the position is tolerably clear. The plaintiff was unfortunately injured, in the course of his work, on Mar. 26, 1954, through a foolish prank practised on him by one Harold Chadwick, a fellow servant who, if I may be forgiven for saying so, is not over-intelligent and appears to have grown to manhood with childish pranks still part of his make-up. Apparently, over the course of some years, while he was employed by the defendants (referred to hereinafter as "the employers"), he had repeatedly made a nuisance of himself, to say the least of it, to his fellow employees through his almost incurable habit of tripping people up, or otherwise engaging in horseplay and skylarking; the kind of thing which was not intended to do any injury, and which certainly could not be regarded as bullying, and was not. No doubt, it was regarded as a bit of fun and almost harmless, but it was the kind of thing that was bound, one of these days, to lead to some injury; rather like the stupid habit, which fortunately one seldom sees nowadays, of people trying to be funny and pulling a chair away from somebody just as that person is sitting down. In ninety-nine cases out of a hundred no damage results, but in the one-hundredth quite serious injury can

H

I

be sustained. That had been going on for some years and, notwithstanding repeated reprimands, Mr. Chadwick continued in his practice of teasing not only the plaintiff but other people with this kind of conduct, and on this particular occasion the inevitable at last happened. In the course of Mr. Chadwick getting hold of the plaintiff from behind and then forcing him down on to the ground, the plaintiff unfortunately put his hand out to save himself and fractured his right wrist. A

The question arises whether the employers are responsible. Counsel for the plaintiff did not contend that the employers were vicariously liable for any negligent act of a fellow servant; his contention was that they were primarily liable because they were guilty of a breach of their common law duty to take care for the safety of their employees. This is an unusual case, because the particular form of lack of care by the employers alleged is that they failed to maintain discipline and to take proper steps to put an end to this stupid skylarking which was likely to lead, or might lead, to injury at some time in the future. B C

As it seems to me, the matter is covered not by authority so much as principle. It is the duty of employers, for the safety of their employees, to have reasonably safe plant and machinery. It is their duty to have premises which are similarly reasonably safe. It is their duty to have a reasonably safe system of work. It is their duty to employ reasonably competent fellow workmen. All of those duties exist at common law for the safety of the workmen, and, if, for instance, it is found that a piece of plant or part of the premises is not reasonably safe, it is the duty of the employers to cure it, to make it safe and to remove that source of danger. In the same way, if the system of working is found, in practice, to be beset with dangers, it is the duty of the employers to evolve a reasonably safe system of working so as to obviate those dangers, and, on principle, it seems to me that, if, in fact, a fellow workman is not merely incompetent but, by his habitual conduct, is likely to prove a source of danger to his fellow employees, a duty lies fairly and squarely on the employers to remove that source of danger. D E

I agree with counsel for the employers that it is a matter of degree. Nobody would say that if Mr. Chadwick had merely tripped somebody up for the first time and had been at once reprimanded by the foreman and then did not do it again, that was such conduct, on an isolated occasion by a workman, as would put on the employers the duty of taking the extreme course of dismissing that workman in case he should do it again. Most people, if they are told not to do a thing, will carry out that instruction. In the same way, nobody would say that employers, after one or perhaps two experiences of that kind, would foresee that danger was likely to result from that particular sort of conduct. I think I am fortified in that view by *Smith v. Crossley Brothers, Ltd.* (1) ((1951), 95 Sol. Jo. 655), to which counsel for the plaintiff drew my attention. In that case PEARCE, J., in the first instance, had found the employers liable because injury had been caused to the plaintiff, a boy sixteen years of age, through the conduct of two apprentices in the misuse of a compressed air pipe, which they put up the unfortunate plaintiff's rectum. SINGLETON, L.J., in allowing the appeal and finding the employers not liable, said (*ibid.*) that "The defendants had no reason whatever to anticipate that the two apprentices in question would use [the compressed air pipe] in that way." They had never done it before. He went on to say (*ibid.*): F G H I

"The duty of an employer towards his employees was to take reasonable care for their safety; and the evidence did not show any negligence by the defendants. The injury to the plaintiff resulted from what was wilful misbehaviour by the other two boys and a wicked act which the defendants had no reason to foresee."

- A That is the converse case, something which had happened for the first time, having never happened before. It is quite clear, on the facts of that case, that there was no danger from the compressed air pipe which the employers could anticipate would result, but the evidence in the present case makes it, in my judgment, the converse of *Smith v. Crossley Brothers, Ltd.* (1), because here the evidence is that over a space of something like four years Mr. Chadwick had been
- B in the habit of doing this kind of thing to his fellow employees, including the plaintiff, over and over again. He was reprimanded over and over again by the foreman, Mr. Hammill, and, in being warned, Mr. Chadwick was told that if he did not stop this horseplay somebody would be likely to be hurt one of these days. Unfortunately, that day dawned on Mar. 26, 1954, when somebody was hurt.
- C It is really unarguable that here is a case where there did exist, as it were in the system of work, a source of danger, through the conduct of one of the employers' workmen, of which the employers knew: repeated conduct which went on over a long space of time, and which they did nothing whatever to remove, except to reprimand and go on reprimanding to no effect whatever. It may be that Mr. Hammill was sorry, for obvious reasons, for Mr. Chadwick, it may be that he was reluctant to report him so as to have him removed, but, whatever steps were taken, it was the duty of the employers to put a stop to such conduct. By that time they must have known that one day there might be injury if Mr. Chadwick went on with this sort of conduct. He had done it before, he went on doing it and still he was allowed to remain in their employment and was not removed from it. In my judgment, therefore, the injury was sustained as a
- E result of the employers' failure to take proper steps to put an end to that conduct, to see that it would not happen again and, if it did happen again, to remove the source of it. It was for that reason that this injury resulted. In those circumstances, although it is an unusual type of case, I have come to the conclusion that counsel for the plaintiff is right in his contention and that the employers are liable for the plaintiff's injuries.

Judgment for the plaintiff.

Solicitors: *F. Edwin Monks & Co.*, Manchester (for the plaintiff); *James Chapman & Co.*, Manchester (for the defendants).

[*Reported by M. DENISE CHORLTON, Barrister-at-Law.*]

MORGAN v. CARMARTHEN CORPORATION.

[COURT OF APPEAL (Lord Evershed, M.R., Hodson and Romer, L.J.J.), April 4, 1957.]

Costs—Taxation—Solicitor and client—Standard to be adopted—Contempt of court—Motion for committal or attachment—Applicants' costs of motion—R.S.C., Ord. 65, r. 27 (29).

On a motion by the applicants to commit the respondents for contempt of court in connexion with the publication of a newspaper article during an action in which the applicants were defendants and one of the respondents was plaintiff, the court ordered as follows: "The [respondents] by their counsel apologising . . . this court doth not think fit to make any order on the motion but doth order that the [respondents] do pay to the [applicants] their costs of the said motion, such costs to be taxed by the taxing master as between solicitor and client." On taxation the taxing master reduced two items in respect of the fees of counsel for the applicants by two-thirds. In answer to objections carried in by the applicants the master stated that the order was for costs of the motion as between solicitor and client which was "the strictest of three bases of solicitor and client taxations" and "entitled the applicants in effect to party and party costs, but on more generous lines"; and on this basis, after giving due weight to the importance of the case and applying the standard laid down in R.S.C., Ord. 65, r. 27 (29), he considered that the reduced fees were fair and adequate. The applicants applied by summons to have the taxation reviewed.

Held: the taxing master had properly applied the correct principle, viz., that taxation of costs directed by the order "as between solicitor and client" was merely a taxation as between party and party but on more generous lines; and the fact that the motion had been to commit for a contempt of court of a public character, viz., an act calculated to interfere with the due administration of justice, did not result in Ord. 65, r. 27 (29) having any other than its ordinary effect in relation to this order for costs and, therefore, the applicants were not entitled to taxation on the basis, substantially, of indemnity.

Giles v. Randall ([1915] 1 K.B. 290) applied.

Decision of DANCKWERTS, J. ([1957] 1 All E.R. 437) reversed.

Per LORD EVERSHEDE, M.R.: it is doubtful whether the court can competently give a direction, in the absence of agreement, that, for example, counsel's fees should not be the subject of taxation at all, and also whether the court can order a taxation inter partes, again in the absence of agreement, as between solicitor and own client (see p. 237, letter G, post).

[**Editorial Note.** It is indicated at p. 240, letter B, and p. 237, letter I, to p. 238, letter A, post, that it is unfortunate that the phrase "solicitor and client" costs, which does not occur in R.S.C., Ord. 65, r. 27 (29), should have come to be used in a sense different from that of "solicitor and own client" costs, and that the matter might receive the attention of the Rule Committee. The recommendation of the Committee on the Supreme Court Practice and Procedure, in their final report in July, 1953, was that the term "full action" costs might be adopted (Cmd. 8878, paras. 720, 721); the "solicitor and client" basis of taxation is there considered and attention is drawn (*ibid.*, para. 718) to the possibility of there being no less than six distinct bases of charge.

As to costs between solicitor and client, see 26 HALSBURY'S LAWS (2nd Edn.) 101, para. 190.

As to brief fees, see 3 HALSBURY'S LAWS (3rd Edn.) 80, para. 129.

For R.S.C., Ord. 65, r. 27 (29), see the ANNUAL PRACTICE, 1957, 1550.]

A Cases referred to:

- (1) *Plating Co. v. Farquharson*, (1881), 17 Ch.D. 49; 50 L.J.Ch. 406; 44 L.T. 389; 45 J.P. 568; 1 Digest 83, 680.
- (2) *Giles v. Randall*, [1915] 1 K.B. 290; 84 L.J.K.B. 786; 112 L.T. 271; Digest (Practice) 936, 4756.
- (3) *Reed v. Gray*, [1952] 1 All E.R. 241; [1952] Ch. 337; 3rd Digest Supp.

B

Appeal.

This was an appeal (by leave of the Court of Appeal) by the respondents to a motion for committal against an order of DANCKWERTS, J., dated Jan. 15, 1957, reported [1957] 1 All E.R. 437, made on a summons for review of a taxation of costs, viz., of the costs of the motion for committal taxed pursuant to an order made thereon that the respondents should pay to the applicants their costs of the motion to be taxed as between solicitor and client. On hearing the summons, DANCKWERTS, J., held that the full brief fees of leading and junior counsel for the applicants on the motion should be allowed because the order for costs on a motion to commit for contempt was of a punitive nature and the intention of the order was that the applicants should be indemnified for the costs incurred by them on such a motion.

D

Charles Russell, Q.C., and *H. P. J. Milmo* for the respondents.
R. O. Wilberforce, Q.C., and *Nigel Warren* for the applicants.

LORD EVERSHED, M.R.: This is an appeal by leave of this court from an interlocutory order made by DANCKWERTS, J., on Jan. 15, 1957. In my judgment, though I confess to some feeling of regret, this appeal must be allowed.

The action, which was begun in 1955, is one in which the plaintiff (according to the title of the action, "trading as Keble Morgan & Co.") is making a claim in regard to a cattle market in Carmarthen. In February, 1956, there appeared in the "Daily Sketch" newspaper an article or news item which bore the title "I'll break this ring". The consequence of that publication was a motion by the defendants (hereafter called "the applicants") in the Chancery court asking that the plaintiff, as having been in part responsible, and two gentlemen called Peter Stewart and Herbert Smith Gunn, who are in the service or on the staff of the "Daily Sketch" newspaper, should be committed to prison for contempt of court. The contempt was not of a character which is perhaps more commonly encountered in the Chancery Division, viz., for disobedience of some order which the court had made, but constituted an act calculated to interfere with the fair and due administration of justice and one designed or likely to embarrass the applicants in the proper defence of the action.

The relevance of this last remark is that the case was very plainly one in which not only were the public concerned because the High Court, as it was alleged, was being contemned, but also the applicants, who were defending themselves in the courts were, as they said, likely to be embarrassed. When the motion for contempt came on I gather that it followed the course which, as counsel for the applicants pointed out, is often the case in such matters. It was first said by the three respondents to the motion (hereafter called "the respondents") that it was not a contempt at all; secondly, it was said, if it was a contempt, it was only a very little contempt; and, thirdly, and in any case, they tendered an apology. That is what I understand happened; but, whatever were the facts, the judge, VAISEY, J., clearly came to the conclusion that it was not a serious or grave contempt. He regarded it rather as an indiscretion which had the effect which the applicants suggested than a disregard of the dignity of the court and due process of the law. He therefore made an order in this form:

"The [respondents] by their counsel apologising and expressing their regret for writing, publishing and procuring to be published the said article

or item of news, this court doth not think fit to make any order on the motion but doth order that the [respondents] do pay to the [applicants] their costs of the said motion, such costs to be taxed by the taxing master as between solicitor and client."

The next step was that the applicants brought in their bill for taxation pursuant to the order. Among the items which they had disbursed and which they claimed to have paid to them by the terms of the order by the respondents were two items of counsel's fees. The applicants, as it appears, had thought it right (as, indeed, had the respondents) to brief leading counsel on the motion, and they briefed the leading counsel who had been retained by them for the purposes of the action. The fees paid to that leading counsel (who is, in fact, not the same leading counsel as appears in this court) and the corresponding fees paid to junior counsel (who is, in fact, also not the same as the junior counsel who appears here) were the two items which were objected to as regards their amounts. The two items together amounted to a sum approximately of five hundred guineas, three hundred guineas to the leader and two hundred guineas for the junior. The taxing master, having considered the objection to those items, reduced them for the purposes of the bill to two figures approximately equivalent to one-third. To that reduction the applicants made objection and they set out their objections for the consideration of the taxing master. I need not read the objections as all the points have been made here by counsel for the applicants.

The taxing master, however, in answer to those objections, stated as follows:

"The order made on this interlocutory motion was for payment by the respondents of the applicants' costs of the motion as between solicitor and client, which is the strictest of three bases of solicitor and client taxations."

It will become plain later what was meant by that last remark.

"The order entitles the applicants in effect to party and party costs, but on more generous lines. On this basis, after careful consideration and giving due weight to the importance of the case and applying the standard laid down in R.S.C., Ord. 65, r. 27 (29), I am of opinion that 100 guineas is a fair and adequate fee for leading counsel on this motion with junior counsel's fee in proportion",

and he overruled the objections.

Thereupon, the applicants applied by summons to DANCKWERTS, J., and his order made on Jan. 15, 1957, which is the order now under appeal, said:

"This court being of opinion that on the taxation of the [applicants'] costs under the order dated Mar. 2, 1956, the [respondents] are liable to pay the whole of the [applicants'] costs including the fees to counsel referred to in the objections . . . doth order that it be referred to the taxing master to review his taxation accordingly in respect of the said fees."

DANCKWERTS, J., gave reasons for his judgment which we have considered. After referring to certain authorities to which I must later allude, he said ([1957] 1 All E.R. at p. 440):

"What is the nature of the present case? It is an application against persons who have been guilty of contempt of court for their committal or attachment, and it is well established by a number of cases to which I have been referred that such a case is in the nature of a criminal information. It is the kind of application of which one has considerable experience in this Division, and it has been my experience that costs are not awarded against a respondent to such an application unless the court is of the opinion that

- A the respondent has been guilty of contempt and thus deserving of punishment, although it may be that he was not deserving of extreme punishment, such as committal to prison. When costs are awarded against such a respondent as between solicitor and client, it is, as counsel for the applicants contended, because of the fact that the court desires to show, first, its disapproval of the conduct of the respondent, and secondly, that the application by the applicant is justified."
- B

- Then the learned judge went on to say that since the award of costs was of a punitive nature, and since it was intended that the applicants should substantially be indemnified, the taxing master had erred in principle in applying to this taxation the general strict rule of solicitor and client taxation. The reference which DANCKWERTS, J., made to the nature of an application for committal of contempt of court was a reference to many instances but no doubt included the case, to which counsel for the applicants referred, of *Plating Co. v. Farquharson* (1) ((1881), 17 Ch.D. 49). That was an application for contempt of court consisting of an alleged breach of an injunction. The matter came before this court and in the end the parties who were charged were absolved, the court expressing views discouraging motions for committal where there really was not a case—the matter being one rather of public concern than of private right. As was pointed out by counsel for the applicants, it has been recently laid down* that the public nature of an application to commit is such as requires the motion to be moved by counsel and not by a litigant in person. But I have referred to *Plating Co. v. Farquharson* (1) for a single sentence at the end of the report of the judgment of JAMES, L.J. (*ibid.*, at p. 57):
- C
- D
- E

"I think that costs as between solicitor and client may sometimes be given to the party moving [the application for committal] by way of indemnifying him, instead of committing the respondent, but I do not think they can be given to the respondent."

- F Therefore, I do not doubt that in many cases where orders of this kind are made it would be found that counsel moving the motion, and perhaps the judge alike, had it in mind that the order would operate substantially by way of indemnity. I have no doubt that in many cases in fact it does so.

- That brings me to *Giles v. Randall* (2) ([1915] 1 K.B. 290), a decision of this court which, on my reading of it and its effect, is really conclusive of this matter; for, as was there pointed out, the effect of the rule (which seems to me inevitably and inescapably to apply in this case) may well be to defeat what in some cases has been at the back of the mind of either the party concerned or of the judge. In *Giles v. Randall* (2) an action was brought for breach of promise of marriage, and the action was settled on the terms that the plaintiff should have judgment for £500 "with costs as between solicitor and client to be taxed (if necessary)".
- G
- H As the members of this court, BUCKLEY, L.J., and PICKFORD, L.J., observed, that it was likely enough, to say the least of it, that when that settlement was made the plaintiff, at any rate, and her advisers, supposed and intended that she should get £500 clear after her costs had been paid. As was pointed out, the effect of the rule as interpreted by them, and as we must interpret it, may well be disappointing to people who have an intention of that kind.

- I Before I refer to what BUCKLEY, L.J., and PICKFORD, L.J., said, it is right that I should now make some reference to the rules. It has been explained that, except in special cases, of which R.S.C., Ord. 22, r. 14A, is an example, the general provisions for taxation contained in Ord. 65 do not refer to "solicitor and client taxation" as distinct from "party and party taxation". As I follow it, the distinction is one which has grown up over a long period of time as a practical distinction in taxation of costs, and that distinction has been picked up and

* See *Re G.'s Application for a Committal Order*, [1954] 2 All E.R. 794.

adopted since not only in the Rules of Court, of which I gave an example a moment ago, but has also been applied more recently in regard to legal aid legislation. But in this case we are not concerned with any special statutory provision of that kind. For us the application of Ord. 65 cannot be in doubt. Rule 27 opens with the formula:

"The following . . . general regulations shall apply to . . . all taxations in the Supreme Court of Judicature . . ."

I have read only the relevant words. It is on r. 27 (29) that the whole matter turns. That sub-rule provides:

"On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for the defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses."

The rule took that form in 1902: and the effect of it seems to me quite clearly to be that (save in the excepted case) a taxing master's duty is to allow only such costs as appear to him "necessary or proper" for the attainment of justice, and, in doing so, to disallow such costs as he attributes to over-caution and the like or regards as otherwise unusual.

I will now return to *Giles v. Randall* (2), observing that the phrase which I have read "but save as against the party who incurred the same" is an exception to the general provision of the rule which relates to the case of a solicitor charging his own client. In *Giles v. Randall* (2) the facts were as I have stated them. What had happened was that certain expenses of the plaintiff's had been disallowed by the taxing master, so that the plaintiff discovered that she had not got by an appreciable margin her clear £500. The facts of the long-established practice appear from the report, where the master in his answers to objections said ([1915] 1 K.B. at p. 291):

"It is well settled that there are various forms of taxation as between solicitor and client. No. 1. Where the costs are payable by the client to his solicitor or where the costs are payable out of a fund belonging entirely to the party":

i.e., belonging to the party concerned and where therefore the effect in practice is exactly the same as that of a solicitor charging his own client. I have already said that that class of case is the subject of the exception introduced by the relevant words in sub-r. (29). The answers continued (*ibid.*):

"No. 2. Where the costs are payable out of a general or common fund. No. 3. Where the costs are payable out of a fund which belongs to other parties and in which the party has no interest or where the costs are payable by one party to another."

There is no doubt that in *Giles v. Randall* (2) the case was within category No. 3. There is also no question that in this case the costs are likewise payable by one party to the other. BUCKLEY, L.J., said (*ibid.*, at p. 295): "There are three modes of taxation as between solicitor and client". He referred to them and continued (*ibid.*):

"The present case falls within this last mentioned class. The plaintiff was to have her costs as between solicitor and client to be paid by the

A defendant. A practice has grown up, which I must say I regret, of differentiating between taxation of costs as between solicitor and client and as between solicitor and own client. In the former case the taxation is substantially a party and party taxation on a more generous scale. In the latter case there is an ascertainment and allowance of the charges properly payable by the client to his solicitor. That distinction is too firmly established for this court to interfere with it, though it may be a matter proper to be considered by the Rule Committee. I have no doubt that litigants who stipulate for and by agreement are to receive costs as between solicitor and client often intend to get an indemnity in respect of costs."

C He accordingly held that the taxing master was bound to tax on the basis that it was a class 3 case and he came to the conclusion that the taxing master's discretion could not be properly interfered with. PICKFORD, L.J., gave judgment to the same effect, equally drawing attention to the effect of the long-established practice in diminishing the effect of solicitor and client taxation and distinguishing it from solicitor and own client taxation. He referred ([1915] 1 K.B. at p. 297) to a passage in DANIELL'S CHANCERY PRACTICE which corresponds with a passage in SETON'S JUDGMENTS AND ORDERS (7th Edn.) (1912), Vol. 1, at p. 244, to which counsel for the respondents referred. The passage in DANIELL'S CHANCERY PRACTICE (8th Edn.) (1914), Vol. 2, p. 1078, quoted by PICKFORD, L.J., is:

E ". . . a distinction is made: first, where such costs are payable out of a fund belonging to other parties; secondly, where such costs are payable out of a common fund in which the party entitled to costs has only a limited interest; and, thirdly, where such costs are payable out of a fund belonging exclusively to such party himself."

Thus the classes are in the converse order. Then continuing his quotation from DANIELL:

F "These distinctions, however, are not made in the order directing the taxation, but only when the order is acted upon by the taxing officer . . ."

G Then the lord justice indicated that possibly the court might, if it desired to produce that result, give a direction in any order as to taxation that certain matters, such as counsel's fees, for example, should not be the subject of any taxation at all. I think, as at present advised, that it is doubtful whether the court can competently give a direction of that sort in the absence of agreement, and also whether the court can order a taxation inter partes, again in the absence of agreement, as between solicitor and own client. It is not necessary for the purposes of this case to express any final view on those matters, and I do not do so.

H I come back to the regret which I expressed earlier, because (whether this is such a case or no) I am quite sure from my own experience that there are cases, contempt cases, where the court would desire to give an applicant something very like an indemnity.

I In this case the applicants, that is the defendants, are the Mayor, Aldermen and Burgesses of the County of the Borough of Carmarthen. They have a duty to their own rate-paying citizens, but they are, as I think, in a somewhat happier position as regards costs than an ordinary private litigant might be. It would, of course, be a wrong thing in the public interest if an individual party were deterred from bringing a real case of contempt to the notice of the court through the fear that he would have to pay out of his own pocket a substantial or a not negligible sum for costs in performing what was, in effect, a public duty or, at least in one aspect of it, a public duty. I venture, therefore, to echo what was said by BUCKLEY, L.J., as to the possibility that this matter and its effect

in some cases might be thought proper for consideration by the Rule Committee. A

Whatever the future may have in store, the question we have in this case to determine is whether DANCWERTS, J., was entitled to hold, as he did, that the effect of this order was to require the taxing master, as a matter of principle, not to give the full indemnity as would arise in a taxation between a solicitor and his own client, but at least to give a substantial indemnity: in other words, that the taxing master erred in treating this case as one falling within the third class above mentioned. It will be remembered that the taxing master's answer stated that the case fell within the third class, being the strictest of the three bases of solicitor and client taxation. We are not here concerned with the question whether the taxing master rightly exercised his discretion as to amount if the case were of the nature and kind which he, the taxing master, thought it was. We are asked, as a matter of principle, to say that these contempt cases should be regarded as in a category by themselves (outside the general purview of the order) for the reasons intimated by the judge, viz., first that the order was intended to be punitive and, secondly, that it was intended to provide substantially an indemnity to the applicant. B C

I have already stated at the beginning of my judgment that I have been unable to agree with the view of the learned judge. It seems to me that there is no basis on which we could so hold, and indeed that such a view would be in conflict with what was laid down by this court in *Giles v. Randall* (2). D

Reference was made to the judgment of ROXBURGH, J., in *Reed v. Gray* (3) ([1952] 1 All E.R. 241). That was a different case. It was not a contempt case. It was a case in which the judge thought that a party who had made (and persisted too long in) a charge of fraud should be ordered to pay solicitor and client costs. The learned judge, having referred to *Giles v. Randall* (2), said (*ibid.*, at p. 244): E

"That case, in my judgment, decided one thing quite clearly, i.e., that the latter part of the sub-rule applies to a solicitor and client taxation with the inevitable corollary that a solicitor and client taxation cannot be assimilated to, or cannot be made identical with, a solicitor and own client taxation." F

With that I entirely agree. I appreciate, of course, that counsel for the applicants has not said that the taxation in this case must be treated as identical with a solicitor and own client taxation. He has said, for the reasons which he indicated, that it should be regarded as being something very like it, and indeed he referred to a later passage in ROXBURGH, J.'s judgment (*ibid.*, at p. 245) as an intimation that, where the intention of the court in making such an order could be discerned as meaning something near to an indemnity, then, as a matter of principle, the taxing master must so approach the taxation. I doubt whether ROXBURGH, J., intended to lay down any such general rule; but if he did, I am afraid I could not go with him, because I do not see any basis which would justify us in giving to a solicitor and client taxation, not being of the two special kinds which are called classes 1 and 2, any other meaning than that which Parliament through the Rule Committee by Ord. 65, r. 27 (29), has laid down. That sub-rule requires that on every taxation certain principles shall be followed. It is now established that on a solicitor and client taxation the application of those principles is to be made with greater generosity than on a party and party taxation. So much was laid down in *Giles v. Randall* (2) and has since been followed. It is still a matter of degree and discretion. But, as counsel for the respondents pointed out in his reply, the claim to make these contempt orders a class by themselves for this purpose is a claim which does not rest on any basis such as that which distinguishes classes 1 and 2 from class 3 referred to in *Giles v. Randall* (2), namely, because there is some fund out of which the costs will be paid; but is founded merely on the fact that the order is of a particular kind in which certain assumptions as to the intention of the court are made. G H I

- A As regards those assumptions, I think, with the division of this court which gave leave to appeal, that it may be doubtful whether you can attribute to a court a desire to impose a punishment, that is to say a penalty, when the order imposing the penalty would produce a result unknown and unquantified by the court. Again I am not to be taken as saying that, in making these orders, as JAMES, L.J., said three quarters of a century ago, the court may not well be
- B expressing its disapproval of the conduct of the party charged. If the court desires to impose a particular penalty, then it may well be that in future such an order would have to be differently expressed. As regards indemnity, the difficulty with which I think counsel for the applicants is faced and which he cannot surmount is that this order on the face of it is an order for taxation between solicitor and client and that the order must be treated as being like other
- C orders made inter partes for taxation of costs between solicitor and client, namely, one that is intended to be governed by the general rule. There is nothing in the order from first to last to qualify that result.

- I revert, finally, to the language of the taxing master which I have already read in his answers to the respondents' objections. I think there is no doubt that since this was a contempt case the taxing master would have to consider
- D questions of over-caution, exceptional fees and the like in relation to that important fact; but I can see no ground for saying that in the answers which we have before us he did not do so. He says that the order entitled the applicants, in effect, to party and party costs on more generous lines and that, after careful consideration of, and giving due weight to, the importance and nature of the case, he was of opinion that the fees allowed were fair. In my judgment, the
- E taxing master was properly formulating for himself and so far as I can see properly applying the principles which should affect him in exercising his discretion.

The result, therefore, is that with such regret as I earlier indicated, I have come to the conclusion that we cannot do other than allow this appeal and, accordingly, set aside the order of DANCKWERTS, J.

- F **HODSON, L.J.:** I agree. I share the regret expressed by LORD EVERSHED, M.R., that it is necessary to allow this appeal, because one naturally feels that if parties bring to the attention of the court a contempt which has been committed, it is unfortunate that they should have to do that, partly at any rate, at their own expense. The learned judge in dealing with the matter condemned the party in
- G contempt in costs as between solicitor and client, going as far as he could towards indemnifying the successful party and going as far as he could towards punishing the unsuccessful party in the absence of the infliction of a fine. But the order which he made has to be dealt with in accordance with R.S.C., Ord. 65, r. 27 (29), which has been considered by this court in *Giles v. Randall* (2) ([1915] 1 K.B. 290). To my mind, it is impossible to treat the taxation as a matter of
- H principle in a way other than the way in which the master treated it. It is clear from his answers to the objections which the applicants raised that he had in mind the language of BUCKLEY, L.J., in *Giles v. Randall* (2); and he pointed out that the order entitled the applicants in effect to party and party costs, but on more generous lines. That rule has to be acted on, bearing in mind that it is the source of the payment and not the kind of litigation which is relevant in taxation
- I between adversaries. There was no misdirection and no error in point of principle into which the master fell.

The contention has been put forward in this court that, in contempt proceedings, although the taxation should not be on the basis of solicitor and own client, there should be some superior class of taxation as between solicitor and client. There is no warrant, in my judgment, for such a contention, certainly not in the language of the rule. No doubt, the importance of the litigation is a matter to be considered, but there is no warrant in the language of the rule for putting contempt proceedings in a class by themselves so as to involve the master

in the intellectual process of adopting a more generous scale in such proceedings than in other proceedings where the taxation is on the solicitor and client basis. A

The judgment of BUCKLEY, L.J., in *Giles v. Randall* (2), in my opinion, is exhaustive. If it be desired to correct the situation as it exists at present under the rules, that is a matter for the Rule Committee. BUCKLEY, L.J., pointed out as long ago as 1914 that it was a little unfortunate that there had grown up a difference between the phrases "solicitor and own client costs" and "solicitor and client costs", which a successful litigant is often surprised to find existing. B
There has been no correction in that matter by the Rule Committee since that time, but, on the matter which arises in this case of the taxation of costs in contempt proceedings, I agree with LORD EVERSHERD, M.R.*, that it might well be the subject-matter of separate consideration by the Rule Committee. I agree that the appeal should be allowed. C

ROMER, L.J.: I also agree. Despite the attractive way in which counsel for the applicants presented their argument, I have been quite unable to escape from the view that in reality the summons which the applicants issued to review the taxing master's certificate was an attempt to persuade the learned judge to interfere with the discretion of the taxing master on a question of quantum, which of course the court has no jurisdiction to do. D

Counsel for the applicants attempted, as he was bound to do if he was to succeed, to base the matter on a question of principle. The principle, in brief, for which he contended is this: that, whatever may be the accepted meaning of an order for taxation of costs as between solicitor and client in ordinary litigation, it has or may have a special meaning attributed to it when such a taxation is directed in an order made on an application founded on contempt; and the fact that it is an order made on an application founded on contempt should in itself result in the taxing master attributing a special significance to the expression which it does not bear in any other form of order. The significance which it is suggested the taxing master should attach to the phrase is that he should tax the costs not wholly on an indemnity basis in favour of the successful party to a contempt application but practically on an indemnity basis, subject to the power of the taxing master to cut down or reduce some obviously exorbitant charge. E
It may very well be that such a principle would be a highly desirable one to adopt, but the fact remains that it has not been enshrined in our procedure. F
I say that it might be a highly desirable one to adopt because anything that is calculated to deter a person from bringing to the attention of the court the fact that there has been a contempt is to be deplored. If a person is called on to put his hand to some extent into his own pocket when bringing contempt to the notice of the court he will be deterred from doing so. Be that as it may, it is clear to me that no such principle is incorporated in our practice. It seems to me, indeed, very difficult to reconcile such a principle with the express language of R.S.C., Ord. 65, r. 27 (29). G

Accordingly, on that short ground that the principle is not one which in fact exists and that in substance this is an appeal on a question of quantum, I, with the same regret as my brethren have expressed, must agree to the appeal being allowed. H

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Sweepstone, Walsh & Son* (for the respondents); *Boxall & Boxall* (for the applicants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

* See the passage at the top of p. 233, ante.

A

COMPANIA NAVIERA AZUERO S.A. v. BRITISH OIL AND
CAKE MILLS, LTD. AND OTHERS.

[QUEEN'S BENCH DIVISION (Pearson, J.), April 4, 8, 1957.]

B

Shipping—Charterparty—Construction—“Weather working day”—Weather such as to justify work being stopped—Work not interrupted, or not intended to be done, at that time—Whether times excluded in computing lay time.

A charterparty provided: “10. Cargo to be received at destination at an average rate of not less than 1,000 tons per weather working day (Sundays and holidays excepted) provided vessel can deliver at such rate . . .

C

14. Lay days in loading and discharging to be calculated on the basis of 24 hours per day”. Demurrage was payable by the receivers of the cargo at an agreed amount per day or pro rata for shorter periods. After lay time had begun to run there were several periods during which rain was heavy enough to stop or prevent unloading. In fact, however, no unloading was prevented as none would have been done at these periods if the weather had been fine. The question arose whether in calculating lay time deductions should be made in respect of the periods in which the rain fell.

D

Held: whether or not a day was a weather working day was to be determined solely by the state of the weather on the day; therefore periods while the weather was so bad that no work could have been done should not be included in calculating lay time, even though work was not in fact interrupted or intended to be done then.

E

DICTUM OF SCRUTTON, L.J., in *Burnett S.S. Co., Ltd. v. Danube & Black Sea Shipping Agencies* ([1933] 2 K.B. at p. 448) applied.

[As to the meaning of working days, and weather working days, see 30 HALSBURY'S LAWS (2nd Edn.) 342, 343, para. 523; and for cases on the subject, see 41 DIGEST 572-574, 3965-3978.]

F

Cases referred to:

(1) *Branchelow S.S. Co. v. Lamport & Holt*, [1897] 1 Q.B. 570; 66 L.J.Q.B. 382; 41 Digest 573, 3975.

G

(2) *Bennetts & Co. v. Brown*, [1908] 1 K.B. 490; 77 L.J.K.B. 515; 98 L.T. 281; 41 Digest 573, 3976.

(3) *Dampskibsselskabet Botnia A/S v. Bell (C. P.) & Co.*, [1932] 2 K.B. 569; 101 L.J.K.B. 574; 147 L.T. 499; Digest Supp.

(4) *Burnett S.S. Co., Ltd. v. Danube & Black Sea Shipping Agencies*, [1933] 2 K.B. 438; 103 L.J.K.B. 44; 149 L.T. 598; Digest Supp.

H

(5) *Alvion Steamship Corpn. of Panama v. Galban Lobo Trading Co. S.A. of Havana*, [1954] 3 All E.R. 324; *affd.* C.A., [1955] 1 All E.R. 457; [1955] 1 Q.B. 430; 3rd Digest Supp.

Action.

This was an action for demurrage by Compania Naviera Azuero S.A., the plaintiffs, owners of the vessel s.s. Azuero, against the British Oil and Cake Mills, Ltd., Charles E. Ford & Co., Ltd., Holder and Stone, Ltd., and R. and W. Paul, Ltd., the defendants, who were indorsees of bills of lading. The facts and contentions were set out in an agreed statement.

I

By a charterparty dated London, Nov. 3, 1955, and made between S. G. Embiricos, Ltd., the plaintiffs' agents, and Louis Dreyfus & Co., Ltd., as charterers of the s.s. Azuero (referred to hereinafter as the vessel), the vessel was chartered to proceed to Baltimore or Philadelphia or Norfolk, Virginia, as ordered, and there load a full and complete cargo of grain in bulk, and, thereafter, to

proceed to Belfast or Cardiff or Barry or Avonmouth or London as ordered. The charterparty provided *inter alia* as follows: A

"It is also mutually agreed that this contract shall be completed and be superseded by the signing of bills of lading on the same form as in use by regular line steamers from loading port to port of destination; or, if port of destination be one to which there is no regular line of steamers from loading port, this contract shall be superseded by the signing of bills of lading in the form customary for such voyages for grain cargoes, which bills of lading shall, however, contain the following clauses:— B

"4. Cargo to be received at destination as per cl. 10 . . . 6. Vessel to have a lien on the cargo for all freight, dead freight, demurrage or average. Charterers' liability under this charter to cease on cargo being shipped. C
7. Charterers have the option of ordering the vessel to discharge at two ports on the west coast of the United Kingdom within the above mentioned limits (including Belfast) . . . 9. Ports of discharge to be in geographical rotation. 10. Cargo to be received at destination at an average rate of not less than 1,000 tons per weather working day (Sundays and holidays excepted) provided vessel can deliver at such rate, time counting at first or sole port from 7 a.m. on the next business day following receipt at or before 4 p.m. (or at or before 12 noon if on Saturday) of the master's notice of readiness to discharge, whether in berth or not, and at second port, if used, from receipt of master's notice of readiness to discharge, whether in berth or not, failing which receivers to pay demurrage at the rate of £300 (three hundred pounds British sterling) per day or pro rata for part of a day. D
For all lay time saved, owners to pay despatch money at the rate of £150 (one hundred and fifty pounds British sterling) per day or pro rata for part of a day. 14. Lay days in loading and discharging to be calculated on the basis of twenty-four hours per day." E

Pursuant to the charterparty the vessel was ordered to proceed to Philadelphia and she there loaded a cargo of grain in bulk destined partly for Avonmouth and partly for Belfast; it was agreed by an addendum to the charterparty that the ports of discharge should be in that rotation. The cargo was shipped in fourteen parcels in respect of which separate bills of lading, each dated Nov. 15, 1955, were issued on behalf of the plaintiffs to Leval & Co., Inc., as shippers. Each of the bills of lading expressly incorporated all terms, conditions, and exceptions of the charterparty dated Nov. 3, 1955. Six of the bills were thereafter indorsed to the four defendants as follows:—The British Oil and Cake Mills, Ltd.—one bill covering about one thousand tons of corn; Charles E. Ford & Co., Ltd.—two bills each covering about 250 tons of corn; Hodder and Stone, Ltd.—two bills each covering about 250 tons of corn; and R. & W. Paul, Ltd.—one bill covering about 250 tons of corn; the property in the goods covered by each of these bills of lading accordingly passed to the defendants. These six bills of lading provided for delivery of the goods covered by them at Avonmouth. The remaining bills of lading were indorsed to W. and R. Barnett, Ltd., of Belfast. On completion of loading the vessel sailed for the United Kingdom, and in the course of the voyage it was agreed that the vessel should proceed first to Belfast and secondly to Avonmouth; this she did. The vessel arrived at Belfast on Thursday, Dec. 1, 1955, and gave notice of readiness at 9.30 a.m. that day; lay time accordingly ran from 7 a.m. on Friday, Dec. 2. The out turn weight of the cargo to be discharged at Belfast was approximately 7,185 tons, and its discharge was completed at 5.10 p.m. on Tuesday, Dec. 6. No rain or other bad weather occurred during the discharge of the Belfast portion of the cargo. Thereafter, the vessel sailed for Avonmouth and arrived there on Thursday, Dec. 8, giving notice of readiness at 8.45 a.m. that day. The lay time at this port, accordingly, began to run from 8.45 a.m. on Dec. 8. The out turn weight of the Avonmouth F
G
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I

- A portion of the cargo was approximately 2,199 tons, and its discharge was completed at 6.50 p.m. on Wednesday, Dec. 21. Between 8.45 a.m. on Dec. 8, and 6.50 p.m. on Dec. 21, the following periods of rain occurred at Avonmouth:—

Friday, Dec. 9—midnight to 2 a.m.	..	..	..	..	2 hrs.
5 a.m. to 8 a.m.	..	..	..	..	3 hrs.
6 p.m. to 10 p.m.	..	..	..	..	4 hrs.

- B Tuesday, Dec. 13—3 a.m. to 5 p.m. 14 hrs.
 Wednesday, Dec. 14—3 a.m. to 8 p.m. 17 hrs.
 Thursday, Dec. 15—10 a.m. to 7 p.m. 9 hrs.
 Friday, Dec. 16—noon to 6 p.m. 6 hrs.
 Saturday, Dec. 17—1 p.m. to 4 p.m. 3 hrs.

- None of these periods of rain in fact prevented the work of discharging the cargo as that work was not actively in progress at the onset of any of the periods of rain, nor in any event, would it have been started or resumed by or on behalf of the defendants during any of those periods, and no labour had to be stood off on behalf of the defendants or was in fact prevented from starting or resuming the work of discharging the cargo by reason of the onset or continuance of any of the periods of rain. Throughout all the periods of rain, the weather was such that the defendants would have been justified in suspending the work of discharging the cargo had it then been in progress, and the plaintiffs conceded that the defendants would, in the circumstances, have been entitled to deduct the periods of rain in computing the lay time used in discharging the cargo.

- There was a further period of rain at Avonmouth between 8 a.m. and 2 p.m. on Dec. 9, 1955, but the work of discharging proceeded during this period and it was conceded by the defendants that lay time should be treated as continuing to run during this period.

The material contentions on the computation of lay time, having regard to the term "weather working days" in cl. 10 of the charterparty, were as follows. The plaintiffs contended that—

- F "Deductions would fall to be made in drawing up the time-sheet in respect of periods of rain occurring during the running of the lay days only in the event and to the extent that such periods of rain in fact served to prevent the work of discharging the cargo."

The defendants contended that—

- G "Deductions fall to be made in drawing up the time-sheet in respect of all periods of rain occurring during the running of the lay days and during which the weather was such that the defendants would have been justified in suspending the work of discharging the cargo if that work had been actually in progress at the time."

Appendices showing the demurrage computed according to whichever contention was correct were agreed.

- H The case is reported only on the question of the interpretation of the expression "weather working days".

Ashton Roskill, Q.C., and Basil Eckersley for the plaintiffs.

Eustace Roskill, Q.C., and R. A. MacCrindle for the defendants.

Cur. adv. vult.

- I Apr. 8. PEARSON, J., stated the facts, and having decided the first point* raised in the action, continued: The second question is as to the meaning

* The first point was whether despatch money or demurrage payable under cl. 10 of the charterparty was to be calculated and paid separately in respect of each of the two ports of discharge, viz., Belfast and Avonmouth. PEARSON, J., upheld the defendants' contention that there should be a single calculation of these sums in respect of the whole cargo carried by the *Azuero* on the voyage in question, and that the discharging of the cargo at Belfast and Avonmouth should be treated as a single operation. In reaching this conclusion on the construction of this particular charterparty, he derived assistance from *United British Steamship Co., Ltd. v. Minister of Food*, [1951] 1 Lloyd's Rep. 111, 115.

of the expression "weather working day" in cl. 10 of the charterparty. Clause 14 provides: "Lay days in loading and discharging to be calculated on the basis of twenty-four hours per day". That clause looks as if it may produce some artificial results, but as it is a clause of this contract, it has to be applied whether the results are artificial or not. A

The question arises in this way. At Avonmouth, the lay time began at 8.45 a.m. on Dec. 8, 1955, and the unloading was completed at 6.50 p.m. on Wednesday, Dec. 21, 1955. Between those times there were certain periods when rain was falling, and the rain was heavy enough to stop or prevent unloading operations, if such operations had been started or intended. But, in fact, the defendants' arrangements were such that no unloading would have been done in those periods, even if they had been periods of fine weather. B

Then, do the days on which rain fell count as full "weather working days" for the purpose of calculating the lay time and demurrage, or should deductions be made for the periods when rain was falling? C

The plaintiffs contend that the principle is as set out in para. 15 (ii) of the agreed statement of facts, that is to say:

"Deductions would fall to be made in drawing up the time-sheet in respect of periods of rain occurring during the running of the lay days only in the event and to the extent that such periods of rain in fact served to prevent the work of discharging the cargo." D

The defendants contend that the principle is as set out in para. 16 (ii) of the agreed statement of facts, namely:

"Deductions fall to be made in drawing up the time-sheet in respect of all periods of rain occurring during the running of the lay days and during which the weather was such that the defendants would have been justified in suspending the work of discharging the cargo if that work had been actually in progress at the time." E

The very experienced counsel who appeared in this case agreed that there is no binding decision on the point. There are, however, certain passages in judgments in decided cases which may tend to support the one contention or the other. I will refer to those passages. F

First, there is *Brackelow S.S. Co. v. Lamport & Holt* (1) ([1897] 1 Q.B. 570). In that case, the bad weather had, in fact, prevented working, so that the present issue did not arise to be decided. LORD RUSSELL OF KILLOWEN, C.J., gave his judgment (*ibid.*, at p. 572) and I think that the fair view is that he does not give any clear indication, on either side, with regard to the present issue. He said: G

"A question of general importance arose during the argument of this case, and was indeed the question to which the arguments of counsel were mainly directed; it is whether, when a part only of a weather working day is in fact used by the charterers, that part is to be counted against them as a whole day or as part of a day, or whether it is to be excluded from the calculation altogether." H

Then he examined the facts, and said:

"On Tuesday, Mar. 10, the day began with heavy rain, and the captain did not suggest in his evidence that there was not ample reason for the charterers' men declining to work; the morning was not a weather-working day. The weather, however, cleared up later, and in the afternoon from 1 to 5.30 a considerable quantity of cargo was loaded." I

Then LORD RUSSELL goes on to deal with the question of what should be done as regards parts of days, and the rest is not material.

Then there is *Bennetts & Co. v. Brown* (2) ([1908] 1 K.B. 490), a case decided by WALTON, J. One question which arose there was whether evidence as to an

- A alleged usage or custom of the port of Valparaiso was admissible to explain the meaning of "weather working days". The expression "weather working days" was used to define the proper time for discharging the cargo, but the alleged Valparaiso custom was that if the day was a surf day, such day should not be counted in the time allowed for discharging, and that the harbour master should be allowed to decide what was a surf day and what was not. It was for that reason that WALTON, J., had to say something about what was a weather working day.

He said (*ibid.*, at p. 496):

- C "The first question I have to consider is whether, as between the parties to this charterparty, which was made in London, the charterers can rely upon such a custom. The custom appears to me to give a meaning to the words 'weather working days' which is not their plain and natural meaning. I may mention that, as far as I can understand, the discharging did go on every day, including those days which are called surf days.

- D "The conclusion at which I have arrived is that 'weather working days' is a well-known phrase. Whether it is perfectly grammatical and perfectly good English is not for me to consider; but it is a phrase, I think, which has grown into common use, and is generally understood and has come to have an ordinary meaning as part of the English language (at any rate, as part of the English language which is used by men of business), and I think it has a natural meaning, viz., a day on which the work of discharge—it might be of loading, but in the present case it is of discharge—is not prevented by bad weather. The phrase might refer to half a day. Half a day might not be weather working and the other half might be weather working, but I think that that is the natural meaning of the words, and I do not think that it is competent to the charterers in a charterparty of this kind, worded as this charterparty is, to put upon that expression a different meaning which, it is said, the words by custom have obtained at the port of Valparaiso."

- E F It would be possible to obtain some indication on the one side or the other from that case, and, indeed, it is possibly arguable that WALTON, J., was relying on the fact that the discharging did go on every day, including those days which are called surf days. Again, I think that the fair view is that the question did not really arise there in the form in which it is presented in the present case, and although the expression of opinion, or the description of "weather working days" given in the judgment of WALTON, J., has to be taken into account, I do not think that it can be relied on as conveying any decision on the point.

- G The next case is *Dampskibsselskabet Botnia A/S v. C. P. Bell & Co.* (3) ([1932] 2 K.B. 569), and the question there was, whether days on which, owing to ice, loading could not commence were weather working days. It was held that such days were not weather working days. The decision was given by BATESON, J., and he referred to the question raised in the present case (*ibid.*, at p. 575) where he said:

- I "Mr. Pilcher says that there is only one case—namely, *Bennetts & Co. v. Brown* (2), where the words 'weather working day' have ever been interpreted. It is a decision of my great master in the law, WALTON, J., and therefore I pay unbounded respect to it. He says ([1908] 1 K.B. at p. 496): 'I think it has a natural meaning, viz., a day on which the work of discharge—it might be of loading, but in the present case it is of discharge—is not prevented by bad weather'. Mr. Pilcher says that this was not bad weather, that ice is present very often in beautiful weather; but I think that in this charterparty it is bad weather when ice prevents loading. SCRUTTON, L.J., in his book on CHARTERPARTIES (13th Edn.), p. 365, says that "weather working days" means days on which the weather allows working'. Personally, I do not see very much difference between what WALTON, J., says and

what SCRUTTON, L.J., says. I am satisfied in this case that the proper interpretation of these words is that which I have given to them.”

Next there is *Burnett S.S. Co., Ltd. v. Danube & Black Sea Shipping Agencies* (4) ([1933] 2 K.B. 438). That was a case in which there was a majority decision by GREER and ROMER, L.J.J., with SCRUTTON, L.J., dissenting. GREER and ROMER, L.J.J., did not say anything which bears on the present question, but there are some passages bearing on the present question in the argument of Mr. W. L. McNair, and in the dissenting judgment of SCRUTTON, L.J. These are the material passages, because they do seem to show clearly what views were taken by Mr. McNair, and by SCRUTTON, L.J., at that time. Mr. McNair, arguing for the shipowners, said (*ibid.*, at p. 445):

“ This type of contract, which is the standard form for berth contracts, differs from an ordinary charterparty in that it does not provide for weather working days. The arbitration proceeded on the assumption that it was only necessary for the charterers to prove that rain occurred which would prevent loading. The clause, however, contemplates the actual facts and not a hypothetical state of facts. The charterers are not entitled to an extension of the lay days unless they can prove that they have been actually prevented from loading by rain. [SCRUTTON, L.J. Was it not intended to give the charterers fifteen weather working days as lay days?] No. It was intended by the berth contract to give the charterers fifteen days within which to load, and the time lost owing to rain was to be added to the lay days. The term used in the contract is ‘time so lost’ which appears to indicate that time may be lost but cannot be added to the lay days because it was not ‘so lost’. It is not sufficient for the charterers merely to prove that work was made impossible through rain; they must also prove that time was actually lost to the charterers through rain.”

In order to explain that argument, I should refer to the wording of the contract, which appears in the headnote ([1933] 2 K.B. 438). It reads:

“ ‘should any time be lost whilst steamer is in a loading berth owing to work being impossible through rain . . . the amount of actual time so lost during which it is impossible to work owing to rain . . . to be added to the loading time . . . ’ ”

It seems to me, if I may respectfully say so, obvious that there are two things which have to be proved to take advantage of that provision: first, that work was impossible through rain, and, secondly, that, for that reason, time was in fact lost, and Mr. McNair was, in this argument, drawing a distinction between that kind of provision and the ordinary expression “weather working days”. SCRUTTON, L.J., was not inclined to agree that there was any such difference.

Then we come to the dissenting judgment of SCRUTTON, L.J., from which I will read a fairly long passage, because I think it all bears on the present question. SCRUTTON, L.J., says (*ibid.*, at p. 447):

“ There may be cases, and *Vergottis v. William Cory & Sons, Ltd.*,* to which we have been referred, is one, where the ship has to go into a particular dock which has regulations which require the charterer to have cargo in the dock before the vessel is admitted; but that is quite a different case. He may be liable for damages in such a case for having contracted to load the ship in a dock and not having the necessary cargo which the dock regulations require before the ship can get in. There is nothing of that sort in this case. This particular contract is: ‘Cargo shall be loaded at the average rate of 400 units per running day’. The ‘average rate’, of course, shows that the charterer need not load 400 tons on any particular day; so long as at the end of the fixed number of days he has loaded his cargo into the ship, he

* [1926] 2 K.B. 344.

- A has completed his contract, and he is not liable because on certain particular days he did not load any cargo at all; and as he is not liable if on a particular day he does not load any cargo, obviously he need not so far as the charter-party is concerned have any cargo there on that particular day. The charterer is to load the ship at the average rate of 400 units per running day, and the time he has for loading will depend on the size of the ship, and will amount in this case to 15 days 13 hours, I call it 15 days for simplicity, Sundays and non-working holidays excepted. If the 15 running days include a Sunday it is not to be counted, if they include a non-working holiday, whatever that may be, it is not to be counted, and there is no question that it could not be contended that a Sunday or non-working holiday must be included in the 15 running days, because the charterer had no cargo alongside on the Sunday, or no cargo alongside on the non-working holiday.
- C Then there comes another class of cases: What about weather? The charterer is to have 15 days for loading. Supposing it rains on the 15 days, is he to have only 15 days for loading or is he to have any more? That is very frequently dealt with by the clause saying that the charterer is to have so many weather working days. In that case it is quite clear that it would be no answer to say to the charterer, it is true that Monday was not a weather working day, but inasmuch as no cargo was alongside the ship on that day it must count as a weather working day. That is quite clear, in fact Mr. McNair does not attempt to dispute it."
- D

E Then, finally, we come to *Alvion Steamship Corpn. of Panama v. Galban Lobo Trading Co. S.A. of Havana* (5) ([1955] 1 All E.R. 457). The facts of that case were that a charterparty for the carriage of sugar provided:

"Lay days at the average rate of . . . provided vessel can receive at those rates per weather working day, Sundays and holidays and Saturday afternoons excepted, shall be allowed to the said charterers (if steamer is not sooner loaded) for loading and waiting for orders . . ."

- F There was an established custom at the loading ports in question that the normal working periods were eight hours on a weekday and four hours on a Saturday. It was held that a "working day" was a length of time consisting of a number of hours which, according to the custom of the port, were usually worked at the port, and the word "weather" qualified it so that from the number of hours which would be the ordinary hours of the port was to be deducted
- G the length of time during which the weather interfered with the work.

The case was tried by McNAIR, J. ([1954] 3 All E.R. 324) and in one paragraph (*ibid.*, at p. 326) there are a few words which show what view McNAIR, J., was taking of the present question:

- H "On the other hand, on behalf of the charterers it is said, in effect, that the whole conception of the words 'working day' necessarily involves that it is the times during which work is done to which regard is to be had, and that when considering 'weather working day' the same approach is to be made: it is to be considered, as regards a particular day, whether during the working hours the weather does, or would, interfere with the loading or discharging as the case may be."

- I It is those words "or would" which show what his view was.

On the other hand, in the Court of Appeal ([1955] 1 All E.R. 457), LORD GODDARD, C.J., who gave the first judgment, said this (*ibid.*, at p. 460):

"Does the use of the word 'weather' before those words 'working day' alter the construction which one would otherwise put on 'working day'? I think it does to this extent. The expression 'weather working days' appears to have come into use in shipping matters at about the end of the last century, the 1890's. There does not seem to be any doubt between

the parties as to what the word 'weather' means. It means that, from the working day, whatever it may be, is to be deducted the time which the men are stood off, or the loading is suspended, by reason of rain or other weather conditions, e.g., a hurricane, preventing work being done. The working day must be reduced by the time during which working is suspended by reason of the weather. Apart from any authority, therefore, I think the umpire calculated the demurrage on proper lines . . ."

That seems to be a strong expression of opinion on the one side, but it is subject to two points. First of all, LORD GODDARD said: "There does not seem to be any doubt between the parties as to what the word 'weather' means". So it looks as if the present question was not argued before the Court of Appeal, and, secondly, there is an express reservation by LORD GODDARD, where he said (*ibid.*, at p. 462):

"No question is raised in the Special Case whether charterers are bound to have cargo ready on a day or at a time when weather prevents work, so I say nothing about this."

I think that reservation is intended to be a reservation, in substance, of the present question, and although *Burnett S.S. Co., Ltd. v. Danube & Black Sea Shipping Agencies* (4) was not cited in the Court of Appeal, I am inclined to think that the wording of that reservation of LORD GODDARD, C.J., is probably a reminiscence of what SCRUTTON, L.J., said in the *Burnett* case (4). Whether that suggestion is right or not, however, I think the intention of LORD GODDARD, C.J., was to reserve the question raised in the present case. Indeed, I think it is true to say that any decision on the present question, if it had been given in *Alvion Steamship Corpn. of Panama v. Galban Lobo Trading Co. S.A. of Havana* (5) would have been obiter, because it was not necessary to the conclusion.

That is the somewhat difficult state of the authorities on this question. As there is no decisive authority, but some real, or apparent, conflict of opinions expressed in the cases, where the question was only mentioned incidentally and did not have to be decided, I must consider and decide the question as best I can, and the question is, What is the proper meaning of the expression "weather working days"?

Counsel for the plaintiffs, following expressions of opinion in his favour in the decided cases to which I have referred, used what may be called a negative approach towards the ascertainment of the meaning of the expression. He said that you start with a twenty-four hour day, and you proceed to cut it down by deducting any period of bad weather which, in fact, prevents or interrupts the work of discharging the ship. Using a convenient metaphor, he said: "If rain stops play, you make a deduction; but if all that can be said is that rain would have made play impossible if anyone had intended to play, then no deduction is to be made". I think that puts his point very clearly.

Counsel for the defendants argued that the expression "weather working days" should be considered and interpreted in an ordinary manner, and that it is not and does not involve an exception in a technical sense, but is simply descriptive of the class of days by reference to which lay time is to be calculated.

In my view, what I have called the negative approach to the definition, stating what is excluded, may, indeed, have its uses at some stage, but it is not sufficient and one cannot rest content with it. One must consider what positively is a weather working day. Is it a day on which the weather permits relevant work to be done and relevant work is, in fact, done, both conditions having to be fulfilled in order to make a weather working day? That, to my mind, is plainly not right, because, if that were so, the defendants could extend the lay time by not working on a fine day, and then one of the two conditions would be unfulfilled. If the weather is fine on Monday, then Monday counts against the defendants as a lay day, whether or not they make any use of it.

A In my view, a correct definition of a "weather working day" is a day on which the weather permits the relevant work to be done, whether or not any person avails himself of that permission, in other words, so far as the weather is concerned, it is a working day.

B In my view, also, the converse proposition must be on the same basis. A day is not a weather working day, it fails to be a weather working day, in so far as the weather on that day does not permit the relevant work to be done, and it is not material to inquire whether any person has intended or planned or prepared to do any relevant work on that day. The status of a day as being a weather working day, wholly or in part or not at all, is determined solely by its own weather, and not by extraneous factors, such as the actions intentions and plans of any person.

C That interpretation of the expression avoids what seems to me the absurdity of saying that a day afflicted with continual storms of rain, snow and sleet is to be counted as a weather working day if nobody had planned to do relevant work on that day.

That means I agree with the view expressed in note 5 on p. 364 of SCRUTTON ON CHARTERPARTIES (16th Edn.), which is that:

D "Extensions of loading time on account of bad weather take two forms. In some charterparties the rate of loading is calculated 'per weather working day'. In such a case it is immaterial that the charterer has no cargo available on a particular day if on that day bad weather would have prevented loading. Other charterparties provide that any time lost through work being impossible owing to bad weather is to be added to the lay days or is not to count. In this case the charterer must prove not only that bad weather occurred, but also that it did in fact prevent him from loading."

E A similar note is to be found in the 14th Edn. of SCRUTTON ON CHARTERPARTIES (1939); but more important, I think, is that one can see from *Burnett S.S. Co., Ltd. v. Danube & Black Sea Shipping Agencies* (4) ([1933] 2 K.B. 438), that SCRUTTON, L.J., himself, must have held the same view.

F I have done the best I can to work out the meaning of "weather working day" by the application of ordinary principles of construction. Had there been a unanimous trend of opinion amongst all the commercial judges to the effect that a more artificial meaning should be given, I would have thought it right to follow that; but it is, to my mind, an artificial meaning which is suggested on the part of the plaintiffs here, and I think the meaning suggested on the part of the defendants is the correct one. I therefore decide this question in their favour. That being so, the financial consequences have been worked out in the agreed statement of facts and it follows that the method set out in appendix III to the agreed statement is correct, and that the joint liability of the defendants to the plaintiffs is £30 6s. 4d.

Judgment for the defendants.

Solicitors: *Constant & Constant* (for the plaintiffs); *Richards, Butler & Co.* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

R. v. PERFECT.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Streatfeild, JJ.),
April 8, 15, 1957.]

Criminal Law—Sentence—Supervision order—Need for sentences as well as convictions on two “previous occasions”—Breach of probation order—Sentence for original offence and for second offence during probation passed on same occasion—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 22 (1) (a).

On Aug. 25, 1952, the appellant was placed by quarter sessions on probation for two years. On Aug. 23, 1954, he was sentenced by quarter sessions to twelve months' imprisonment for the offence for which he had been placed on probation, and, in respect of the commission of a further offence during the period of the probation, of which offence he was then convicted, he was at the same time sentenced to twelve months' imprisonment, the two sentences to run concurrently. On Feb. 2, 1957, the appellant was sentenced by quarter sessions to eighteen months' imprisonment for unlawful wounding, and a supervision order was made under s. 22 of the Criminal Justice Act, 1948, which section enabled such an order to be made if the appellant had been “convicted on at least two previous occasions of offences for which he was sentenced . . . to imprisonment.”

Held: the supervision order must be quashed since, although the appellant had been twice previously convicted, he had not been sentenced to imprisonment on two separate occasions, viz., two appearances at separate courts of quarter sessions, as the conviction for which he was placed on probation did not rank as a conviction until he was sentenced in August, 1954, on which occasion he was also convicted of and sentenced for the second offence.

R. v. Rogers ([1953] 1 All E.R. 206) applied.

Per CURIAM: on an appeal to the Court of Criminal Appeal against sentence in a case sent to quarter sessions under s. 29 of the Magistrates' Courts Act, 1952, the committal order with the sentence indorsed thereon should be sent to the Court of Criminal Appeal for rectification if the sentence should be altered.

Appeal allowed.

[As to previous convictions and sentences in determining whether a person is liable to a supervision order, see 10 HALSBURY'S LAWS (3rd Edn.) 514, para. 934.]

For the Criminal Justice Act, 1948, s. 22 (1), see 28 HALSBURY'S STATUTES (2nd Edn.) 373.]

Cases referred to:

- (1) *R. v. Harris*, [1950] 2 All E.R. 816; [1951] 1 K.B. 107; 114 J.P. 535; 2nd Digest Supp.
- (2) *R. v. Stobart*, [1951] 2 All E.R. 753; 115 J.P. 561; 2nd Digest Supp.
- (3) *R. v. Rogers*, [1953] 1 All E.R. 206; [1953] 1 Q.B. 311; 117 J.P. 83; 3rd Digest Supp.

Appeal.

The appellant, John William Perfect, was convicted on Jan. 14, 1957, at Sittingbourne Magistrates' Court of unlawful wounding and was committed for sentence to the East Kent Quarter Sessions where, on Feb. 2, 1957, he was sentenced to eighteen months' imprisonment and an order was made under the Criminal Justice Act, 1948, s. 22. He now appealed against the order under s. 22.

G. W. Davey for the appellant.

Miss D. K. Dix for the Crown.

Cur. adv. vult.

- A** Apr. 15. **LORD GODDARD, C.J.**, read the following judgment of the court: This appellant was convicted by a magistrates' court of unlawful wounding and committed for sentence to the East Kent Quarter Sessions where, on Feb. 2, this year he was sentenced to eighteen months' imprisonment and an order was made under s. 22 of the Criminal Justice Act, 1948. He applied for leave to appeal against sentence, and was given leave only on the question whether
- B** such an order could be made in this case. The requisite notice was served on him, and, at the hearing, he admitted that, on Aug. 25, 1952, he was placed on probation for two years at the East Kent Quarter Sessions; that, on Aug. 23, 1954, in respect of the commission of a further offence during the period of probation he was sentenced by the said court in respect of that conviction to twelve months' imprisonment, and that on the same day at the same court he
- C** was convicted of office breaking and sentenced to twelve months' imprisonment. Those two sentences were made to run concurrently. The question is whether, on Feb. 2 this year, when he was sentenced for the present offence, he was a person who had been convicted on at least two previous occasions of offences for which he was sentenced to imprisonment. There were thus two separate convictions, the first in August, 1952, and the second in August, 1954, but the
- D** sentences were passed on the same day. Section 8 (5) of the Criminal Justice Act, 1948, provides that, where it is proved to the satisfaction of the court by which a probation order was made, that the probationer has been convicted and dealt with in respect of an offence committed during the probation period, the court may deal with him, for the offence for which the order was made, as if he had just been convicted by or before the court for that offence. So the quarter
- E** sessions had jurisdiction to deal with him in August, 1954, both for the offence committed in 1952 for which he was placed on probation and the subsequent offence in 1954. By s. 12 (1) of the Act of 1948, a conviction for which an offender is placed on probation is not deemed to be a conviction for any purpose other than the purpose of the proceedings in which the order is made and of any subsequent proceedings which may be taken against him under the foregoing
- F** provisions of the Act, provided, however, that where an offender who is not less than seventeen years of age at the time when he was placed on probation is subsequently sentenced for that offence this sub-section does not apply. The effect of this section has been explained both in *R. v. Harris* (1) ([1950] 2 All E.R. 816) and *R. v. Stobart* (2) ([1951] 2 All E.R. 753). It has been emphasised* how desirable it is to pass some sentence, even if a nominal one, where a probationer
- G** had broken the terms of his probation, so that the offence for which he had been dealt with in that manner would thereafter count as a conviction. Section 22, however, would seem to require not only convictions on two previous occasions but also sentences of imprisonment on two previous occasions, for if, on one of the previous convictions, a fine only had been imposed the section would not apply†. This court had to consider the words "previous occasions" in *R. v.*
- H** *Rogers* (3) ([1953] 1 All E.R. 206), a case relating to preventive detention. The court there pointed out that the same construction must be given to these words in s. 22 (1) (a) as in s. 21 (1) (b) and (2) (b) which deal with the requirements for sentences of corrective training or preventive detention. It was held that separate occasions meant appearances at a separate court of quarter sessions or assize. The conviction for which a probation order was made did not rank as a
- I** conviction till the appellant was sentenced at the sessions in August, 1954, when he was also convicted of a subsequent offence. We think, therefore, that the reasoning in *R. v. Rogers* (3) applies to the present case and, accordingly, we quash the order under s. 22.

We desire to add for the guidance of clerks of the peace that it would be convenient, when there is an appeal against sentence in a case sent to the sessions

* In *R. v. Fry*, [1955] 1 All E.R. 21.

† Cf. *R. v. Driscoll*, [1955] 2 All E.R. 113.

under s. 29 of the Magistrates' Courts Act, 1952, for the committal order with the sentence indorsed thereon to be sent to this court for rectification if the sentence should be altered, just as is done with an indictment.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *N. K. Cooper, Maidstone* (for the Crown).

[*Reported by G. A. KIDNER, ESQ., Barrister-at-Law.*]

Re KNIGHT (*deceased*). Re WYNN (*deceased*).
MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD.
v. PARKER AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Hodson and Romer, L.J.J.), April 1, 2, 3, 4, 16, 1957.]

Power of Appointment—Exercise—Special power to appoint by deed or will—Gift subject to payments of debts of “all the residue . . . including any property over which I may have any power of disposition at the date of my death” to objects of power—Whether special power exercised by will.

A testator who died in 1919 directed his trustees to hold one half of his residuary estate on trust for his daughter, L.M.W., for her life and after her death on trust for the children or remoter issue of L.M.W. at such times and ages, in such shares and in such manner as L.M.W. should by deed or will appoint, and, in default of and subject to any such appointment, for the children of L.M.W. on attaining the age of twenty-one years, or, in the case of daughters, earlier marriage, in equal shares. L.M.W. had three children only, two daughters, Mrs. S. and Mrs. P., and a son. In 1921 L.M.W. irrevocably appointed to Mrs. P. one-third of the said moiety of the testator's residuary estate subject to L.M.W.'s life interest. In 1941 Mrs. P. died and in 1945 L.M.W.'s son died. By her will dated Sept. 20, 1951, L.M.W., after giving legacies, devised and bequeathed “all the residue and remainder of my real and personal estate whatsoever and wheresoever whether in possession or reversion of which I may die possessed and including any property over which I may have any power of disposition at the date of my death” to her trustee on the usual trusts for sale and conversion and she directed that her trustee should “out of the proceeds of such sale . . . and out of my ready moneys pay my funeral and testamentary expenses and just debts and the legacies given by this my will . . . and the duties payable on such legacies . . . and shall stand possessed of the residue of the said moneys and any part or parts of my said estate remaining unconverted” on trust (a) as to one-third thereof for her daughter Mrs. S. absolutely, with a provision in favour of that daughter's children in the event (which did not happen) of her predeceasing L.M.W., (b) as to a further one-third share to be divided equally between the children of Mrs. P., and (c) as to the remaining one-third share for the children of a deceased son of L.M.W. equally. L.M.W.

A died on Mar. 7, 1955. Five children of Mrs. P. and two children of L.M.W.'s son survived L.M.W. The question arose whether the residuary gift contained in L.M.W.'s will operated as an exercise of the special power of appointment given to her by the testator's will. L.M.W. had not at either the date of her will or the date of her death any power of appointment other than that under the testator's will.

B **Held:** L.M.W.'s special power of appointment was not exercised by her will, because on its true construction she did not intend to exercise every limited power that she might have, but meant only to exercise such powers as she might have at her death that would enable her to bring into, and make part of her general and disposable estate, for all the purposes of her will, property which was not, strictly speaking, her own (see p. 258, letter G, post).

C Appeal allowed.

Observations on the weight to be given, in relation to the question whether a special power of appointment had been exercised by will, to the use by the testator of the words "over which I may have any power of disposition" (see p. 260, letters A to E, post).

D **[Editorial Note.** The Court of Appeal adopt the analysis of the earlier cases in *Re Holford's Settlement* ([1944] 2 All E.R. 462); see p. 260, letter A, post. They attach weight to the consideration that the testatrix dealt with her property as one mass (see p. 259, letter H, post, citing per NEVILLE, J., in *Re Sanderson* (1912), 106 L.T. 26), although property over which she had a special power of appointment would not be applicable, e.g., in payment of her debts.

E As to the expression of intention to exercise powers, see 25 HALSBURY'S LAWS (2nd Edn.) 543, 549-556, paras. 982, 986-993; and for cases on the subject, see 37 DIGEST 446-459, 491-609.]

Cases referred to:

- (1) *Re Teape's Trusts*, (1873), L.R. 16 Eq. 442; 43 L.J.Ch. 87; 28 L.T. 799; 37 Digest 451, 541.
- (2) *Re Swinburne, Swinburne v. Pitt*, (1884), 27 Ch.D. 696; 54 L.J.Ch. 229; 37 Digest 453, 550.
- (3) *Von Brockdorff v. Malcolm*, (1885), 30 Ch.D. 172; 55 L.J.Ch. 121; 53 L.T. 263; 37 Digest 480, 771.
- (4) *Re Welford's Will Trusts, Davidson v. Davidson*, [1946] 1 All E.R. 23; 2nd Digest Supp.
- (5) *Re Weston's Settlement, Neeves v. Weston*, [1906] 2 Ch. 620; 76 L.J.Ch. 54; 95 L.T. 581; 37 Digest 451, 540.
- (6) *Re Hayes, Turnbull v. Hayes*, [1901] 2 Ch. 529; 70 L.J.Ch. 770; 85 L.T. 85; 37 Digest 425, 335.
- (7) *Re Ackerley, Chapman v. Andrew*, [1913] 1 Ch. 510; 82 L.J.Ch. 260; 108 L.T. 712; 37 Digest 454, 562.
- (8) *Re Beresford's Will Trusts, Sturges v. Beresford*, [1938] 3 All E.R. 566; Digest Supp.
- (9) *Re Sanderson, Sanderson v. Sanderson*, (1912), 106 L.T. 26; 37 Digest 457, 585.
- (10) *Re Slack's Settlement, Re Slack, Butt v. Slack*, [1923] 2 Ch. 359; 93 L.J.Ch. 46; 129 L.T. 628; 37 Digest 449, 519.
- (11) *Re Holford's Settlement, Lloyds Bank, Ltd. v. Holford*, [1944] 2 All E.R. 462; [1945] Ch. 21; 114 L.J.Ch. 71; 171 L.T. 379; 2nd Digest Supp.
- (12) *Re Boyd, Nield v. Boyd*, (1890), 63 L.T. 92; 37 Digest 451, 538.
- (13) *Re Mayhew, Spencer v. Cutbush*, [1901] 1 Ch. 677; 70 L.J.Ch. 428; 84 L.T. 761; 37 Digest 452, 542.
- (14) *Re Lane, Belli v. Lane*, [1908] 2 Ch. 581; 77 L.J.Ch. 774; 99 L.T. 693; 37 Digest 445, 490.

Appeal.

This was an appeal by the eighth and ninth defendants, Elaine Louise Knight Stacpoole-Ryding, a daughter of Linda Margaret Wynn, deceased, the testatrix, and Dorothy Rosa Price, the personal representative of a deceased son of the testatrix, from a judgment of DANCKWERTS, J., given on Oct. 9, 1956. DANCKWERTS, J., held that the will of the testatrix dated Sept. 20, 1951, operated as an exercise of the special power of appointment conferred on the testatrix by the will of her father, Frederick Knight, deceased.

Charles Russell, Q.C., and *F. B. Alcock* for the eighth and ninth defendants.

R. W. Goff, Q.C., and *M. M. Wheeler* for the first five defendants, children of a deceased daughter of the testatrix.

S. W. Templeman for the plaintiffs, the trustees of the will of Frederick Knight, deceased.

The sixth and seventh defendants were not represented on the appeal.

Cur. adv. vult.

Apr. 16. **LORD EVERSHERD, M.R.**, read the following judgment of the court: Under the will and codicil of Frederick Knight, who died in 1919, his residuary estate was (in the events which have happened) directed to be held by his trustees, as to one-half, on trust (subject to a life interest therein of his widow) to pay the income thereof, without power of anticipation during coverture, to his daughter Mrs. Linda Margarita Wynn for her life; and after her death on trust for the children or remoter issue of Mrs. Wynn "to be born and take vested interests within twenty-one years after her death" at such times and ages and in such shares

"and with such future or other trusts for their benefit and such provisions for their respective advancement . . . and maintenance and education at the discretion of my trustees or any other person or persons"

and in such manner as Mrs. Wynn should by deed or deeds revocable or irrevocable or by will or codicil appoint; and in default of and subject to any such appointment for the children of Mrs. Wynn, on attaining the age of twenty-one or (in the case of daughters) earlier marriage, in equal shares; and there was a provision in usual form for hotchpot applicable to any unappointed share of any child of Mrs. Wynn in whose favour Mrs. Wynn had made any appointment.

In 1921, on the occasion of the marriage of one of her daughters to Mr. Leslie Edward Parker, Mrs. Wynn appears, by an irrevocable deed, to have appointed to that daughter a third (she having then three children) of the moiety of her father's residuary estate, subject to the life interest of Mrs. Knight (who was then still living) and of herself. This deed of appointment has been lost; but notice was given to Mr. Knight's trustees by the trustees of Mrs. Parker's marriage settlement (to whom Mrs. Parker had transferred her appointed share) of those facts: and from that notice it appears that Mrs. Wynn did not release (as she could not have done in her husband's lifetime) her own life interest in the appointed share of her father's estate.

Mrs. Wynn died on Mar. 7, 1955. She was survived by one only of her three children, namely, Mrs. Stacpoole-Ryding, the eighth defendant in this action and one of the appellants in this court. Mrs. Parker had died in 1941 survived by five children, being the first five defendants, represented before us by Mr. Goff. Mrs. Wynn's third child, her son, died in 1945 leaving him surviving his widow and executrix, the last (the ninth) defendant (also an appellant before us) and two children, the sixth and seventh defendants. Of these the second was an infant at the time of the issue of the originating summons, but is now of full age;

A and we were informed by counsel for the eighth and ninth defendants that the interests of the sixth and seventh defendants could be regarded as identical with the interest of their mother and that they were not, accordingly, participating in the appeal. Mr. Knight's widow died some years ago.

The question before us is whether Mrs. Wynn's will operated as an exercise of the power of appointment, already recited, given to her by the will of Mr. Knight.

B The will of Mrs. Wynn is dated Sept. 20, 1951: and the first thing to be noted about it is that apart from legacies to her sister, Mrs. Lever, and to her solicitor, a Mr. Scott, the only beneficiaries thereunder are her surviving daughter, daughter-in-law, and grandchildren, to all of whom she referred (as she did also in the case of her sister) in terms of affection. Since the solution of the question presented to us depends on the true interpretation to be given to the language

C of Mrs. Wynn's will, it is necessary to refer to it at some length. By the first clause she appointed the first plaintiff, the Midland Bank Executor and Trustee Co., Ltd., to be the trustee and executor of the will with the right to remuneration for its services in accordance with its published handbook: and she expressed the desire that, unless the first plaintiff saw reason to the contrary, her solicitor, Mr. Scott, should be employed as such in connexion with her estate. By cl. 2

D of her will Mrs. Wynn gave legacies to her sister, to her daughter-in-law, to Mr. Scott, and to her grandchildren—the legacies to the last mentioned being equal; and she directed that “all duties payable in respect” of the legacies “should be paid as part of my testamentary expenses out of my general personal estate”. By cl. 3, Mrs. Wynn gave, devised and bequeathed:

E “all the residue and remainder of my real and personal estate whatsoever and wheresoever whether in possession or reversion of which I may die possessed and including any property over which I may have any power of disposition at the date of my death unto the company upon trust to sell call in and convert the same into money with full power for the company in their

F absolute discretion to postpone such sale or conversion of any part or parts of my said estate for so long as they shall think fit without being answerable for any loss resulting from such postponement and I direct that the company shall out of the proceeds of such sale calling in and conversion and out of my ready moneys pay my funeral and testamentary expenses and just debts and the legacies given by this my will or any codicil hereto and the duties

G payable on such legacies and bequests and shall stand possessed of the residue of the said moneys and any part or parts of my said estate remaining unconverted (being and hereinafter called ‘my residuary estate’) Upon trust (a) as to one-third share thereof”

for her daughter Mrs. Staepoole-Ryding absolutely, with a provision in favour of that daughter's children in the event (which did not happen) of her predeceasing Mrs. Wynn; (b) as to “a further one-third share thereof” to be divided equally between Mrs. Parker's children, the first five defendants, and (c) Mrs. Wynn directed that the first plaintiff should “stand possessed of the remaining one-third share of my residuary estate” for the sixth and seventh defendants (the children of her deceased son) in equal shares.

I It appears from the terms of the originating summons that the first plaintiff (the Midland Bank Executor and Trustee Co., Ltd.) are now, together with Mrs. Wynn's sister, Mrs. Lever, the trustees of the will of Mr. Knight, though it does not appear when they were so appointed. At the date of Mrs. Wynn's appointment in 1921 the trustees of Mr. Knight's will were Mrs. Knight, Mrs. Wynn's husband and two other persons not parties to the present proceedings. Mr. Wynn and Mrs. Lever were (at that time) the trustees with another individual trustee of Mrs. Parker's marriage settlement.

It remains only to add that Mrs. Wynn had not at the date either of her will or her death any power of appointment, general or special, other than her special power under Mr. Knight's will. There is no evidence of any circumstances from which it might have been inferred that Mrs. Wynn either had or had not in mind that she had a testamentary power to appoint under her father's will: or had or had not in mind the terms of her father's will or the fact that she had made the appointment in Mrs. Parker's favour in 1921. But since (as we were informed) Mrs. Wynn's will was prepared by a solicitor, we may legitimately observe that the choice of the formula "... including any property over which I may have a power of disposition at the date of my death " cannot fairly or easily be attributed to a skilled draftsman who had been informed of the existence of the special power under Mr. Knight's will, let alone of its terms and the fact of its having already been exercised—or indeed of any limited power. Mrs. Wynn appears to have been in receipt of the income of a moiety of Mr. Knight's residuary estate up to the date of her death. It was stated in evidence that the value of that moiety was at Mrs. Wynn's death about £70,000; but that Mrs. Wynn had also free estate of her own of a substantial amount.

The question, then, is that which we have already stated—should the will of Mrs. Wynn be taken, on its true effect and interpretation, to have exercised her limited power of appointment under Mr. Knight's will? We were informed that we could assume (a) that the first five defendants were now equally entitled between them to the subject-matter of Mrs. Wynn's appointment in their mother's favour in 1921 and would be likewise entitled to any share of the moiety of Mr. Knight's estate going in default of appointment to Mrs. Parker's estate; and (b) that the sixth and seventh defendants would similarly be entitled equally between them to any share of the same moiety going in default of appointment to the estate of their father, Mrs. Wynn's son. It therefore follows that if Mrs. Wynn's will did not operate as an exercise of the special power, the moiety of Mr. Knight's residuary estate would be divisible (having regard to the hotchpot clause) between the first five defendants, the sixth and seventh defendants and the eighth defendant in equal shares per stirpes, in the same way as would be divided also the free estate of Mrs. Wynn. If, on the other hand, the question posed should be answered affirmatively, then by the joint effect of Mrs. Wynn's two appointments—that by deed in 1921 and that by her will—the first five defendants, the Parker stirpes, would together take five-ninths, and the other two stirpes respectively only two-ninths each, of the moiety of Mr. Knight's residuary estate: though the three stirpes would take equally between them Mrs. Wynn's free estate.

It was the view of DANCKWERTS, J., that the second of the two above alternatives provided the correct answer in the present case, which he regarded as governed by a number of decisions of which *Re Teape's Trusts* (1) ((1873), L.R. 16 Eq. 442), *Re Swinburne, Swinburne v. Pitt* (2) ((1884), 27 Ch.D. 696), *Von Brockdorff v. Malcolm* (3) ((1885), 30 Ch.D. 172) and *Re Welford's Will Trusts, Davidson v. Davidson* (4) ([1946] 1 All E.R. 23) were examples; and that the decisions in what the judge called "the other line of cases" (illustrated by *Re Weston's Settlement, Neeves v. Weston* (5) ([1906] 2 Ch. 620) were not applicable.

It will appear from the preceding sentence, and it is the fact that a large number of cases has from time to time been before the courts in which the question for determination has been similar to that now before us, i.e., whether wills expressed in language comparable to (but nevertheless in one respect or another different from) the language of Mrs. Wynn's will have, in the relevant circumstances of those cases, operated to exercise special powers of appointment. Learned counsel before us have very properly cited all these cases to us and commented on them, on the one side or the other. It has been pointed out more

A than once in the later cases that the decisions are not easily reconcilable; and it is, we think, at any rate clear that the observation is justified. Only one of the cited cases came before the Court of Appeal, namely, *Re Hayes, Turnbull v. Hayes* (6) ([1901] 2 Ch. 529), in which this court decided that the formula "all the residue of the property over which at the time of my death I shall have a disposing power", in the context of the will in which it appeared, was not effective to exercise a limited power of appointment to which the testator became entitled by an instrument made after the date of his will. We feel, however, no hesitation in adopting the correctness of the interlocutory observation in that case of ROMER, L.J. (*ibid.*, at p. 531):

C "The intention to exercise a special power must be gathered from the whole will. The cases do not lay down any general principles . . ."

and the learned lord justice added his authority to the view, already mentioned, that the decided cases are not easily reconcilable.

Since, therefore, none of the earlier decisions can be regarded as authority binding us in the present case, and since moreover the language used by Mrs. Wynn differs in some appreciable respects from all the cited instances, we first approach the present problem as one properly depending on the effect and interpretation of the particular will which in the circumstances already narrated Mrs. Wynn chose to make. We shall later have to consider whether the conclusion which would, on this approach, commend itself to us is affected or displaced by any results which from long usage or otherwise emerge from the earlier decisions.

E If, then, the question be one of "intention" (to borrow ROMER, L.J.'s phrase) "to be gathered from the whole will" of Mrs. Wynn, then the principle to be applied is that common to all questions of construction of wills; namely, to discern what is the intention which the testatrix has expressed by the words which she has used, construed in their context according to their ordinary and proper sense. So much was indeed, by way of principle, stated by SARGANT, J., in one of the cases cited to us, *Re Ackerley, Chapman v. Andrew* (7) ([1913] 1 Ch. 510) where that learned judge, transposing similar language used by BUCKLEY, J., in *Re Weston's Settlement* (5) said (*ibid.*, at p. 515):

G ". . . that in order to exercise a special power there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it; and that either a reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for the purpose."

H But in a case like the present, where there is reference neither to the power nor to the property subject to the power, it may be said that the general formula does not carry the matter very far: for the question remains, what degree of precision or aptness is requisite to qualify as an expression of intention? What assumptions (if any) should be made as to the testatrix' knowledge of the character, objects and incidents of the special power the exercise of which is in question? In *Re Beresford's Will Trusts, Sturges v. Beresford* (8) ([1938] 3 All E.R. 566), I MORTON, J. (who expressed his own preference for the line of cases illustrated by *Re Weston's Settlement* (5)) was assisted to his own conclusion that a special power had not been exercised by a general formula bearing some resemblance to that contained in cl. 3 of Mrs. Wynn's will (though the testator had also used the word "appoint") by observing that, if the testator had intended to exercise the power, he must be taken deliberately to have done so by directions which, as regards both the objects and the incidents of the power, substantially departed from the terms of the power itself.

We are not satisfied that—at any rate where the words to be construed include A
so general a formula as that contained in Mrs. Wynn's will, namely, "any
property over which I *may have any power* of disposition at the date of my
death"—it is safe or appropriate to test the question by assuming that the
testator was conscious or aware of the terms and incidents of the power which
he had. At the other extreme, as it were, it is said that the words "any power of
disposition" must be taken to mean, literally, what they say; so that the testator B
must be treated as expressing the intention to exercise every power in fact vested
in him, however limited or remote, and regardless altogether of the nature and
terms of the power; with the result that, by an application of the principle
known as *reddendo singula singulis*, all administrative and other difficulties and
contradictions will be got over and the will can take effect as an exercise of the
special power in question if and to the extent that the benefits in the end of all C
conferred are, and the persons to whom they are given are found to be, within
the scope and objects of the power.

In our judgment this extreme view, by giving literal effect to a few words,
ignores altogether the context in which they appear and stretches to an inappro-
priate and illegitimate extent the convenience of the rule *reddendo singula*
singulis. Moreover, if such be the proper method of construction, then the D
circumstance that the beneficiaries under the will of the suggested appointor are
wholly or in part objects of the special power loses all significance from the point
of view of interpretation. So in the present case counsel for the first five de-
fendants conceded that some limitation must, as a matter of sensible interpreta-
tion in their context, be placed on the words "any power of disposition"; but
he claimed that they should be construed as meaning "any powers which enable E
me to create the beneficial interests hereafter stated".

In our judgment the problem in the present case, as a problem of discovering
expressed intention, has to be solved by posing and answering the questions:
"Having regard to the general form of the will and the context in which the vital
words appear which are said to amount to an operation of the special power,
did Mrs. Wynn intend to exercise, so far as she effectively could, any and every F
power that she might have? Or did she mean to exercise only such powers as
were available and appropriate for making effective the dispositions in the will?"
If such are the proper questions, then in our view, construing the will as a whole
as best we can (and unembarrassed for the moment by any decided cases), we
think that the answer is that Mrs. Wynn was not intending to exercise (to the
extent she could effectively do so) every limited power that she might have: but G
meant only to exercise such powers as she might have at her death that would
enable her to bring into, and make part of her general and disposable estate, for
all the purposes of her will, property which was not, strictly speaking, her own;
and that the words which she used were not sensibly apt to extend further. To
put the matter in a sentence, we think that the words "any power of disposition"
should in their context be taken to mean "any *relevant* power of disposition". H
In our view such is the cumulative effect of the many indications which, in this
will, were relied on by counsel for the eighth and ninth defendants as pointing,
all of them, in that direction and which override the circumstance that, in this
case, the beneficiaries happened (all of them) to be objects of the special power
in question: having regard particularly to the fact, already noticed, that these
beneficiaries were (with the few exceptions noted) the sole objects of Mrs. Wynn's I
bounty and were naturally so, being all her own surviving issue.

It is first to be noted that the duties in respect of the legacies given by cl. 2
were directed to be paid as testamentary expenses "out of my general personal
estate", which phrase we take to be clearly a reference to the subject-matter of
the following clause. That clause opens with a general formula of which it may
be said that many of the words used are repetitive and unnecessary but which
at least shows that the true emphasis is on its subject-matter, namely, the

- A testatrix' *property* of all and every kind. The vital words which follow have, as it seems to us and in that context, the same emphasis and purpose—they are part of the comprehensive reference to all the testatrix' *property* of whatever kind. We think also that there is force in the submission of counsel for the eighth and ninth defendants that the main purpose of the introduction of the words was to avoid the possibly limiting effect of the immediately preceding
- B phrase “. . . of which I may die possessed”. Certainly, in that context, the reference to the future event of the testatrix' death lends no support to the view that she had in mind the special power already vested in her. Then the word “appoint”, which may be said to have some technical significance, does not, after all, occur. The property is “given devised and bequeathed” to the first plaintiff as her executor; and the first trust, expressed with elaboration, is a
- C trust for sale and conversion with a power of postponement followed by a direction in common form for payment of funeral and testamentary expenses and of debts and legacies. It is no doubt true that administrative provisions of this kind should not and would not, however inappropriate in themselves, be necessarily regarded as fatal to a conclusion in favour of an expressed intention to exercise a special power—at least where that intention can, aliunde, be safely
- D discerned; and there are authorities of long standing to that effect. But in this case such other indications as there are seem to us not to assist counsel for the first five defendants. The subject-matter of the trust for conversion is expressly referred to as “my said estate”—a phrase which we think lends reinforcement to the view already expressed that Mrs. Wynn conceived herself to be dealing and intended to deal only with that property which was in truth, or could for all
- E her purposes be made, her estate. And the same phrase “my said estate” is again used at the end of the paragraph in reference to that which remains after the discharge of debts, legacies and testamentary expenses and which she thereupon defines as “my residuary estate”—words which are in terms repeated in the following para. (c) for the purposes of the gift to the sixth and seventh defendants.
- F Matters of construction must in the end of all depend on the impression made on the reader's mind by the words that have been used. Such indeed is the purpose of language. But there remains the question whether a conclusion based on our interpretation of the language used by Mrs. Wynn is consonant with authority. We have already observed more than once that the decided
- G cases are not easily reconcilable and that (save for *Re Hayes* (6)) they are all decisions at first instance. Nevertheless, as counsel for the first five defendants pointed out in his cogent argument, many of the cases are of long standing and it is true to say (as counsel argued) that the decisions to the effect that special powers had not been exercised were on the whole less hallowed by antiquity and could moreover (with the possible exception of *Re Sanderson*, *Sanderson v.*
- H *Sanderson* (9) (1912), 106 L.T. 26) where NEVILLE, J., based his short judgment on the circumstance, which has appealed to us in the present case, that the testator was “dealing with all his property in the mass”) be shown to have turned on special considerations in the respective instruments before the judges which are not exactly found in the present case. Thus, by way of example, EVE, J., in *Re Slack's Settlement*, *Re Slack*, *Butt v. Slack* (10) ([1923] 2 Ch. 359),
- I largely founded himself on the words “if any”; though those words qualified not the powers of disposition themselves but the property subject to the powers. Inevitably, however, decisions in cases of this kind must turn on particular words in particular wills, the conclusion on any one of which cannot constitute direct authority for an instrument in different terms. Our view indeed in the present case is no more than a conclusion on the effect, as we have read and understood it, of Mrs. Wynn's will and cannot be regarded as intended to lay down some new guide for other cases arising hereafter on different instruments.

In the circumstances we do not think it would be useful to add to this judgment an analysis of the earlier cases. Such an analysis will be found in the judgment of VAISEY, J., in the recent case of *Re Holford's Settlement, Lloyds Bank, Ltd. v. Holford* (11) ([1944] 2 All E.R. 462), and we gratefully adopt it. But we think we should refer to one matter which appears to have influenced the conclusion in more than one of the decisions that a special power had been exercised, namely, that otherwise no meaning or effect could, having regard to s. 27 of the Wills Act, 1837, be given to the reference to "any powers of disposition by will". Thus in *Re Swinburne* (2) PEARSON, J., thought that, unless he decided in favour of an exercise of the power, he would in effect be striking altogether out of the will the words there used "... over which I may have any power of disposition". The same point was made by LORD SELBORNE, L.C., in *Re Teape's Trusts* (1) and by STIRLING, J., in *Re Boyd, Nield v. Boyd* (12) ((1890), 63 L.T. 92); see also *Re Mayhew, Spencer v. Cutbush* (13) ([1901] 1 Ch. 677) and *Re Welford's Will Trusts* (4). With all respect to those very learned judges, it seems to us doubtful whether the argument is necessarily a valid one. Counsel for the eighth and ninth defendants made the point that the terms of a general power may be such that an effective exercise requires that express reference be made to the power. It may be that such a qualification is not common—though it is to be found, e.g., in the last edition of KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, vol. 2, at p. 921; and in *Re Lane, Belli v. Lane* (14) ([1908] 2 Ch. 581) SWINFEN EADY, J., held that a general power so qualified was effectively exercised by a form of words closely comparable to that with which we are concerned in the present case ("... and over which I shall have any power of disposition by will"). As MORTON, J., observed in *Re Beresford* (8) ([1938] 3 All E.R. at p. 569) the words "... have power to dispose" may, as a matter of English, properly mean "... have power to dispose of as I think fit". We are not, therefore, inclined to agree with the view that the only alternative to a conclusion in favour of an exercise of a special power must be to treat a general phrase such as "any power of disposition" as otiose. But even if the corresponding words in the present case had to be treated as incapable of making any effective addition to the preceding general words we should not regard that result as fatal to the view which we have formed, since (as we have earlier pointed out) many of those general words are, on any view, merely repetitive and unnecessary. In our judgment the appeal should be allowed.

Appeal allowed.

Solicitors: *Tuck & Mann*, agents for *Wallace, Robinson & Morgan*, Birmingham (for the eighth and ninth defendants); *Peake & Co.*, agents for *Harold Gee & Williams*, Bristol (for the first five defendants); *E. B. V. Christian & Co.*, agents for *Scott & Richards*, Teignmouth (for the plaintiffs).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

A Re HATFEILD (*deceased*).

HATFEILD AND ANOTHER v. HATFEILD AND OTHERS.

[CHANCERY DIVISION (Harman, J.), March 21, 22, April 17, 1957.]

B *Will—Acceleration—Devise of land to A. for life with remainder to his sons in tail male, with remainder to B. in fee simple—Disclaimer by A., having as yet no son—Destination of intermediate income—Whether income expressly disposed of—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 175 (1).*

C By his will dated May 19, 1938, the testator devised certain freehold property known as the H. estate to his cousin H. for life, with remainder to H.'s sons successively in tail male, with remainder to the testator's cousin A. for life, with remainder to A.'s sons successively in tail male, with remainder to the testator's cousin C. in fee simple. The testator gave his residuary estate to his trustees on certain trusts. He died in 1941. H., the first tenant for life, died without issue on Apr. 18, 1950. By a deed dated Aug. 11, 1950, A., who had as yet no son, disclaimed his interest under the will. C. died in 1951. On the question whether, pending the birth of a son to A. or until A.'s death, the income of the H. estate either (a) should be paid to C.'s personal representatives, or (b) was income carried by the contingent interest of an unborn son of A. by virtue of s. 175 (1) of the Law of Property Act, 1925*, and as such should be held in trust for any son who might be born to A., or (c) formed part of the residue,

E **Held:** pending the birth of a son to A., the income of the H. estate from Apr. 18, 1950, was payable to the personal representatives of C., because the disclaimer by A. had accelerated C.'s interest in remainder, and, as the testator's will had made a complete disposition of the H. estate, each interest arising on the cesser of a prior interest, the income was "expressly disposed of", within the exception to s. 175 (1) of the Law of Property Act, 1925, which sub-section accordingly did not apply.

F *Re Scott* ([1911] 2 Ch. 374) not followed.

[As to acceleration of subsequent interests, see 34 HALSBURY'S LAWS (2nd Edn.) 132, para. 171; and for cases on the subject, see 44 DIGEST 428-432, 2575-2596.]

G For the Law of Property Act, 1925, s. 175 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 789.]

Cases referred to:

- H (1) *Bective v. Hodgson*, (1864), 10 H.L. Cas. 656; 33 L.J.Ch. 601; 10 L.T. 202; 11 E.R. 1181; 44 Digest 741, 5982.
- (2) *Re Scott, Scott v. Scott*, [1911] 2 Ch. 374; 80 L.J.Ch. 750; 105 L.T. 577; 44 Digest 430, 2589.
- (3) *Re Flower's Settlement Trusts, Flower v. Inland Revenue Comrs.*, [1957] 1 All E.R. 462.
- I (4) *Re Conyngham, Conyngham v. Conyngham*, [1921] 1 Ch. 491; 90 L.J.Ch. 364; 125 L.T. 300; 44 Digest 431, 2591.
- (5) *Re Willis, Crossman v. Kirkaldy*, [1917] 1 Ch. 365; 86 L.J.Ch. 336; 115 L.T. 916; 44 Digest 430, 2590.
- (6) *Re Brooke, Brooke v. Dickson*, [1923] 1 Ch. 360; *revsd.*, C.A., [1923] 2 Ch. 265; 92 L.J.Ch. 504; 129 L.T. 379; 44 Digest 431, 2592.
- (7) *Jull v. Jacobs*, (1876), 3 Ch.D. 703; 35 L.T. 153; 44 Digest 430, 2586.

*The terms of s. 175 (1) of the Law of Property Act, 1925, are printed at p. 263, letter F, post.

- (8) *Lainson v. Lainson*, (1854), 5 De G.M. & G. 754; 24 L.J.Ch. 46; 24 A L.T.O.S. 85; 43 E.R. 1063; 44 Digest 429, 2580.
- (9) *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30; 63 L.J.Ch. 637; 70 L.T. 777; 44 Digest 787, 6441.

Adjourned Summons.

This originating summons was issued by Aubrey Cecil Hatfeild and Reginald Thurston Rivington as the trustees for the purposes of the Settled Land Act, 1925, of the settlement of the Hatfield estate, settled by the will of the testator, Gilliat Edward Hatfeild, deceased. B

By his will dated May 19, 1938, the testator devised his land and other real property situate at Hatfield or elsewhere in the County of York to his cousin Herbert Seymour Hatfeild (referred to hereinafter as "Herbert") for life, with remainder to Herbert's sons successively in tail male, with remainder to the testator's cousin Aubrey Cecil Hatfeild (the first named plaintiff, referred to as "Aubrey") for life, with remainder to Aubrey's sons successively according to seniority in tail male, with remainder to the testator's cousin Cuthbert Hatfeild in fee simple. The testator gave his residuary real and personal estate to his trustees on trusts for sale and conversion and settled the proceeds thereof on trusts for the benefit of his great-nephews and great-nieces and their issue. The testator died on Feb. 9, 1941, and his will was proved by Herbert and the plaintiffs, the executors therein named, who, by an assent dated Aug. 7, 1942, assented to the Hatfield estate vesting in Herbert for an estate in fee simple on the trusts of the will. Herbert died on Apr. 18, 1950, without ever having had a child. On June 2, 1951, special probate of his will in respect of the Hatfield estate was granted to the plaintiffs. By a deed dated Aug. 11, 1950, Aubrey, who had as yet no son, disclaimed his interest under the will. C

On June 11, 1951, Cuthbert Hatfeild died. The first, second and third defendants were his personal representatives. The Hatfield estate had been sold and was represented by gilt-edged stocks and cash now standing in the names of the plaintiffs. By a deed dated Oct. 6, 1955, the fourth and fifth defendants were appointed as additional trustees of the testator's will for the purposes of the trusts affecting the residuary estate, and represented residue for the purposes of the summons. D

The summons asked for the determination of the question whether, having regard to the disclaimer by the plaintiff Aubrey Cecil Hatfeild, the income of the Hatfield estate and the investments for the time being representing the same, as from the death of Herbert until the expiration of twenty-one years from the testator's death or until a son was born to the plaintiff Aubrey Cecil Hatfeild or until Aubrey's death without having had a son, (a) ought to be paid to Cuthbert Hatfeild's personal representatives as part of his estate, or (b) ought to be accumulated and the accumulations be held on trust for the first or only son who might be born to Aubrey or, if there were no such son, for the personal representatives of Cuthbert Hatfeild, or (c) ought to be paid to the trustees of the testator's residuary estate. The summons further asked for the determination of the destination of the income for the period after the expiration of twenty-one years from the testator's death until such time as a son was born to Aubrey or until Aubrey's death without having had a son. E

J. A. Plowman, Q.C., and *G. D. Johnston* for the plaintiffs, the trustees of the settlement. F

B. L. Bathurst, Q.C., and *C. J. Slade* for the first, second and third defendants, the personal representatives of Cuthbert Hatfeild. G

P. Ingress Bell, Q.C., and *G. M. Parbury* for the fourth and fifth defendants, additional trustees of the testator's will for the purposes of the trusts affecting residue. H

A Apr. 17. HARMAN, J., read a judgment in which he stated the facts and the relevant terms of the testator's will and continued:

In the circumstances the question arises what is the destination of the income of the fund now representing the Hatfield estate until it be known whether Aubrey will have a son, that is to say, during the period from the death of Herbert Hatfeild in 1950 until a son is born to Aubrey or until his death, which-
 B ever event first happens? This period is divided for the purposes of the summons into two, the first being the period of twenty-one years from the testator's death and the second the residue, if there be any. The reason for this is that, if any accumulation is directed, it cannot, by reason of s. 164 of the Law of Property Act, 1925, endure beyond the period of twenty-one years from the testator's death. There are three competitors for the income during this twenty-one
 C years: first, the plaintiffs, who in reliance on s. 175 of the Law of Property Act, 1925, claim that the income should be accumulated for the benefit of any son who may be born to Aubrey: secondly, the personal representatives of Cuthbert, the first three defendants, who allege that the remainder in fee of their testator was accelerated by Aubrey's disclaimer so as to come into effect at once, subject of course to defeasance if a son be born to Aubrey: thirdly, the fourth
 D and fifth defendants, who allege that during the rest of the life of Aubrey the income is undisposed of by the specific devise and falls into the residue of the testator's estate.

To take first the argument on behalf of the plaintiffs, they are content to admit that before the passing of the Law of Property Act, 1925, there would or might have been an acceleration, because (they say) a contingent specific devise
 E of property did not in those days carry the intermediate income before it vested, being in this respect unlike a contingent future devise of residue, to which *Bective v. Hodgson* (1) ((1864), 10 H.L. Cas. 656) applied. On this footing they say that s. 175 has altered the law. Section 175 (1) reads:

"A contingent or future specific devise or bequest of property, whether
 F real or personal . . . and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator, except so far as such income, or any part thereof, may be otherwise expressly disposed of."

G This is, the plaintiffs say, "a contingent or future specific devise of property", the contingency being the birth of a son to Aubrey. For present purposes I am content to agree that so far they are right. They nevertheless must still satisfy me that they can surmount the exception, at the end of s. 175 (1), of income "otherwise expressly disposed of". Both sets of defendants argue that the income is so expressly disposed of, but here they part company, the representa-
 H tives of Cuthbert claiming that the remainder to him is accelerated, and the representatives of residue claiming that there is no acceleration but that there is an effective disposition by the residuary gift in their favour.

There can be no doubt that, as a general rule, the effect of a disclaimer of the particular estate is to accelerate the estates in remainder. This is stated by WARRINGTON, J., in *Re Scott, Scott v. Scott* (2) ([1911] 2 Ch. 374), where he said
 I (ibid., at p. 377):

"There is no question that as a general rule the effect of a disclaimer or other destruction of the particular estate is to accelerate the estates in remainder . . ."

See further the statement of JENKINS, L.J., in *Re Flower's Settlement Trusts, Flower v. Inland Revenue Comrs.* (3) ([1957] 1 All E.R. 462 at p. 465):

"The principle, I think, is well settled, at all events in relation to wills, that where there is a gift to some person for life, and a vested gift in

remainder expressed to take effect on the death of the first taker, the gift in remainder is construed as a gift taking effect on the death of the first taker or on any earlier failure or determination of his interest, with the result that if the gift to the first taker fails—as, for example, because he witnessed the will—or if the gift to the first taker does not take effect because it is disclaimed, then the person entitled in remainder will take immediately on the failure or determination of the prior interest, and will not be kept waiting until the death of the first taker.”

In *Re Scott* (2) WARRINGTON, J., held that this principle did not apply to real estate where the limitations were legal, for reasons which, as he thought, precluded the arising of a legal interest in remainder defeasible in favour of a prior estate. The principle certainly applied to equitable limitations of real estate, of which a good example is in *Re Conyngham, Conyngham v. Conyngham* (4) ([1921] 1 Ch. 491), where it was held that the infant defendant took a life estate by acceleration pending the birth of a son to the plaintiff who would take as tenant in tail. I will read the headnote in *Re Conyngham* (4):

“The testator by his will, dated in 1915, devised his Kent estates to the use of his trustees in fee simple, upon trust out of the income to pay certain life annuities, and, subject as aforesaid, the testator devised the said estates to the uses of his Irish estates—namely, to the use of his brother, the plaintiff, for life, with remainder to the use of the plaintiff’s first and other sons successively, according to seniority in tail male, with remainder to the use of his nephew, the infant defendant, for life, with divers remainders over in strict settlement, and an ultimate remainder to the use of the testator’s own right heirs. By a codicil dated in 1916 the testator revoked the plaintiff’s life interest in the Irish estates ‘and all other benefits’ given him by the will, and in lieu thereof he devised the Irish estates to the use of his trustees during the plaintiff’s life upon trust to pay him a certain annuity out of income. In all other respects he confirmed his will. In 1918 the testator died a bachelor, leaving the plaintiff his heir-at-law. The plaintiff was married in 1914, but had no children:—*Held*, that the testator had shown a clear intention to make the equitable limitations of the Kent estates completely exhaustive against his heir, and consequently until the plaintiff had a son the infant defendant’s life interest in the surplus rents was accelerated.”

The limitations there were equitable. In that case a son was subsequently born to the plaintiff and the estate of the infant defendant determined on the happening of that event.

In *Re Scott* (2), WARRINGTON, J., having decided that there could be no acceleration for the technical reason which he gave, concluded nevertheless that the heir-at-law was excluded on the true construction of the will, on the ground that the residuary devise was a complete disposition of the real property not otherwise effectively disposed of, and held that the income fell into residue. That case is the high-water mark of the cases supporting the claim of the residuary devisees in the present case. It was distinguished in the cases which followed it, namely, *Re Willis, Crossman v. Kirkaldy* (5) ([1917] 1 Ch. 365), *Re Conyngham* (4), and in *Re Brooke, Brooke v. Dickson* (6) ([1923] 2 Ch. 265). In the latter case RUSSELL, J., had held ([1923] 1 Ch. 360) the limitations to be legal and felt himself bound by *Re Scott* (2), although he intimated that he did not agree with it. YOUNGER, L.J., both in *Re Brooke* (6) and (as YOUNGER, J.) in *Re Willis* (5), doubted the correctness of *Re Scott* (2) for reasons connected with the Contingent Remainders Act, 1877, but the case was not overruled when the Law of Property Act, 1925, came into operation. The limitations in the present case are legal, and the question is whether I must follow *Re Scott* (2). In my judgment that

A case is no longer binding, the legislation of 1925 having swept aside distinctions of the kind between legal and equitable limitations.

The question, therefore, is whether, as a matter of construction of this will, the ordinary rule as to acceleration applies. This rule is, of course, one of construction, and was held in *Re Flower's Settlement Trusts* (3) not to apply. That was a case of a deed in which it may be more difficult to apply the rule, and as a matter of construction, both UPJOHN, J., and the Court of Appeal held that it was impossible to infer an acceleration, having regard to the terms of that deed. In the present case the subsequent limitations are not expressed as arising from and after the death of the prior devisee or by reference to time, so that there is no need to construe "after the death" as meaning "subject to the interest" of the prior taker, as in such cases as *Jull v. Jacobs* (7) ((1876), 3 Ch.D. 703), or *Lainson v. Lainson* (8) ((1854), 5 De G.M. & G. 754). The words "with remainder" have always, I think, been construed as showing that the subsequent estate arises on the cesser of the prior estate, which, although expressed as "an estate for life", may fail before the death of the life tenant for various reasons, for instance, by forfeiture, whether under the terms of the will or outside it, because a spouse has witnessed the document, or, as here, by disclaimer. Consequently, in my judgment, the ordinary rule applies. There has been thus a complete disposition of the estate, each interest arising on cesser of a prior interest, and there is no gap into which the provisions of s. 175 of the Law of Property Act, 1925, can intrude, the income being otherwise specifically disposed of. This is enough to dispose of the claim on behalf of unborn infants, and I need not consider the argument that s. 175 has no application to unborn persons, although I observe that LINDLEY, L.J., in *Re Holford, Holford v. Holford* (9) ([1894] 3 Ch. 30 at p. 46) used the following phrase:

E "To treat the future possible rights of unborn persons as existing rights, even if only contingent, would have been to depart from sound principles with no sufficient justification."

F If there be acceleration the claim of residue is, of course, defeated.

In these circumstances the second question does not arise and I propose to declare that the income pending the birth of a son to Aubrey Hatfeild is payable to the personal representatives of Cuthbert Hatfeild.

Declaration accordingly.

Solicitors: *Rivington & Son* (for the plaintiffs and the fourth and fifth defendants); *Payne, Hicks Beach & Co.* (for the first, second and third defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

Re MILLER, GIBB & CO., LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), March 26, 27, 1957.]

Insurance—Indemnity policy—Policy insuring exporting company against percentage of loss from buyer's inability to transfer currency owing to foreign exchange control restrictions—Claim under policy satisfied by insurer—Subrogation—Insurer's right against liquidator of company—Assignment of rights to sums recovered from buyer.

Chose in Action—Assignment—Debt—Legal assignment by letters—Assignment in pursuance of insurer's right of subrogation after payment made pursuant to indemnity policy.

Chose in Action—Assignment—Equitable assignment—Assignment by form of claim under indemnity policy—Whether consideration to support assignment.

By a policy dated in 1951 the Export Credits Guarantee Department of the Board of Trade agreed with exporters, the G. Co., to pay to the company ninety per cent. of any such loss in respect of goods sold and shipped from the United Kingdom to a buyer in, among other countries, Brazil, as the company might sustain by reason of the operation of law which in circumstances outside the control of the company or of the buyer restricted the transfer of payments from the buyer's country to the United Kingdom. Any sum recovered by the company after the loss was ascertained was to be divided between the department and the company in the proportions of ninety and ten. Condition 5 of the policy provided that on payment by the department the department "shall have the right at any time to require the [company] to transfer to the department [its] rights under any contract in respect of which payment has been made as aforesaid for the purpose of effecting recoveries [i.e., recoveries from the buyer] in such manner as the department may consider necessary or desirable". In 1952 the company sold and exported goods covered by the policy to buyers in Brazil, drawing a bill of exchange on the buyers and delivering it and the shipping documents to the M. bank in England for collection. Owing to Brazilian exchange control the buyers were unable to procure the necessary sterling to pay for the goods. In January, 1953, the company, not having been paid for the goods, claimed under the policy. By the terms of the form of claim the company undertook (a) to assign to the department all the company's rights in the debt and interest in the goods forming the subject of the claim, and (b) to pay over to the department forthwith any payments which the company or its agents might receive in respect of the debt. In February, 1953, the department paid ninety per cent. of the contract price of the goods. By letters in November, 1954, the company gave and the department confirmed instructions to the M. bank, which the bank accepted, to hand the proceeds of the bill of exchange in full to the department. In December, 1954, an order was made for the compulsory winding-up of the company. In 1956 the M. bank received the contract price of the goods and interest. The liquidator rejected a claim by the Board of Trade to ninety per cent. of the sum received by the bank.

Held: the Board of Trade were entitled to receive from the M. bank ninety per cent. of the contract price and interest for the following reasons—

(i) the contract between the department and the company being a contract of indemnity, the department, as a result of the payment made by them to the company in February, 1953, became subrogated to all the rights of the company, which, if it had received the payment, would have received it as trustee for the department (see p. 271, letter I, post).

Randal v. Cockran ((1748), 1 Ves. Sen. 98) applied.

A Dicta of BRETT, L.J., in *Castellain v. Preston* ((1883), 11 Q.B.D. at pp. 386, 387) and of LORD HOBHOUSE in *King v. Victoria Insurance Co.* ([1896] A.C. at p. 255) applied.

B (ii) the undertakings given by the company in the form of claim constituted an equitable assignment by the company to the department of the company's rights under the contract, which was not without consideration to support it since, by requiring the undertakings, the Board of Trade were merely exercising the rights reserved by condition 5 of the policy for which the board had given valuable consideration (see p. 273, letter B, post).

C (iii) the letters of November, 1954, constituted an effective absolute legal assignment of the proceeds of the bill of exchange to the department, and for this assignment also the board had similarly given valuable consideration (see p. 273, letter I, to p. 274, letter A, post).

[As to the doctrine of subrogation, see 18 HALSBURY'S LAWS (2nd Edn.) 467, paras. 696, 697; and for cases on the subject, see 29 DIGEST 52-54, 156-166.]

Cases referred to:

- D (1) *Randal v. Cockran*, (1748), 1 Ves. Sen. 98; 27 E.R. 916; 29 Digest 291, 2371.
- (2) *Castellain v. Preston*, (1883), 11 Q.B.D. 380; 52 L.J.Q.B. 366; 49 L.T. 29; 29 Digest 310, 2562.
- (3) *King v. Victoria Insurance Co.*, [1896] A.C. 250; 65 L.J.P.C. 38; 74 L.T. 206; 29 Digest 53, 159.
- E (4) *Stearns v. Village Main Reef Gold Mining Co., Ltd.*, (1905), 10 Com. Cas. 89; 21 T.L.R. 236; 29 Digest 53, 165.
- (5) *Alexander v. Steinhardt, Walker & Co.*, [1903] 2 K.B. 208; 72 L.J.K.B. 490; 8 Digest (Repl.) 582, 291.

Adjourned Summons.

F By a summons in the compulsory liquidation of Miller, Gibb & Co., Ltd., the applicants, the Board of Trade, applied for an order (i) that the decision of the liquidator contained in a letter dated Feb. 16, 1956, rejecting the claim of the applicants that they were entitled as against the liquidator to ninety per cent. of a sum of £2,880 4s. 9d., at present held by Martins Bank, Ltd., and ninety per cent. of the interest thereon, be reversed; and (ii) that the liquidator should execute all such documents and do all such things as were necessary to enable

G the applicants to obtain payment of the sums from Martins Bank, Ltd.

H The sum of £2,880 4s. 9d. was the price of goods sold and shipped by the company in 1952 to buyers in Brazil. The company drew a bill of exchange on the buyers payable on sight and delivered it and the shipping documents to the company's bankers, Martins Bank, Ltd., for collection. Owing to Brazilian currency regulations, the buyers were unable to obtain the sterling to remit the sum to the company on receiving the goods, and in February, 1953, the Export Credits Department of the Board of Trade paid ninety per cent. of the price to the company under a policy issued by the board to the company for value to indemnify the company against that percentage of such a loss. By letters in November, 1954, the company gave and the department confirmed instructions to Martins Bank, Ltd., that the proceeds of the bill of exchange, if and when

I received, were to be paid to the department, and the bank acknowledged these instructions. On Dec. 6, 1954, an order was made for the company to be wound-up compulsorily. In January, 1956, Martins Bank, Ltd. informed the liquidator that the bank had received £3,111 11s. 1d. being the full proceeds of the bill of exchange, £2,880 4s. 9d., and interest, £231 6s. 4d. By a letter dated Feb. 3, 1956, the bank informed the liquidator that the bank intended to retain the money pending receipt of the joint authority of the liquidator and the department or an order of the court as to the disposal thereof. By letter dated Feb.

16, 1956, the liquidator informed the Board of Trade that he was not prepared to meet their claim to ninety per cent. of the moneys received by Martins Bank, Ltd., under the bill of exchange. The liquidator claimed that he was entitled to the whole sum for the benefit of the creditors generally. A

T. G. Roche, Q.C., and M. Littman for the applicants, the Board of Trade.

Lionel Edwards, Q.C., and J. P. Hunter-Brown for the respondent, the liquidator. B

WYNN-PARRY, J.: This is a summons taken out by the Board of Trade in the compulsory liquidation of the company, and it asks that the decision of the liquidator contained in a letter dated Feb. 16, 1956, rejecting the claim of the applicants, the Board of Trade, that they are entitled as against the liquidator to ninety per cent. of a sum of £2,880 4s. 9d. at present held by Martins Bank, Ltd. and ninety per cent. of the interest accrued or accruing thereon, be reversed, and for consequential relief. C

The circumstances in which this summons comes before the court can be shortly stated as follows. The company prior to going into liquidation carried on the business of exporters, and on Apr. 3, 1951, the company made a proposal to the Board of Trade under the Export Guarantees Act, 1949. In the result a policy was issued by the Export Credits Guarantee Department of the Board of Trade, to which I shall refer as "the department". This policy is one to certain provisions of which I must refer in detail. Having recited the proposal by the company, which is described therein as "the exporter", the policy provides by cl. 1 that, in consideration of the premiums paid and to be paid by the exporter to the department as specified in the schedule to the policy, the department agree, subject to the terms of the policy, to pay to the exporter a percentage of the amount of any loss as later defined which he may sustain in respect of goods sold and shipped from the United Kingdom to any buyer in the countries specified in the schedule to the policy, which included Brazil, by reason of any one of a number of causes, which are then set out in sub-clauses. Clause 1 (iii) is the sub-clause relevant to the purposes of the present summons and is in these terms: D

"The operation of a law or of an order, decree or regulation having the force of law, which in circumstances outside the control of the exporter or of the buyer prevents, restricts or controls the transfer of payments from the buyer's country to the United Kingdom." E

Clause 3 reads: "The percentage of the amount of any loss which the department hereby agree to pay shall be . . ." and then first there is a reference to the percentage which is to apply in the case of the causes set out in cl. 1 (i) and (ii). Then there is this provision: "Ninety per cent. where the loss is due to any other cause covered by this guarantee". That is a relevant provision, because it relates, *inter alia*, to the cause set out in cl. 1 (iii). By cl. 6 it is provided: F

"The department will pay to the exporter the sum hereby guaranteed immediately after the loss has been ascertained, and such loss shall be ascertained . . . (iii) where the loss is due to the operation of a law or of an order, decree or regulation having the force of law, which in circumstances outside the control of the exporter or of the buyer prevents, restricts or controls the transfer of payments from the buyer's country to the United Kingdom, six months after the due date of payment." G

By cl. 7 it is provided: H

"Any sums recovered by the exporter or the department after the date at which the loss is ascertained from the buyer or any other source shall be I

- A divided between the department and the exporter . . . (ii) in any other case, in the proportions of ninety and ten."

At the end of the nine clauses of the policy appear a series of conditions, to the fifth of which, c. (5), I must refer. It reads:

- B "Upon payment by the department the exporter shall take all steps to effect recoveries from the buyer which may be necessary or expedient or which the department may at any time require, including if so required the institution of legal proceedings against the buyer by and in the name of the exporter, and the department shall have the right at any time to require the exporter to transfer to the department his rights under any contract in respect of which payment has been made as aforesaid for the purpose of effecting recoveries in such manner as the department may consider necessary or desirable."

- D That policy, as is agreed and admitted, is a policy of indemnity. The policy, which was issued on June 5, 1951, covered all shipments made by the company between Apr. 1, 1951, and Mar. 31, 1952. On Jan. 12, 1952, the company exported certain machinery to buyers in Brazil and this shipment was declared under and covered by the policy. The price was £2,880 4s. 9d., the sum mentioned in the summons. The company drew a bill of exchange on the buyers and handed the bill and the relevant shipping documents to Martins Bank for collection. Martins Bank in turn employed the Bank of London and South America for the purpose. Owing to the currency restrictions obtaining in Brazil the buyers were unable to procure the necessary sterling and, therefore, the Bank of London and South America held the shipping documents till July, 1952, when the Brazilian Customs threatened to sell the machinery. However, an arrangement was eventually arrived at by which the goods were delivered to the buyers on their depositing the equivalent in Brazilian currency of the sterling sum in question. That Brazilian currency was transferred to the bank in Brazil and held by them. In September, 1952, an application for provision of the necessary foreign exchange on behalf of the buyers was approved, but was not paid. It was in these circumstances that, on Jan. 13, 1953, the company made a claim under the policy on the ground set out in cl. 1 (iii), that is, on the ground that the company had not received payment because of circumstances outside the control of the buyers, namely, the currency restrictions then obtaining in Brazil.
- G On Feb. 10, 1953, the department duly met the company's claim by paying to the company ninety per cent. of the sum in question. On Nov. 22, 1954, a petition was presented for the compulsory winding-up of the company, and on Dec. 6, 1954, an order was made on the petition that the company should be wound-up. By an order dated Jan. 6, 1955, the liquidator was appointed. On Jan. 21, 1956, the sterling sum in question with some interest was finally received from Brazil.

- H It is against the background of those facts that I have to consider what the rights of the parties are. As the policy is a policy of indemnity, it follows, as a matter of law, that the insurer has the benefit of the right of subrogation which, in its origin, is an equitable doctrine. If authority be required for that, it can be found in *Randal v. Cockran* (1) ((1748), 1 Ves. Sen. 98). The report of that
- I case is very short and I think that it is useful to refer to it:

"The King having granted general letters of reprisal on the Spaniards for the benefit of his subjects, in consideration of the losses they sustained by unjust captures; the commissioners would not suffer the insurers to make claim to part of the prizes, but the owners only, although they were already satisfied for their loss by the insurers; who thereupon brought the present bill. Lord Chancellor [LORD HARDWICKE] was of opinion, that the

plaintiffs had the plainest equity that could be. The person originally sustaining the loss was the owner; but after satisfaction made to him, the insurer. No doubt, but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he paid . . .”

In *Castellain v. Preston* (2) ((1883), 11 Q.B.D. 380), to which counsel for the applicants referred me, there is a well-known and illuminating judgment by BRETT, L.J., two passages from which I propose to read. The first is where he said (*ibid.*, at p. 386):

“In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.”

Later BRETT, L.J., said (*ibid.*, at p. 387):

“I have mentioned the doctrine of notice of abandonment for the purpose of coming to the doctrine of subrogation. That doctrine does not arise upon any of the terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favour of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason. It is not, to my mind, a doctrine applied to insurance law on the ground that underwriters are sureties. Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties, but that again is in order to prevent the assured from recovering from them more than a full indemnity. But it being admitted that the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is, whether that doctrine as applied in insurance law can be in any way limited. Is it to be limited to this, that the underwriter is subrogated into the place of the assured so far as to enable the underwriter to enforce a contract, or to enforce a right of action? Why is it to be limited to that, if when it is limited to that, it will, in certain cases, enable the assured to recover more than a full indemnity? The moment it can be shown that such a limitation of the doctrine would have that effect, then, as I said before, in my opinion, it is contrary to the foundation of the law as to insurance, and must be wrong. And, with the greatest deference to my Brother CHITTY, it seems to me that that is the fault of his judgment. He has by his judgment limited this doctrine of subrogation to placing the insurer in the position of the assured only for the purpose of enforcing a right of action, to which the assured may be entitled. In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer must be

A placed in the position of the assured. Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated."

D The other two members of the Court of Appeal, COTTON and BOWEN, L.JJ., were of the same opinion and treated the scope of the doctrine as being as wide as was laid down by BRETT, L.J., in the words which I have quoted, and which show beyond the peradventure that his Lordship was intending to enunciate a fundamental rule of universal application.

E I come now to *King v. Victoria Insurance Co.* (3) ([1896] A.C. 250), a decision of the Privy Council on an appeal from the Supreme Court of Queensland. The headnote reads:

F "Payment honestly made by insurers in satisfaction of a claim by the insured entitles the insurers to the remedies available to the insured; and such remedies cannot be resisted on the ground that the payment was not within the terms of the policy:—*Held*, that although the insurers could not by mere force of subrogation sue in their own name, yet that in this case the right to do so was conferred by assignment from the insured aided by s. 5 (6) of the Judicature Act (40 Vict. c. 84), corresponding with the English Judicature Act of 1873."

LORD HOBHOUSE, delivering the judgment of the Board said (*ibid.*, at p. 255):

G "Their Lordships have no doubt that if, after receiving payment from the plaintiffs, the bank had got damages from the government, a court of equity would have treated them as trustees for the plaintiffs to the extent of the payment, and that if it had been necessary to use the name of the bank the court of equity would have compelled the bank to permit it on the usual terms."

H Later on LORD HOBHOUSE said (*ibid.*, at p. 256):

I "They [their Lordships] rest their judgment on the broader and simpler ground that a payment honestly made by insurers in consequence of a policy granted by them and in satisfaction of a claim by the insured, is a claim made under the policy, which entitles the insurers to the remedies available to the insured."

On the authority of those cases it follows necessarily, to my mind, that, as a result of the payment made by the department to the company on Feb. 10, 1953, the department, by reason of the nature of the contract, and not as a result of any express term in it, became subrogated to all the rights of the company. Therefore, if (which did not happen) the sterling sum in question had been received by the company, the company would thereupon have become the trustee thereof for the department.

Some debate turned on *Stearns v. Village Main Reef Gold Mining Co., Ltd.* (4) A
(1905), 10 Com. Cas. 89), the headnote to which reads:

"Gold of the defendants (mine-owners), which had been insured by the plaintiffs (underwriters), was commandeered by the South African Government shortly before the declaration of war. The defendants having asked for a return of part of the gold, the South African Government paid them a sum of money in respect of it, on the understanding that the defendants' mine would be kept open, and that fifty per cent. of the gold won would be handed to the South African Government. The plaintiffs having paid as for a total loss claimed the sum received by the defendants from the South African Government. *Held*, that the sum received by the defendants from the South African Government was a payment in diminution of the loss which the plaintiffs were entitled to recover, but that the defendants were not trustees for the plaintiffs, nor liable to pay interest on the amount while it had remained in their hands."

It is important to bear in mind exactly what was the question in that case and what was the form of the relief sought by the plaintiffs. The sequence is, first, that the gold was commandeered; then £7,239 12s. was paid to the defendants by the Republic of South Africa. The plaintiffs put in to their insurers a claim on the basis of a total loss, namely, for £21,880, without disclosing the receipt of the £7,239 12s.; and what the insurers did was to sue for what, in effect, had been an over-payment. No question of relying on the doctrine of subrogation arose, and, indeed, subrogation was not relevant in the state of facts as I have detailed them. Therefore, it appears to me that *Stearns v. Village Main Reef Gold Mining Co., Ltd.* (4) has no relevance to the problem which faces me on this summons.

I have come to the conclusion that, in view of the nature of the contract, a contract of indemnity, the doctrine of subrogation applies and in the result, having regard to the scope of that doctrine, the applicants are entitled to the relief which they claim on the summons.

Another point was argued and, although what I have said is sufficient to dispose of the summons, I ought, I think, to advert to it. Counsel for the applicants suggested that from the claim form can be extracted an equitable assignment by the company to the department. That arises under Part VIII of the claim form which reads:

"On payment by the department we hereby undertake . . . (b) to assign to the department all our rights in the debt or contract together with any security therefor and any document relating thereto and all our interest in the goods forming the subject of the claim; (c) to pay over to the department forthwith any and all dividends and other payments which we or our agents or any other persons acting on our behalf may receive from the person or persons responsible for the administration of the affairs of the debtor or otherwise in respect of the debt or contract, and we acknowledge and declare that all of such dividends and payments or proportions thereof as the department would be entitled to retain under the policy if the said dividends were recovered by the department, are moneys to which the department alone are beneficially entitled and that until payment to the department as aforesaid the said moneys will constitute trust funds held by us as trustees in trust for the department."

Counsel for the liquidator, while admitting that the language of those two paragraphs was apt to effect an equitable assignment, contended that neither of those paragraphs in fact so operated because there was no consideration moving to the company for the undertakings in question. In my judgment, that argument cannot be supported. Part VIII, and, in particular, the two paragraphs (paras.

A (b) and (c) to which I have referred, are, to my mind, directly referable to and covered by condition 5 of the policy, the relevant part of which I will repeat:

B "... and the department shall have the right at any time to require the exporter to transfer to the department his rights under any contract in respect of which payment has been made as aforesaid for the purpose of effecting recoveries in such manner as the department may consider necessary or desirable."

It follows, in my view, that, by requiring the undertakings under Part VIII of the claim form to which I have referred, the department was doing no more than exercising a right to that end expressly reserved by the policy. Therefore, the point that there is no consideration to support an equitable assignment fails.

C Finally, counsel for the applicants contended that the first three or four letters in the bundle of correspondence forming exhibit "A.H.J.G.3" to the affidavit of Mr. Greenblatt, which was sworn in these proceedings on behalf of the applicants, constitute at least an equitable assignment, indeed a legal assignment. On Nov. 10, 1954, the company wrote to the manager of the Heywoods Branch, Liverpool, of Martins Bank, Ltd., which was concerned with the transaction:

D "Dear Sir, With reference to the above-noted outstanding bill on Auto Electrica Ltda., Brazil:—Collection [then the number is given] £2,880 4s. 9d. I shall be obliged if you will kindly hand proceeds in full, when received, to the Export Credits Guarantee Department."

E On Nov. 13, 1954, the department wrote to the manager of Martins Bank in Liverpool a letter the heading to which identifies the transaction as being the transaction in question. The letter was in these terms:

F "I refer to the above-mentioned bill of exchange on which this department implemented its guarantee on Feb. 10, 1953. Would you kindly note that if and when the proceeds of this bill are received by you, such proceeds are to be forwarded to the department in full, and not in any circumstances paid to [the company]. In this connexion, the department encloses herewith a letter of authority from [the company] confirming the above-mentioned instructions. Would you kindly confirm in due course that you have taken note of this subrogation of the exporters' rights and provide your assurances

G that the proceeds of the bill in question, as and when received by you, will be remitted in full to the department. Would you also kindly take note of the fact that in conformity with the arrangements existing between [the company] and the department, the proceeds of the bill in question will represent trust funds held by [the company] as trustees in trust for the department and cannot be used for any other purpose."

H Finally, on Nov. 15, 1954, Martins Bank wrote to the department, referring to the transaction in question and saying:

I "We are in receipt of your letter of Nov. 13 with reference to the above collection, and confirm that we have taken note of the information therein and that the proceeds of this bill as and when received by us will be remitted in full to your department."

It appears to me that those three letters show that there was an absolute assignment in writing by the company in favour of the department, not merely by way of charge, notice of which was given to and acknowledged by the bank. That, in my view, constitutes a good legal assignment. If authority be wanted for that proposition it will be found, I think, in *Alexander v. Steinhardt, Walker & Co.* (5) ([1903] 2 K.B. 208), which was cited to me by counsel for the applicants.

Counsel for the liquidator again contended as regards the assignment, evidenced by the letters which I have read, that there was no consideration moving to the company for the assignment, but in my judgment that contention fails for the same reason as the contention on the claim form fails, namely, that the assignment which was effected by the letter of Nov. 10, 1954, is directly referable to condition 5 of the policy, and what was being done by that letter was something which was required by the department as the insurer and which the department had a right to require by reason of the terms of condition 5 of the policy. A
B

For these reasons, in my judgment, this application succeeds, and I propose, therefore, to make an order reversing the decision of the liquidator, as asked in para. 1 of the summons, and, under para. 2, an order that the liquidator shall execute all such documents and do all such things which may be necessary to enable the applicants to obtain from Martins Bank, Ltd. ninety per cent. of the sum in question, £2,880 4s. 9d., and the same proportion of the interest when calculated. C

Order accordingly.

Solicitors: *Solicitor, Board of Trade* (for the applicants); *Pritchard, Englefield & Co.*, agents for *Lamb, Goldsmith & Howard*, Liverpool (for the respondent). D

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

WAGG v. LAW SOCIETY.

[CHANCERY DIVISION (Harman, J.), April 2, 3, 17, 1957.] E

Legal Aid—Costs—Charge on property recovered for deficiency of costs—Contract for exchange of dwelling-houses—Assisted person awarded decree of specific performance—No order as to costs except taxation—Maximum contribution paid—Whether Law Society entitled to a charge for remainder on assisted person's dwelling-house—Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6 c. 51), s. 3 (4). F
G

The plaintiff contracted with Mrs. H. to exchange their respective dwelling-houses. A dispute arose and the plaintiff applied for aid under the Legal Aid and Advice Act, 1949, to enable him to pursue a claim for specific performance. His application was approved and he was so informed by the Law Society by letter (in a form B.1* then used for the purposes of the Legal Aid (General) Regulations, 1950, as amended). The letter also informed him that his liability by virtue of any order for costs made against him would not exceed the amount, if any, which was determined by the court or judge as a reasonable one for him to pay; and that if any such sum became payable by him it would be additional to any contribution payable by him to the Law Society. The letter of acceptance (in a form B.2*) which the plaintiff was asked to (and did) sign contained a condition which provided that if his costs proved to be more than the local committee expected, the plaintiff might be called on to pay such further sum as the Law Society might require, but so that in all he would not have to pay more than £194 (his maximum contribution assessed by the National Assistance Board). The H
I

* The forms B.1 and B.2 are forms approved by the Law Society for use under Part 1 of the Legal Aid and Advice Act, 1949; they are not prescribed by regulations.

- A contribution assessed by the local committee was £150, which the plaintiff paid by instalments spread over six months. The civil aid certificate was issued, and the plaintiff's action was begun, Mrs. H. claiming rescission of the contract by way of counterclaim. Mrs. H. was also aided under the Act of 1949, her contribution being assessed at nil. The action succeeded and the counterclaim was dismissed. No order was made as to costs except that the costs of both parties be taxed under the Act of 1949. The plaintiff's costs were taxed, and after being reduced in accordance with the Act, amounted to £480 16s. 11d. The plaintiff was called on to pay his maximum contribution of £194, and did so, and in respect of the remainder, viz., £286 16s. 11d., the Law Society, in reliance on s. 3 (4)* of the Act of 1949, registered a charge under s. 10 (1) (b) of the Land Charges Act, 1925†, against the plaintiff's dwelling-house which, pursuant to the order in the plaintiff's action for specific performance, was conveyed to him by Mrs. H. There was no evidence that the house conveyed to Mrs. H. by the plaintiff was different in value from that conveyed by Mrs. H. to him. In proceedings by the plaintiff against the Law Society for a declaration that the society was not entitled to a charge on the plaintiff's dwelling-house and for an order vacating the registration,

Held: (i) the Law Society was not entitled to a charge on the plaintiff's dwelling-house under s. 3 (4) of the Legal Aid and Advice Act, 1949, because the dwelling-house was not "property . . . recovered or preserved for him in the proceedings" within s. 3 (4).

The Philippine ((1867), L.R. 1 A. & E. 309), *Westacott v. Bevan* ([1891] 1 Q.B. 774) and *Loescher v. Dean* ([1950] 2 All E.R. 124) applied.

(ii) even if the plaintiff's dwelling-house were "recovered or preserved for him" within s. 3 (4) of the Legal Aid and Advice Act, 1949, the charge registered by the Law Society under the Land Charges Act, 1925, s. 10 (1) (b) should be vacated, for it was contrary to the whole policy of the Act of 1949 that the dwelling-house of a legally aided person should be made subject to a charge under s. 3 (4) of that Act.

(iii) the words used in form B.1 and form B.2 did not constitute an exception within the words "except in so far as regulations otherwise provide" in s. 3 (4) of the Act of 1949.

[For the Legal Aid and Advice Act, 1949, s. 2 and s. 3 (4), see 18 HALSBURY'S STATUTES (2nd Edn.) 535-537.

For the Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), see 5 HALSBURY'S STATUTORY INSTRUMENTS 202 and Service.]

Cases referred to:

- (1) *The Philippine*, (1867), L.R. 1 A. & E. 309; 16 L.T. 34; 42 Digest 293, 3282.
- (2) *Westacott v. Bevan*, [1891] 1 Q.B. 774; 60 L.J.Q.B. 536; 65 L.T. 263; 42 Digest 295, 3296.
- (3) *Greer v. Young*, (1883), 24 Ch.D. 545; 52 L.J.Ch. 915; 49 L.T. 224; 42 Digest 291, 3267.
- (4) *Loescher v. Dean*, [1950] 2 All E.R. 124; [1950] Ch. 491; 2nd Digest Supp.
- (5) *Maritime Electric Co., Ltd. v. General Dairies, Ltd.*, [1937] 1 All E.R. 748; [1937] A.C. 610; 106 L.J.P.C. 81; 156 L.T. 444; Digest Supp.

I Adjourned Summons.

By originating summons the plaintiff claimed (i) a declaration that on the true construction of the Legal Aid and Advice Act, 1949, and of the Legal Aid

* The terms of s. 3 (4) are printed at p. 277, letter I, post.

† By reg. 19 (3) of the Legal Aid (General) Regulations, 1950, 5 HALSBURY'S STATUTORY INSTRUMENTS 219, the charge under s. 3 (4) of the Act of 1949 is a land charge of Class B within s. 10 of the Land Charges Act, 1925, 20 HALSBURY'S STATUTES (2nd Edn.) 1076.

(General) Regulations, 1950, as amended by the Legal Aid (General) (Amendment No. 1) Regulations, 1954, and the Legal Aid (General) (Amendment No. 2) Regulations, 1955, and in the events which had happened, the Law Society was not and never had been entitled to a charge dated Apr. 2, 1955, registered as a land charge Class B on the freehold property No. 19, Front Row, Highgate, King's Lynn, in the County of Norfolk; (ii) an order that the Law Society should forthwith vacate the said land charge.

J. A. Plowman, Q.C., and R. M. O. Havers for the plaintiff.

Milner Holland, Q.C., and Nigel Warren for the defendant.

Cur. adv. vult.

Apr. 17. **HARMAN, J.**, read the following judgment: In July, 1950, the plaintiff, who was the owner and occupier of Nos. 1 and 2, Sherwood Cottages, Pot Row, Grimston, in the County of Norfolk, entered into an oral agreement with a Mrs. Hammond, then the owner and occupier of a house known as No. 19, Front Row, Highgate, King's Lynn, in the same county, for the exchange of houses between them, no monetary consideration passing in either direction. In pursuance of this agreement the parties did in fact exchange possession of their respective dwelling-houses, but they fell out over details, particularly it appears as to conditions to be performed by the plaintiff, and though he remained anxious to complete the contract Mrs. Hammond was anxious to rescind it.

In these circumstances the plaintiff applied for legal aid under the Legal Aid and Advice Act, 1949, to the local committee at King's Lynn, and on Feb. 22, 1951, received from the Law Society, through the local secretary, a letter in the form known as B.1 as approved by the Law Society, that form being among the forms published with* the Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359). This letter informed the plaintiff that his application had been approved and that the local committee was prepared to issue a certificate

"on the terms and subject to the conditions set out in the acceptance form of which I enclose two copies. Please study these terms and conditions carefully."

The plaintiff was informed that in order to obtain a certificate he must sign one of the acceptance forms and return it with his cheque to the Law Society. The letter ended in these terms:

"I have to draw your attention to the fact that your liability by virtue of any order for costs made against you with respect to the proceedings to which your certificate relates will not exceed the amount (if any) which is determined by the court or judge as a reasonable one for you to pay having regard to all the circumstances, including the means of all the parties to the proceedings and their conduct in connexion with the dispute. If any such sum becomes payable by you it will be additional to any contribution payable by you to the Law Society."

The acceptance form, B.2, was also a printed document whereby the plaintiff, by signing it, expressed his desire to accept a certificate and to comply with the terms and conditions. He enclosed a cheque for £50 as required by para. 4. The action was to relate to an action in the Chancery Division for specific performance and the plaintiff's contribution was to be £50 down and six monthly payments of £16 13s. 4d. Condition 5 was in these terms:

"If my costs of the proceedings to which my certificate relates prove to be more than the local committee at present expect, I may be called upon

* I.e., in the booklet on Legal Aid prepared by the Law Society and published by H.M.S.O.

A to pay such further sums as the Law Society may require but so that in all (including the sum mentioned in condition 4 above) I shall not have to pay more than £194 which the National Assistance Board have fixed as my maximum contribution."

B A civil aid certificate was issued to the plaintiff on Mar. 27, 1951, in accordance with the acceptance form, the contribution being stated at £150 as assessed by the local committee and the maximum contribution at £194 as determined by the National Assistance Board. On the next day, Mrs. Hammond issued a writ against the plaintiff in the Queen's Bench Division for rescission of the contract. The plaintiff's writ for specific performance was issued in this division on Apr. 11, 1951, and on Apr. 17, 1951, he obtained an emergency certificate to defend Mrs. C Hammond's action in the Queen's Bench. On June 4, 1951, the Queen's Bench action was transferred to the Chancery Division and the two actions were consolidated, Mrs. Hammond's claim for rescission being made by way of counterclaim in the plaintiff's action for specific performance. The action and counterclaim came on for trial on Nov. 17, 1952. The plaintiff succeeded and Mrs. Hammond's counterclaim was dismissed. No order for costs was made on either side except for taxation of both parties' costs under the Legal Aid and Advice Act, 1949. I understand that Mrs. Hammond's contribution was assessed at nil. No order was made for payment of the plaintiff's costs by way of a charge on the house which Mrs. Hammond received in exchange. This, which would obviously have been the ordinary order, was, I take it, precluded because under reg. 17 (1) (b)* of the Regulations of 1950 made under the Act the dwelling-house of an assisted person was to be left out of account in assessing the costs to be paid by her. The plaintiff's costs were taxed and certified on Feb. 10, 1955, in the following sums: (1) profit costs, £261 18s. 3d.; (2) counsel's fees, £149 14s. 6d.; (3) other disbursements, £130 18s. 7d. Taking eighty-five per cent. of the first two items, as the Act directs† the costs payable on the plaintiff's behalf therefore come to £480 16s. 11d., and he has paid, as he was called on to do, his maximum contribution of £194. In respect of the excess of £286 16s. 11d. the defendant, F the Law Society, has registered under the Land Charges Act, 1925, s. 10 (1) (b), against the plaintiff's dwelling-house, No. 19, Front Row, Highgate, a charge, and it is the validity of that charge which is now in question.

If the defendant is right the result of the plaintiff's proceedings is most extraordinary and disastrous to him. He has got the house which he contracted to acquire, but has paid for it not only the price which he agreed, namely, the house given in exchange to Mrs. Hammond, but in addition his maximum contribution of £194, and on top of that a charge of £286 16s. 11d. on his house. This is the result of being right. Mrs. Hammond, who was in the wrong throughout, has got the house she contracted to acquire without either payment of costs or any charge on it at all so far as I know. When a result so extraordinary is produced H it is natural to look with some suspicion on the reasons which are said to have brought it about.

The defendant's case is simple enough. It relies on s. 3 (4) of the Legal Aid and Advice Act, 1949, which is in these terms:

I "Except so far as regulations otherwise provide, any sums remaining unpaid on account of a person's contribution to the legal aid fund in respect of any proceedings and, if the total contribution is less than the net liability of that fund on his account, a sum equal to the deficiency shall be a first charge for the benefit of the legal aid fund on any property (wherever situate) which is recovered or preserved for him in the proceedings."

* Now replaced by reg. 17 (2), substituted by the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954 No. 166).

† See the Legal Aid and Advice Act, 1949, Sch. 3, paras. 1 (1), 2 (1).

It says that the £286 odd is the excess of the fund's liability on the plaintiff's account over his contribution, that the plaintiff's present dwelling-house is "property . . . recovered or preserved for him" in the action, and that, therefore, the excess is made by the very words of the section a first charge on the property for the benefit of the fund. The defendant further argues that the plaintiff is in no worse a position than any plaintiff who sues an impecunious defendant and who cannot recover his costs even if he succeeds. This, however, is a false point in my judgment. If Mrs. Hammond were not legally aided the plaintiff could at least recover his costs up to the value of the house which he had to convey to her as consideration for his purchase. The Legal Aid (General) Regulations, 1950, prevent this, as I have pointed out*, because the house is Mrs. Hammond's dwelling-house and, therefore, exempt when considering her liability for costs.

The plaintiff at the Bar made two answers, first that this property was not "recovered or preserved" within the meaning of the section, but was merely exchanged for other property of presumably equal value. This seems to me a point of difficulty on which there is no direct authority. At first sight it appears that the property which it was the object of the plaintiff's action to obtain must, if the action succeeds, be properly recovered in the action. The result of the action, however, shows that there was a valid contract already in existence before it began. If so, the plaintiff was already the equitable owner of the property; all that was recovered in the action was the legal estate. If he had sued, as he might have done, for damages for breach of contract, he could only have recovered such sum as represented the excess in value of the house he got (which, in breach of contract, had not been conveyed to him) over the value of the house which he had agreed to convey in exchange. If the two were of the same value he could only recover 40s. for the breach. There is no evidence here that one was more valuable than the other. Further, if the house which the plaintiff got was recovered in the action, so was the house which Mrs. Hammond was obliged to accept recovered for her. I do not see how property can have been recovered or preserved for both. Property is "recovered", so the authorities seem to show, when the plaintiff has been enriched as the result of the action. The order in this, as in other specific performance actions, was that on the plaintiff making a good title and tendering a proper conveyance of his house, Mrs. Hammond should do the like as to her house, but that if either failed to make a good title, each should deliver up possession to the other. Can it be said, on an order in this form, that the houses, or one or each of them, have been recovered or preserved for the persons to whom they are to be conveyed? It seems to me unlike any of the cases to which I was referred. Most of those cases deal with the like phrase found in the Solicitors Acts, now s. 69 of the Act of 1932.

The earliest case to which I was referred was *The Philippine* (1) ((1867), L.R. 1 A. & E. 309). In that case the skipper of a boat sued for wages and so forth, and there was a counterclaim by the owner against him for moneys due from the skipper for payments which he had agreed to make for shares in the ship. The result of the claim and counterclaim was that it was found that £103 7s. 8d. was due to the plaintiff on the balance of his account as master, and £173 11s. 1d. was due from him on account of the counterclaim, leaving a balance due from him. Then the headnote goes on:

"On a motion by the plaintiff's attorney, under [the Solicitors Act, 1860, s. 28] that he might have a charge for his costs in the suit upon the plaintiff's interest in the ship as being property 'recovered or preserved': Held, that as the result of the suit to the plaintiff was, that he was entitled to a transfer of the shares in the vessel for a less sum than he would have been if the suit

* See p. 277, letter D, ante.

- A had not been instituted, the plaintiff's attorney had recovered or preserved the property to the plaintiff, and was entitled to a charge upon it for his costs to an amount not exceeding the sum so preserved."

In other words, the advantage obtained by the plaintiff was the property on which the charge to the attorney could be given, not the whole property. Next

- B I refer to *Westacott v. Bevan* (2) ([1891] 1 Q.B. 774):

"The plaintiff claimed £742 for work done under a contract to repair the defendants' ship. The defendants paid £500 into court, with a denial of liability, and counterclaimed damages for the plaintiff's delay in completing the work according to the contract. The plaintiff proceeded with the action, and in the result £465 was found to be due to him on his claim, and £210 to the defendants on their counterclaim: Held, that the sum paid into court was not property 'recovered or preserved' by the exertions of the plaintiff's solicitor within the meaning of [the Solicitors Act, 1860, s. 28], so as to entitle him to charge the whole sum with payment of his costs."

- D He was entitled, however, to charge, as the Court of Appeal held, the balance between the claim and the counterclaim, that is to say, the excess of £465 over £210. That again rather points to the view that you must find a balance in favour of the plaintiff or the defendant, as it may be, in order that you may give the attorney a charge. In *Greer v. Young* (3) ((1883), 24 Ch.D. 545) I find SIR WILLIAM BRETT, M.R., describing the right as a right akin to salvage.

- E A more modern decision is one of my own, *Loescher v. Dean* (4) ([1950] 2 All E.R. 124), where I held that money paid by a successful plaintiff in a purchaser's specific performance action was not "recovered or preserved" by the defendant's solicitors so as to entitle them to a charging order. That money stands on the same footing as the house conveyed by the plaintiff here, and if the decision be right it would follow that Mrs. Hammond's solicitors here would obtain no charging order against that house. As I have pointed out, it is difficult to suppose that a different rule applies to the house conveyed to the plaintiff. On the whole I conclude that this point of the plaintiff's is a good one.

- G If so, that is enough to conclude the case, but I think I should deal with the plaintiff's second point, which was that s. 3 (4), on which the defendant relies, starts with the words "except so far as regulations otherwise provide", and that the effect of the regulations, as they then stood, was that a contract arose between the plaintiff and the defendant whereby the defendant agreed to conduct the action for him at a maximum expense to him of £194 so far as they were concerned.

- H The argument is that the forms are part of the regulations. First the form B.1 states categorically that the certificate will issue if the acceptance form is signed. Moreover B.1 specifically draws attention to a further possible liability on the plaintiff in case of an order for costs made against him in the defendant's favour, and this is a matter referred to in s. 2 (2) of the Act of 1949. Reading this section anyone might be excused for thinking that it does cover all the financial conditions of legal aid, including liability for costs ordered to be paid to the other party. Next comes the acceptance form B.2, which by para. 5 expressly provides that the plaintiff shall not have to pay more than £194. It is pointed out that this form B.2 has recently been altered by adding the words "unless I have recovered damages or property", and the plaintiff argues that this is a recognition on the part of the defendant that before the appearance of those words a certificate issued on the faith of form B.2 precluded the defendant from making a further charge. In my judgment this contention can only prevail if the form of words used in form B.2 can be said to provide an exception within s. 3 (4) of the

Act. Certain payments are, by reg. 16 (8)* expressly excluded from the effect of the charge, and these are no doubt exceptions to which the section refers. In my judgment the form of words used in forms B.1 and B.2 does not amount to a further exception even though constituting such a contract as is alleged on the plaintiff's behalf. The defendant, in carrying out its duties under the Legal Aid and Advice Act, 1949, is bound to carry out the provisions of the statute and cannot preclude itself from its statutory obligations. It is, moreover, the duty of both parties to obey the law, part of which is s. 3 (4) of the statute. In this connexion see *Maritime Electric Co., Ltd. v. General Dairies, Ltd.* (5) ([1937] 1 All E.R. 748). I do not, therefore, accept this argument of the plaintiff.

If I were wrong about the "recovered or preserved" point I still should not decide in the defendant's favour. This is for a reason not canvassed before me at the Bar. It seems to me that the cardinal factor in the case is that the property over which the charge has been registered is the plaintiff's dwelling-house. It is provided† first that in assessing the applicant's contribution the value of his dwelling-house is to be left out of account, secondly‡ that in assessing costs to be paid by a legally aided person to his opponent his dwelling-house is similarly to be left out of account. It seems to me, therefore, to be contrary to the whole policy of the Act that a legally aided person's dwelling-house should be made subject to a charge where it happens to be the property recovered or preserved in the action. If the value of the dwelling-house is to be excluded in assessing the plaintiff's contribution, whether to his own costs or those of the defendant, it seems an absurdity that it may yet be encumbered to recoup to the fund costs which should in the ordinary course have been paid by the defendant in the action. I cannot think that while Mrs. Hammond who was in the wrong, can escape scot-free under this principle the plaintiff, who was in the right, is not also exempt.

In my judgment, therefore, the Law Society's charge under s. 3 (4), if contrary to my view they have one, ought not to be enforced against the legally aided person's dwelling-house, and on that ground, too, I would order the charge here to be vacated.

Declaration accordingly.

Solicitors: *Metcalf, Copeman & Pettefar* (for the plaintiff); *Hempsons* (for the defendant).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

* Paragraph (8) was added to reg. 16 of the Legal Aid (General) Regulations, 1950, by the Legal Aid (General) (Amendment No. 1) Regulations, 1954 (S.I. 1954 No. 166) and is in these terms: "(8) The provisions of this regulation shall not apply to moneys payable under the provisions of s. 3 (2) and s. 5 (4) of the Guardianship of Infants Act, 1925, or s. 19, s. 20, s. 22, s. 23, s. 26 and s. 28 of the Matrimonial Causes Act, 1950, and for the purposes of s. 3 (4) of the Legal Aid and Advice Act, 1949, the expression 'property' shall not be taken as including any moneys so payable."

† By para. 1 of Sch. 2 to the Legal Aid and Advice Act, 1949, subject to r. 5 of Sch. 2, Pt. 1, to the Legal Aid (Assessment of Resources) Regulations, 1950 (S.I. 1950 No. 1358).

‡ By reg. 17 (1) (b) of the Legal Aid (General) Regulations, 1950, subsequently superseded by reg. 17 (2) thereof, as substituted by S.I. 1954 No. 166; and see s. 2 (4) of the Legal Aid and Advice Act, 1949.

A

BRIDGES (INSPECTOR OF TAXES) v. HEWITT.
BRIDGES (INSPECTOR OF TAXES) v. BEARSLEY.

[COURT OF APPEAL (Jenkins, Morris and Sellers, L.JJ.), March 7, 8, 11, 12, 14, April 11, 1957.]

B

Income Tax—Income—Voluntary payments—Gift of shares in a company—Recognition of work of directors—Covenant to transfer shares—Consideration expressed as undertaking to continue engagements with company—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. 9, Rules applicable to Sch. E, r. 1.

C

In building up the business of a company, the founder and principal shareholder had been substantially assisted by three directors, but he did not leave them any shares in the company by his will. The founder's son, who became chairman of the company after his father's death, considered that the founder had been remiss in not so recognising the directors' work for the company, and in 1945 agreed with two of the directors that they and the third director should receive twenty thousand shares between them. The founder's son and his brother, also a director, subsequently entered into deeds of covenant in which they undertook to transfer shares to that total number to the three directors or their executors in the event of the death of any of them, on the death of the founder's widow, when the brothers would become entitled to the founder's shares. On the advice of the solicitor advising two of the directors receiving the shares, this undertaking was expressed in the deeds to be in consideration of those two directors continuing their engagements with the company for four years. The directors did so continue and received regular remuneration (actually later increased) from the company therefor. On July 27, 1953, before the widow's death, the shares were transferred to the two directors and to the executors of the third director, who had died. The two directors were assessed to income tax under Sch. E to the Income Tax Act, 1952, for 1953-54 in respect of the values, as at July 27, 1953, of sixteen thousand shares so transferred to them. On appeal,

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Held: (i) the question was one of mixed fact and law, open to appeal.

G

(ii) (JENKINS, L.J., dissenting) the assessments must be discharged, because the sixteen thousand shares were personal gifts not remuneration for services, and thus were not a profit from the directors' offices.

H

(iii) (per JENKINS and SELLERS, L.JJ.) if the shares were taxable they were properly taxable on their values on the date of transfer to the directors for it was not the contractual rights conferred by the deeds of covenant that were assessable to income tax (see p. 294, letter H, to p. 295, letter A, and p. 304, letters G and H, post).

I

Per MORRIS, L.J.: the circumstance that a large payment is to be made by someone other than an employer may be a considerable indication, though by no means a conclusive one, that the payment is not by way of remuneration . . . remuneration for services is generally effected by systematic and recurring payments . . . remuneration has further the element of reward or payment for some specific services rendered. Where some payment, and particularly some non-recurring payment, is received from someone other than an employer, it will probably only have the attributes of remuneration in those classes of cases where it is reasonable to expect that remuneration would come from some other source than the pocket of an employer (see p. 299, letters B to D, post).

Decision of DANCKWERTS, J. ([1956] 3 All E.R. 789) reversed.

[**Editorial Note.** Enactments of Sch. E, s. 156 of the Income Tax Act, 1952, and of Sch. 9 to that Act, have been much affected, subsequently to the dates relevant to the present case, by the Finance Act, 1956, s. 10, s. 44, Sch. 2 and Sch. 5. A

As to taxation of voluntary payments to the holder of an office or employment, see 17 HALSBURY'S LAWS (2nd Edn.) 213, para. 435; and for cases on the subject, see 28 DIGEST 85-88, 490-507. B

For r. 1 of the Rules applicable to Sch. E in Sch. 9 to the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 522.]

Cases referred to:

- (1) *Herbert v. McQuade*, [1902] 2 K.B. 631; 71 L.J.K.B. 884; 87 L.T. 349; 66 J.P. 692; 4 Tax Cas. 489; 28 Digest 86, 492. C
- (2) *Blakiston v. Cooper*, [1909] A.C. 104; 78 L.J.K.B. 135; 100 L.T. 51; sub nom. *Cooper v. Blakiston*, 5 Tax Cas. 347; 28 Digest 86, 495.
- (3) *Seymour v. Reed*, [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 11 Tax Cas. 625; Digest Supp.
- (4) *Moorhouse v. Dooland*, [1955] 1 All E.R. 93; [1955] Ch. 284; 36 Tax Cas. 1, 12; 3rd Digest Supp. D
- (5) *Cowan v. Seymour*, [1920] 1 K.B. 500; 89 L.J.K.B. 459; 122 L.T. 465; 7 Tax Cas. 372; 28 Digest 85, 490.
- (6) *Cameron v. Prendergast*, [1940] 2 All E.R. 35; [1940] A.C. 549; 109 L.J.K.B. 486; 162 L.T. 348; sub nom. *Prendergast v. Cameron*, 23 Tax Cas. 122; 2nd Digest Supp. E
- (7) *Weight v. Salmon*, (1935), 19 Tax Cas. 174; sub nom. *Salmon v. Weight*, 153 L.T. 55; Digest Supp.
- (8) *Patrick v. Burrows*, (1954), 35 Tax Cas. 138; 3rd Digest Supp.
- (9) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223; sub nom. *Westminster (Duke) v. Inland Revenue Comrs.*, 19 Tax Cas. 490; Digest Supp. F
- (10) *Tait v. Smith*, (1954), 35 Tax Cas. 79; 3rd Digest Supp.
- (11) *Calvert v. Wainwright*, [1947] 1 All E.R. 282; [1947] K.B. 526; [1947] L.J.R. 1335; 177 L.T. 159; 27 Tax Cas. 475; 2nd Digest Supp.
- (12) *Turner v. Curzon*, (1888), 22 Q.B.D. 150; 58 L.J.Q.B. 131; 60 L.T. 332; 53 J.P. 148; 2 Tax Cas. 422; 28 Digest 62, 313. G

Appeal.

The respondent taxpayers, Mr. Ernest Bearsley and Mr. Walter M. Hewitt, appealed to the Special Commissioners of Income Tax against assessments to income tax, Sch. E, made on them for 1953-54 in the sums of £50,465 and £39,022 respectively. The questions in issue were: (i) whether £36,000, the value at July 27, 1953, of eight thousand shares in Meccano, Ltd., transferred on that day to each of the two taxpayers by the brothers Roland and Douglas Hornby was income assessable under Sch. E from the taxpayers' offices or employments as managing director, and secretary and director, respectively, of Meccano, Ltd.; (ii) if the values of the shares did not represent such income, whether the value of the covenants to transfer them made by the Hornby brothers on Dec. 30, 1945, represented such income; and (iii) if any income was assessable, whether such income was properly assessable for 1953-54. H I

The taxpayers contended that: (i) evidence as to the circumstances in which deeds of covenant for the transfer of the shares were entered into by Mr. Roland and Mr. Douglas Hornby on Dec. 30, 1945, was admissible; (ii) these circumstances included a meeting between Mr. Roland Hornby and the taxpayers

A towards the end of 1945, at which a promise to transfer shares was given by Mr. Hornby and such promise was a pure act of bounty and in no sense a reward or remuneration for past or future services to the company; (iii) these circumstances also included the circumstances in which clauses expressing consideration moving from the covenantees (the taxpayers) came to be inserted in the deeds, which latter circumstances showed that the consideration clause in no way affected what had been arranged at the previous meeting between Mr. Roland Hornby and the taxpayers; (iv) after the execution of the deeds of covenant the position remained the same as before, and the transfers of shares promised in them by Mr. Roland and Mr. Douglas Hornby were pure acts of bounty and in no sense a reward or remuneration for past or future services to the company; the expression of the consideration moving from the covenantees (the taxpayers) was conventional and was inserted simply to give them a procedural right to sue on the documents effectively; (v) no income assessable under Sch. E arose to the taxpayers on the transfer of the shares on July 27, 1953, or on the execution of the deeds of covenant on Dec. 30, 1945; (vi) alternatively, if any income assessable under Sch. E arose to the taxpayers, it arose on the execution of the deeds of covenant on Dec. 30, 1945, when they acquired rights which were valuable and saleable; such income should therefore have been assessed for 1945-46 and not for 1953-54; (vii) alternatively, if any income assessable under Sch. E arose to the taxpayers, it arose under the deeds of covenant of Dec. 30, 1945, in respect of the four years 1945-46 to 1948-49; such income should therefore have been spread over and assessed for those four years and was not income assessable for 1953-54.

The second taxpayer also contended that, if there was any element of payment of remuneration or reward for services, the payment was in respect of the taxpayer's services as secretary of the company, and it was made when the shares were transferred on July 27, 1953. At that date the taxpayer had ceased to be secretary and the payment was therefore not assessable on him under Sch. E for 1953-54.

The Crown contended that: (i) the deeds of covenant of Dec. 30, 1945, were clear and unambiguous and the intentions of the parties were therefore to be derived from those deeds alone, without reference to extrinsic evidence; (ii) under the deeds, the taxpayers were entitled to the shares in consideration partly of past services to the company and partly of undertaking to serve the company for a further four years; (iii) the value of the shares transferred on July 27, 1953, represented income assessable under Sch. E from the taxpayers' offices or employments as managing director, and secretary and director, respectively, of the company; (iv) such income arose in 1953-54, when the shares were transferred and was properly assessable on the taxpayers for that year.

The commissioners held that most of the evidence of matters and events antecedent to the execution of the deeds of covenant led by the taxpayers was admissible as evidence of the surrounding circumstances in which the deeds were made, but that some was not admissible. If they considered only the deeds, they would hold that neither the value of the shares nor the value of the covenants represented income assessable on the taxpayers under Sch. E. Evidence of matters antecedent to the execution of the deeds which they thought inadmissible or irrelevant was the evidence (including a draft deed with manuscript alterations) explaining why the consideration came to be inserted in the deeds, which was designed to show that what were bare promises unsupported by any consideration made at the meeting of 1945 remained in the deeds pure acts of bounty. Even excluding this evidence, they held that neither the value of the shares nor the value of the covenants to transfer them represented income assessable

on the taxpayers under Sch. E. They found that the covenants were entered into and the shares were transferred by the Hornby brothers in their personal capacity from the personal motive of doing something which they thought that morally their father should have done by his will, i.e., transferred the shares. If they considered all the evidence of antecedent matters, they would find that the consideration clause was inserted with the object of binding the Hornby brothers as strongly as possible but this would not alter the opinion they had reached on considering only the evidence they regarded as admissible. A B

Although some estimate of the value of the covenants could have been made in December, 1945, when they were entered into, since there were too many factors of uncertain value, they considered they did not at that date represent money's worth which could form part of the taxpayers' income under Sch. E. If, contrary to their view, anything was assessable at all, it would be the value of the shares transferred and the proper year of assessment would be 1953-54, when they were transferred. They allowed the appeal. The Crown appealed by way of Case Stated. On Nov. 8, 1956, DANCKWERTS, J. ([1956] 3 All E.R. 789), allowed the appeal, holding that, though the transfer of shares by itself would have been a gift, as it was expressed in the deed to be in consideration of services, the shares were received as profits of the taxpayers' offices; that the shares were properly taxable in the year in which they were transferred and that the contractual rights conferred at the date of the deed of covenant were not assessable, and that the value of the shares should not be spread over the four years of service undertaken by the taxpayers. C D E

The taxpayers appealed.

N. E. Mustoe, Q.C., and H. H. Monroe for the taxpayers.

F. N. Bucher, Q.C., and Sir Reginald Hills for the Crown.

Cur. adv. vult. F

Apr. 11. The following judgments were read.

JENKINS, L.J.: These are two appeals by Mr. Walter Manning Hewitt and Mr. Ernest Bearsley respectively from orders made by DANCKWERTS, J., on Nov. 8, 1956, reversing determinations of the Special Commissioners in favour of the taxpayers on their respective appeals against assessments to income tax, Sch. E, made on them for the year 1953-54. G

Each of the two appeals raises on substantially identical facts three questions in regard to certain transfers of fully paid shares in Meccano, Ltd. (hereinafter called "the company") made to the taxpayers by Messrs. Roland and Douglas Hornby, the sons of the late Mr. Frank Hornby, who was the founder of, and principal shareholder in, the company. The three questions are thus formulated in para. 2 of the Case Stated by the Special Commissioners with respect to Mr. Bearsley: H

"(a) whether £36,000, the value at July 27, 1953, of eight thousand shares in Meccano, Ltd., transferred on that day to the [taxpayer, Mr. Bearsley] by the brothers Roland and Douglas Hornby was income, assessable under Sch. E, from the [taxpayer's] office or employment as managing director of Meccano, Ltd.;" I

"(b) if the value of the said shares did not represent such income, whether the value of covenants to transfer them made by the Hornby brothers on Dec. 30, 1945, represented such income;

"(c) if any income was assessable, whether such income was properly assessable for the year 1953-54."

A The Case Stated in respect of Mr. Hewitt formulates the three questions in similar terms, the only material difference being that the taxpayer's office or employment is referred to as that of director, not managing director, of the company. Mr. Hewitt's appeal raises a subsidiary issue to the effect that the relevant office or employment in his case was that of secretary to the company, which office he had ceased to hold before the shares were transferred to him.

B The facts relevant to the two appeals are fully set out in the Case Stated with respect to Mr. Bearsley, and I will endeavour to avoid repeating them at undue length.

The salient matters of fact may be thus summarised:

(i) The two taxpayers and the late Mr. George Jones were old servants of the company, which had been formed in 1908 to take over a business founded and theretofore carried on by Mr. Frank Hornby. Mr. Bearsley had joined the business in 1907, becoming a director of the company in 1919 and managing director on the works side as from Oct. 1, 1936. Mr. Jones had joined the business in 1908, becoming managing director of the company on the sales side as from Oct. 1, 1936. Mr. Hewitt had joined the company as secretary in 1913 and became a director in 1932. At the date of the deeds of covenant mentioned above (namely, Dec. 30, 1945) Mr. Bearsley and Mr. Jones held their respective offices as managing directors, and Mr. Hewitt held his office as secretary, for the term of ten years from Oct. 1, 1936, under an agreement dated Feb. 15, 1937, with respect to Mr. Bearsley and Mr. Jones, and an agreement dated Apr. 1, 1937, with respect to Mr. Hewitt. Mr. Jones became incapacitated from business in the autumn of 1945 and died in 1949. Mr. Hewitt ceased to be secretary in January, 1951, and he resigned his directorship through ill health in October, 1953. By the agreement of Feb. 15, 1937, Messrs. Bearsley and Jones were precluded from engaging in a similar business in Great Britain without the consent of the company for three years after they should respectively cease to hold office as directors, and Mr. Hewitt by the agreement of Apr. 1, 1937, was subjected to a like restriction for three years after ceasing to hold office as secretary. No new service agreements were entered into after those that I have referred to expired, but at a board meeting held on Oct. 8 and 11, 1946, Messrs. Bearsley and Hewitt were continued as managing director and as director and secretary respectively at increased rates of remuneration on the footing that they now had to perform the duties formerly discharged by Mr. Jones.

(ii) The company's business was remarkably successful, and its success, which was largely due to the skill and energy of Messrs. Bearsley, Jones and Hewitt in the conduct of its affairs, ensured chiefly for the benefit of Mr. Frank Hornby, who had at all times been by far the largest shareholder. In these circumstances Messrs. Bearsley, Jones and Hewitt thought it no more than their due that Mr. Frank Hornby should provide them with fairly substantial holdings of shares in the company. To quote the Case, para. 6 (a):

"They wanted these shares for reasons of security, and also as giving them a standing with the employees of the company commensurate with their respective important positions; for they were in fact the backbone of the company, had helped Frank Hornby to build up the company's business, and were very largely in their different capacities responsible for its successful running once it had been firmly established."

Mr. Frank Hornby did from time to time transfer to them comparatively small batches of shares during his lifetime, but not the number of shares (quoting again from the Case) "to which these three gentlemen thought they were in justice entitled". They made representations on the subject from time to time to

Mr. Frank Hornby, who said he would look after them; but except as mentioned above he gave them no shares. Mr. Frank Hornby was apparently inclined to put off Mr. Bearsley's requests for shares with some increase in remuneration which (to quote the Case, para. 6 (b))

"was not what [he] wanted; for he was satisfied with his remuneration, and what he wanted was an increased shareholding so that people might know what he was in the company."

In the end, Mr. Frank Hornby gave Messrs. Bearsley, Jones and Hewitt to understand, or at all events left them under the impression, that he would leave each of them a reasonable number of shares by his will.

(iii) Mr. Frank Hornby died on Sept. 12, 1936, having by his will left all his shares in the company to his wife, Mrs. Clara Hornby, for life with remainder to his two sons in equal shares.

(iv) Messrs. Bearsley, Jones and Hewitt were surprised and disappointed that Mr. Frank Hornby had left them no shares, and decided to approach the two sons. For some unexplained reason they did not do this until 1945, when they asked Mr. Roland Hornby for twenty thousand shares between the three of them. The approach was made at a meeting between Mr. Roland Hornby and Messrs. Bearsley and Hewitt. To quote the Case, para. 9 (b):

"Roland Hornby agreed at once that the [taxpayer Bearsley], Hewitt and Jones should have twenty thousand shares between them. Roland Hornby's view was that his father had been remiss in not leaving shares by his will to these three gentlemen. Nothing was said suggesting that the shares were to be a reward or remuneration for past services, but Roland Hornby thought the shares should have been left in recognition of the work of these three gentlemen with the company. No condition was suggested that the [taxpayer Bearsley] and Hewitt should continue in the service of the company (their service agreements were due to expire on Sept. 30, 1946), or that the shares were remuneration."

(v) The agreement ultimately reached in oral discussion was that after the death of Mrs. Hornby twenty thousand of the shares subject to the trusts of the will should be provided in equal proportions by the two sons and transferred as to eight thousand to Mr. Bearsley, as to eight thousand to Mr. Hewitt and as to the remaining four thousand to Mr. Jones. In view of the fact that the transfers of the shares were not to be made until Mrs. Hornby's death, it was thought desirable that the arrangement should be recorded in a formal document, and it was left to Mr. Hewitt to see to this.

(vi) Mr. Hewitt accordingly consulted his solicitor, Mr. Dawson, who produced a draft form of deed of covenant which, with certain alterations made by the sons' solicitors, was adopted as the form actually used in the deeds as executed. There were six deeds in all whereby the sons covenanted to transfer four thousand shares each to Mr. Bearsley, four thousand shares each to Mr. Hewitt and two thousand shares each to Mr. Jones. The deed between Mr. Roland Hornby (the covenantor) and Mr. Bearsley (the covenantee), which is annexure E to the Case, may be quoted as showing (so far as material for the present purpose) the form of all six deeds as executed. It is a deed of covenant made on Dec. 30, 1945, between Mr. Roland Hornby and Mr. Ernest Bearsley, and there were these recitals:

"Whereas the covenantor [Mr. Roland Hornby] now holds ordinary shares in Meccano, Ltd., to a number in excess of four thousand and under the will of his deceased father Frank Hornby will on the death of his mother Clara Hornby become absolutely entitled to further ordinary shares

A in the said company. And whereas the covenantor desires to mark his appreciation of the past services of the covenantee [the taxpayer] in the employment of the said company and also desires that the covenantee shall remain in the employment of the said company for a certain period."

Then the operative part, para. 1:

B "Now this deed witnesseth as follows:—1. In consideration of the
C covenantee [the taxpayer] continuing his present engagement with Meccano, Ltd., until the expiry of four years from the date hereof the
D covenantor for himself and his legal personal representatives hereby covenants with the covenantee that he the covenantor will after the date of the death of the said Clara Hornby and within three months after such date transfer and assign to the covenantee absolutely and free from any lien charge or other incumbrance and without any payment therefor by the covenantee four thousand ordinary shares in Meccano, Ltd., or the equivalent thereof if the capital be increased and will execute in due form a written transfer in respect of such shares sufficient to vest the full equitable title to such shares in the covenantee and will use his best endeavours to procure that the covenantee shall be registered as the holder of such shares in the register of members of the said company."

E These are, I think, the only provisions of the deeds to which it is necessary to refer. They follow exactly the form of Mr. Hewitt's solicitor's draft, save that the words

"and also desires that the covenantee shall remain in the employment of the said company for a certain period"

F are substituted in the second recital for the words (even less happy from the taxpayer's point of view) which Mr. Hewitt's solicitor had used, his words having been

"and also desires to offer an inducement (over and above salary) to the covenantee to remain in the service of the said company for a certain period";

G and that in cl. 1 "three months" is substituted for "one month" as the period after Mrs. Hornby's death within which the shares were to be transferred. I should perhaps add that, in cl. 1 of the deeds of covenant with Mr. Jones as
H executed, six months is given as the period of continuance of his present engagement with the company, as compared with the four years required in the cases of Mr. Bearsley and Mr. Hewitt, this difference being no doubt attributable to the state of his health.

(vii) In October, 1952, Mr. Hewitt fell ill, and being apprehensive as to his financial position pressed for the transfer of the shares without waiting for the death of Mrs. Hornby. On July 27, 1953, the shares were in fact transferred to Mr. Bearsley, Mr. Jones' executors and Mr. Hewitt respectively, although
I Mrs. Hornby was still alive.

(viii) Mrs. Hornby died in October, 1953, at the age of ninety-three years.

These being the essential facts, I propose in the first instance to consider the question of tax liability on the footing that, if there was any liability to tax at all, the taxable receipt consisted of the value on July 27, 1953, of the shares transferred on that date to the taxpayers respectively (namely, £36,000 in each case) which accordingly constituted a receipt of the year 1953-54; putting aside for later consideration the taxpayer's alternative argument to the effect that if,

contrary to their main contention, there was any liability to tax at all, the taxable receipt consisted of the value as at the date of the deeds of covenant (Dec. 30, 1945) of the benefits conferred on them respectively by those deeds, which would be a receipt of the year 1945-46 and accordingly out of time for the purposes of assessment; and also the special contention put forward on behalf of Mr. Hewitt to the effect that the relevant office in his case was that of secretary which he ceased to hold in January, 1951, whereas the shares were not transferred until July 27, 1953.

The statutory provisions relevant to the two appeals are to be found in the Income Tax Act, 1952, s. 156 and Sch. 9. Paragraph 1 of Sch. E as set out in s. 156 is so far as material* in these terms:

"1. Tax under this Schedule shall be charged in respect of every public office or employment . . ."

Rule 1 of the Rules applicable to Sch. E as set out in Sch. 9 is in these terms:

"1. Tax under Sch. E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Sch. E, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and bona fide paid and borne by the party to be charged."

These provisions do not materially differ from their predecessors in previous income tax legislation. It is clear that the taxpayers are taxable under Sch. E in respect of all profits from their respective offices or employments under the company. The question is whether the benefits they received in the shape of the value of the shares transferred to them respectively were profits from those offices or employments within the meaning of the Act. We were referred, as was the learned judge, to many of the numerous authorities in which the courts, dealing with the particular facts of particular cases, have held benefits received by holders of offices or employments to be or not to be profits arising therefrom so as to attract or, as the case may be, escape liability to tax under Sch. E. The following much quoted passages state the general principles to be applied.

In *Herbert v. McQuade* (1) ((1902), 4 Tax Cas. 489) (the clergy sustentation fund case) SIR RICHARD HENN COLLINS, M.R., said (*ibid.*, at p. 500):

"Now that, whether the particular facts justified it or not, is certainly an affirmation of a principle in law, that a payment may be liable to income tax although it is voluntary on the part of the persons who make it, and that the test is whether from the standpoint of the person who receives it, it accrues to him in virtue of his office; if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it. That seems to me to be the test; and if we once get to this—that it has come to him by virtue of his office, accrued to him in virtue of his office—it seems to me that it is not negatived, that it is not impossible merely by reason of the fact that there was no legal obligation on the part of the persons who contributed the money, to pay it."

STIRLING, L.J., said (*ibid.*, at p. 501):

"I think that a profit accrues by reason of an office when it comes to the holder of the office as such—in that capacity—and without the fulfilment

* The enactments are printed without giving effect to the amendments that have subsequently been made by the Finance Act, 1956; for example, the words "in respect of every public office or employment" in para. 1 of Sch. E, as set out above, are repealed by that Act.

A of any further or other condition on his part; and what we have got to look to see is whether the sum in question does so come to the holder of this office."

In *Cooper v. Blakiston* (2) ((1908), 5 Tax Cas. 347) (the Easter offerings case), LORD LOREBURN, L.C., said (*ibid.*, at p. 355):

B "In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present."

C In *Seymour v. Reed* (3) ((1927), 11 Tax Cas. 625) (the cricketer's benefit case), VISCOUNT CAVE, L.C., after referring to the relevant statutory provisions said (*ibid.*, at p. 646):

D "These words and the corresponding expressions contained in the earlier statutes (which were not materially different) have been the subject of judicial interpretation in cases which have been cited to your Lordships; and it must now (I think) be taken as settled that they include all payments made to the holder of an office or employment as such—that is to say, by way of remuneration for his services, even though such payments may be voluntary—but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as ROWLATT, J., put it, 'Is it in the end a personal gift or is it remuneration?' If the latter, it is subject to the tax; if the former, it is not."

F I would also refer to the recent case in this court, *Moorhouse v. Dooland* (4) ([1955] 1 All E.R. 93), which may be said to be of the same order as the earlier cases above referred to, inasmuch as it concerned the liability to tax of the proceeds of collections on the ground, which a Lancashire League professional cricketer was entitled to have made on his behalf by the terms of his contract with the club employing him and the rules of the league. All these cases, save *Seymour v. Reed* (3), went against the taxpayer on their particular facts.

G I come next to *Cowan v. Seymour* (5) ((1919), 7 Tax Cas. 372) which is somewhat nearer the present case, in that it concerns a sum of money paid by the shareholders of a company to its secretary and liquidator, the company being in the final stages of liquidation, and the sum in question being the surplus available for distribution amongst the members. ATKIN, L.J., quoted (*ibid.*, at p. 381) the passages from SIR RICHARD HENN COLLINS' judgment in *Herbert v. McQuade* (1) and LORD LOREBURN'S speech in *Cooper v. Blakiston* (2) to which I have already referred, and continued (*ibid.*):

H "So I should say the question here is whether, if a sum of money is given to the secretary or liquidator substantially in respect of his services as secretary or liquidator, it accrues to him by reason of his office. The question, therefore, in this case is whether this payment was given to this gentleman substantially in respect of his services as secretary or liquidator."

I YOUNGER, L.J., said (*ibid.*, at p. 383):

"And in the same connexion, as has already been pointed out by the Master of the Rolls, it is to be observed that this payment was not made by

the natural paymaster, the company, under which the so-called office of profit was held, and it is clearly, as I think, notwithstanding Mr. Edwardes Jones' argument, not a perquisite, which might very naturally be paid by somebody else. That circumstance is, of course, not in any way conclusive, at least in connexion with an office still held, for which I will refer to the observation in *Herbert v. McQuade* (1) which ATKIN, L.J., has cited, but it may be a very relevant circumstance, and when it is remembered that this payment, if made by the company, the natural paymaster, at the time when it was made would have been ultra vires and illegal, and that the payment can only be justified as one by the individual contributories out of their own money, the circumstance lends further weight to the view that this was not a profit by reason of the office at all, but was really a gift by persons in the position of beneficiaries who had appreciated and, it may be, had benefited by, the personal exertions of the holder of the office while he held it."

In the result, the claim to tax on the sum provided by the shareholders was rejected. Great weight was attached to the fact that the office had ceased when the payment was made, and some to the circumstance that the amount in question was provided by the shareholders individually and not by the company, "the natural paymaster". But the case does seem to me to show quite clearly that a benefit conferred on the holder of an office or employment under a company may be a profit of the office or employment for tax purposes although conferred by shareholders of the company and not by the company itself.

The case of *Cameron v. Prendergast* (6) ([1940] 2 All E.R. 35), provides authority for the proposition that a lump sum paid by a company to the holder of an office under the company in consideration of a promise on his part to serve the company in that office, even for an unspecified period which might be a matter only of days, is in the hands of the recipient a profit from his office and taxable accordingly. The case of *Weight v. Salmon* (7) ((1935), 19 Tax Cas. 174), provides authority for the proposition that money's worth such as a right conferred by a company on a salaried director to subscribe at par for shares in the company of a market value greater than par will, if conferred in respect of the recipient's office, constitute a profit of the office for tax purposes.

If the present appeals fall to be judged simply by reference to the deeds of covenant, then in my judgment the terms of those deeds are fatal to the taxpayers. Under the deeds the taxpayers became entitled to receive from the two Hornby sons money's worth in the shape of the shares to be transferred on their mother's death to the taxpayers respectively, and in each of the deeds this benefit was expressly stated to be conferred

"in consideration of the covenantee continuing his present engagement with Meccano, Ltd., until the expiry of four years from the date hereof."

As I have said, it is clear from *Cowan v. Seymour* (5) that a benefit provided for the holder of an office or employment under a company may be a profit of that office or employment although provided by shareholders and not by the company itself, the "natural paymaster". An actual example of such a case is to be found in *Patrick v. Burrows* (8) ((1954), 35 Tax Cas. 138); and although, where the character of the benefit is a matter of inference, the circumstance that it was so provided may tend against the conclusion that it was in the nature of remuneration, that circumstance cannot displace that conclusion where the benefit is expressly described in a formal document as being in consideration of the recipient continuing to serve the company in the office or employment which he holds, which, as appears from *Cameron v. Prendergast* (6) stamps it unequivocally as remuneration.

A The Special Commissioners found it possible to hold that, even if the matter was to be decided by reference to the deeds alone, nevertheless the shares were not remuneration provided for the taxpayers in respect of their offices or employments with the company. I find it impossible to accept that view.

B Counsel for the taxpayers contended that the whole history of the matter must be examined and the effect of the deeds must be considered in the light of the circumstances and events leading up to and surrounding their execution. Counsel for the Crown very fairly admitted that the matter could not be determined by reference to the deeds alone, but he claimed that, when all the surrounding circumstances were looked at, the Crown must still be entitled to succeed.

C Certain evidence adduced on behalf of the taxpayers was rejected by the Special Commissioners as inadmissible. This was evidence directed to explaining the reasons for the insertion in the deeds of the consideration moving from the taxpayers in the shape of their continuing in their "present engagements" with the company for four years. Counsel for the Crown submitted that the Special Commissioners were right in rejecting this direct evidence of intention. Counsel for the taxpayers, while he did not go so far as to claim it was admissible for the purpose of nullifying the deeds of covenant as merely fictitious or colourable documents, said (in effect) that it could be used to show that the consideration consisting of the taxpayers' continuing their present engagements with the company was never an essential element in the transaction but was introduced, as it were, by a side-wind, not as a stipulation which the Hornby brothers had propounded or insisted on as a condition of their promise to transfer the shares on their mother's death, but as an embellishment recommended to the taxpayers by their own solicitor because he considered that its inclusion would strengthen the taxpayers' position in the event of the Hornby brothers being disposed to change their minds.

E Once this circumstance is taken into consideration, then, according to the submission of counsel for the taxpayers, the transaction reveals itself as being substantially a matter of gift and not a matter of remuneration (see per LORD LOREBURN, L.C., in *Cooper v. Blakiston* (2) (5 Tax Cas. at p. 355), and ATKIN, L.J., in *Cowan v. Seymour* (5) (7 Tax Cas. at p. 381)). This involves the assumption, in all probability well founded, that the Hornby brothers would have transferred the shares whether the consideration moving from the taxpayers had been inserted in the deeds of covenant or not, and for that matter would have done so if the taxpayers had been content simply to rely on their oral undertaking, their substantial motive being to make good Mr. Frank Hornby's testamentary shortcomings by according to the taxpayers the tangible recognition of their loyal and efficient service which Mr. Frank Hornby had been under a moral obligation to accord to them by his will.

H Having regard to the principles stated by the House of Lords in the case of *Duke of Westminster v. Inland Revenue Comrs.* (9) ((1935), 19 Tax Cas. 490), which was in a sense the converse of the present case, inasmuch as the attempt to go behind the deed was there made by the Crown, I think counsel for the Crown is well justified in his support of the commissioners' view on this point. I But he goes on to submit that this evidence if admitted affords no assistance to the taxpayers, and here again I find myself in agreement with him.

If, in response to the taxpayers' representations, Mr. Frank Hornby had in his lifetime transferred to each of them eight thousand shares in the company, it may be that such shares could in all the circumstances of the case, and on the principles laid down by the authorities to which I have referred, properly have been held to have been given by Mr. Frank Hornby and received by the taxpayers as a present made in token of their long and successful business association with him, and not as remuneration. If Mr. Frank Hornby had given the

taxpayers substantial holdings of shares in the company by his will, as in effect he had promised to do, it seems clear that such shares would have come to the taxpayers purely by an act of testamentary bounty on the part of Mr. Frank Hornby wholly removed from the sphere of remuneration.

The result would, I think, in all probability have been the same if the taxpayers had rested content with the Hornby brothers' oral and purely voluntary promise to transfer to each of them eight thousand shares in the company on Mrs. Hornby's death, and the shares had been transferred simply by way of performance of that promise. If the transaction had taken this form, then I think there would, on the facts found, have been strong support for the view that the Hornby brothers were by a pure act of bounty making good their father's omission to leave the taxpayers by will the shares which he was under a moral obligation to leave them having regard to the part they had taken in the building up of the company's business, and to his promise, or what the taxpayers took as amounting to a promise by him, to provide them with substantial holdings of shares in this way. It would then, as I think, hardly have been possible to maintain that the shares were given by the Hornby brothers or received by the taxpayers as remuneration and not as a mere present.

But the taxpayers did not rest content with the simple promise of the Hornby brothers, and in the result the deeds of covenant were brought into existence. As I have already indicated, I think these deeds are on the face of them fatal to the taxpayers' case; and even if all questions of admissibility are resolved in their favour I can find nothing in the extrinsic evidence to displace that conclusion. The evidence, admissible or inadmissible, directed to explaining how it was that the consideration moving from the taxpayers in the shape of their continuing their "present engagements" with the company came to be included in the deeds of covenant as executed is thus summarised in para. 10 of the Case Stated with respect to Mr. Bearsley:

"10. (a) Hewitt got in touch with his solicitor, Mr. Dawson, the senior partner in a firm of Liverpool solicitors, who acted for the [taxpayer Bearsley], Hewitt and Jones in the subsequent transactions.

"(b) Hewitt asked Dawson whether there was any way in which the arrangement arrived at at the meeting referred to in the previous paragraph could be incorporated in some document.

"(c) Dawson knew Douglas Hornby, who would have to transfer some shares under the above-mentioned arrangement, quite well, and considered him rather an erratic person; and apart from this personal knowledge he considered that any document embodying the arrangement should be made as binding on the Hornby brothers as possible. It was also Hewitt's wish that the Hornby brothers should be bound as strongly as possible.

"(d) Dawson had the idea firmly fixed in his mind that it was always a good thing to have a consideration in a deed, even though the transaction was a voluntary disposition. With this idea in mind he drafted a document which expressed a consideration moving from the covenantees (the [taxpayer Bearsley], Hewitt and Jones) as follows:—'in consideration of the covenant continuing his present engagement with Meccano, Ltd., until the expiry of four years from the date hereof . . .' The idea of inserting a consideration in the document was entirely Dawson's. The reference to the expiry of four years was due to a misinterpretation of the restrictive covenant in the service agreements of the [taxpayer Bearsley], Hewitt and Jones (see para. 5 hereof).

"(e) Dawson's draft was sent to the solicitors acting for the Hornby brothers; these solicitors returned the draft with certain alterations.

"(f) A copy of this draft showing the alterations made by the solicitors acting for the Hornby brothers is annexed hereto, marked 'D'.

A “(g) As appears from our decision, we consider that the evidence contained in sub-paras. (d) to (f) of this paragraph was inadmissible.”

Treating the whole of this evidence as admissible, I cannot see that it comes to any more than this:

B The Hornby brothers were ready and willing, in the circumstances stated at length above, to transfer the shares to the taxpayers on Mrs. Hornby's death purely as a matter of bounty without any consideration or condition with respect to the taxpayers continuing in the service of the company. The taxpayers on Mr. Dawson's advice conceived that it would be more advantageous to them, and put them in a stronger position, if, instead of their taking the shares purely as a gift, and relying simply on the Hornby brothers' voluntary promise to transfer them on Mrs. Hornby's death, the transaction was carried out as a transaction for valuable consideration under which the Hornby brothers would transfer the shares to them in consideration of their continuing their “present engagements” with the company. Accordingly Mr. Dawson prepared his draft deed of covenant in this form, the submission of which to the Hornby brothers' solicitors was tantamount to a request that the transaction should be carried out in this way. The approval by those solicitors of the draft submitted to them with the alterations to which I have referred, the acceptance of such alterations by Mr. Dawson, and the execution by the Hornby brothers of the deeds of covenant in the form of the draft as altered, signified that the Hornby brothers acceded to the taxpayers' request, and bound the Hornby brothers to carry out the transaction on the terms stated in the deeds as executed.

E There is no reason to suppose that the Hornby brothers would not have been quite content to give purely voluntary covenants, or that the inclusion of the consideration moving from the taxpayers in the deeds as executed was a matter to which they attached any importance. It can, I think, fairly be assumed that they regarded themselves simply as carrying out the moral obligation under which they felt themselves to be. So far as the taxpayers were concerned, they no doubt regarded the deeds simply as securing to them on Mrs. Hornby's death the shares which they conceived to be morally their due. The fact remains that under Mr. Dawson's advice the taxpayers chose to take the shares, not simply as a gift, but on the terms of the deeds, based as they were on the draft propounded by Mr. Dawson. The taxpayers (in effect) asked that the benefit should take that form, and the Hornby brothers gave it to them in that form. Given in that form, and accepted in that form, it seems to me that by the plain terms of the deeds it must necessarily be held to have been given to the taxpayers, and accepted by them, in their capacity of managing director in the case of Mr. Bearsley and of director and secretary in the case of Mr. Hewitt, and in consideration of services to be rendered by them to the company in those respective capacities. To argue, as did counsel for the taxpayers, that the transaction was substantially a matter of bounty, in which the consideration expressed in the deeds played an insignificant and indeed nominal part, seems to me to confound the motive for conferring the benefit with the character of the benefit conferred.

H I do not think that the mistake as to the effect of the restrictive covenants in the service agreements which is said to have led to the selection of four years as the period for which the taxpayers were to continue in their “present engagements” with the company can affect the result. I confess that I am not clear as to the precise nature of the mistake. The position was that at the date of the deeds the service agreements had only about nine months to run, and the restrictive covenants were in the cases of Mr. Bearsley and Mr. Jones for the period of three years from their respectively ceasing to be directors of the company and in the case of Mr. Hewitt for the period of three years from his ceasing to be

secretary. The suggestion apparently is that the service agreements were mistakenly regarded as continuing until the expiration of the periods of restriction imposed by the restrictive covenants. That would make approximately three years from the dates of the deeds of covenant. It is to be noted, however, that no such mistake can have led to the fixing of six months as the period of continuance in his "present engagement" stipulated in the deeds of covenant in favour of Mr. Jones, which was no doubt attributable to the state of his health. All that one can do in the circumstances is to take the consideration to be as expressed in the deeds as they stand. The "mistake", whatever its exact form, only had the effect of making the consideration moving from the covenantees more valuable in the case of the taxpayers than the parties may have thought.

Nor in my opinion is the result altered by the circumstance that in the end the shares were in fact transferred on July 27, 1953, when Mrs. Hornby was still alive. These transfers were, I think, clearly made in pursuance of and in satisfaction of the Hornby brothers' obligation under the deeds of covenant and not as a new departure.

Although no new service agreements were entered into after the expiration of the ten-year agreements on Sept. 30, 1946, I think that, having regard to the minutes of the board meeting of Oct. 8/11, 1946, the taxpayers must be taken to have duly continued their "present engagements" with the company for the stipulated period of four years from the date of the deeds of covenant.

For these reasons I am of opinion that the learned judge came to a right conclusion on the main question involved in these appeals.

As to the alternative contention to the effect that the proper subject of assessment consisted of the value of the rights acquired by the taxpayers under the deeds of covenant in December, 1945, which constituted income of the taxpayers for the financial year 1945-46: on the footing that the taxpayers fail in their main contention the position was that by the deeds of covenant the Hornby brothers covenanted that, in consideration of the taxpayers continuing their respective engagements with the company for four years from the date of the deeds, the Hornby brothers would transfer to them on the death of Mrs. Hornby the specified number of shares in the company by way of remuneration for the services rendered by them to the company during that period. The time at which the taxpayers were to receive this additional remuneration for their services to the company for this further period was thus fixed by the terms of the bargain as the death of Mrs. Hornby, or, to be strictly accurate, the expiration of three months from her death. In fact the taxpayers duly completed their four years' further service in Mrs. Hornby's lifetime, and the shares were transferred to them shortly before her death, although the Hornby brothers would have been entitled to withhold such transfer until three months after the happening of that event. I see no reason for treating the stipulated remuneration, i.e., the shares, as received or receivable on any earlier date than that on which the shares were actually transferred, which, as I have said, was in fact earlier than the date on which the Hornby brothers were obliged under the deeds of covenant to transfer the shares to the taxpayers. In *Weight v. Salmon* (7) the benefit held to constitute remuneration consisted of an immediate right to subscribe at par for shares worth in the market substantially more than par. In *Tait v. Smith* (10) ((1954), 35 Tax Cas. 79), it was held that the taxpayer was wrongly assessed for the year 1949-50 in respect of the surrender value of an endowment policy on his life which under the terms of his service he had become entitled to have immediately transferred to him in 1946. I do not think that either of these cases, on which counsel for the taxpayers relied, supports his contention that in the present case the taxable profit consisted of the value of the rights conferred by the deeds of covenant at the date of those deeds and not of the value of the shares at the date when they were transferred. On this point I need say nothing further

A beyond expressing my complete agreement with the reasoning and conclusions of the learned judge.

A further point taken below to the effect that the value of the shares should be spread for tax purposes over the four years during which the taxpayers were respectively to continue their engagements with the company was, as I think rightly, rejected by the learned judge, and counsel for the taxpayers has not

B pursued it in this court.

A special point was taken in Mr. Hewitt's case on the ground that Mr. Hewitt ceased to hold the office of secretary to the company in January, 1951, whereas the shares were not transferred until July 27, 1953. On this point, which does not appear to have been dealt with by the learned judge, I see no reason to differ from the Special Commissioners' conclusion to the effect that the

C engagement referred to in the deeds of covenant with him was not exclusively his engagement as secretary. He continued to hold for the requisite period of four years the combined offices of director and secretary which he held at the date of the deeds of covenant with him, and after he ceased to hold office as secretary he continued in office as a director of the company and was still in that office at the date when the shares were transferred. Accordingly, I do not think
D Mr. Hewitt can escape liability to tax on the ground that at the date of the transfer he had ceased to hold any relevant office under the company.

Finally, I think it is plain that the Special Commissioners' decision in favour of the taxpayers was a decision on a mixed question of fact and law and therefore open to appeal. This is sufficiently demonstrated by the large number of cases in which appeals on similar questions have been entertained.

E It is not without regret that I find myself constrained to reach a conclusion adverse to the taxpayers, as it may well be that, if the transaction had been differently carried out, the taxpayers could have received the same benefits free of the heavy inroads which the law as I understand it now requires to be made on them for tax; but the effect of the deeds appears to me to be inescapable.

F For my part, I must accordingly hold that the learned judge was right in the conclusion to which he came, and that the appeals fail and should be dismissed. But a different conclusion has been reached by both my brethren, and the result will therefore be as indicated in the judgments they are about to deliver.

MORRIS, L.J.: The taxpayer Mr. Bearsley (with whose appeal I propose
G first to deal) was assessed under Sch. E for the year 1953-54 because he was managing director of Meccano, Ltd. Having that office or employment he was chargeable

"in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment . . ."

H When on July 27, 1953, the brothers Mr. Roland and Mr. Douglas Hornby transferred shares in Meccano, Ltd., worth £36,000 to Mr. Bearsley, did Mr. Bearsley become chargeable to income tax for the year 1953-54 under Sch. E on £36,000 so as to make him assessable for that year in the sum of £50,465? That is the question raised in his appeal. It is not suggested that Mr. Bearsley received these shares worth £36,000 as salary for his services as managing director:
I nor as fees: nor as wages. The Crown do not invoke the word "perquisites". The Crown case is founded on the words "profits whatsoever therefrom for the year of assessment". It is said, therefore, that the result of the transfer of shares from the two brothers was that Mr. Bearsley received £36,000 from his office as managing director for the year 1953-54.

* Income Tax Act, 1952, Sch. 9, para. 1, before the amendment effected by the Finance Act, 1956, which, however, does not alter the effect of the legislation materially for the purposes of the scope of charge relevant here.

The word "therefrom" must be construed in its context. A profit accruing by reason of holding an office or employment may be a profit "therefrom". This may be so even though some payment which is received is not made by the employer of the recipient and even though the payment is made voluntarily. The profit need not necessarily be in the form of a cash payment. The conception which is introduced by the word "therefrom" is that some taxable remuneration may accrue to a person by reason of his having or exercising an office or employment of profit. The reference is to what is received by the holder of an office or employment in that capacity; to the holder of the office or employment as such. This was pointed out by VISCOUNT CAVE, L.C., in his speech in *Seymour v. Reed* (3) ((1927), 11 Tax Cas. 625). LORD CAVE said (*ibid.*, at p. 646):

"These words and the corresponding expressions contained in the earlier statutes (which were not materially different) have been the subject of judicial interpretation in cases which have been cited to your Lordships; and it must now (I think) be taken as settled that they include all payments made to the holder of an office or employment as such—that is to say, by way of remuneration for his services, even though such payments may be voluntary—but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services. The question to be answered is, as ROWLATT, J., put it, 'Is it in the end a personal gift or is it remuneration?' If the latter, it is subject to the tax; if the former, it is not."

In his speech in the same case LORD PHILLIMORE, having referred to some of the authorities, said (*ibid.*, at p. 655):

"My Lords, I do not feel compelled by any of these authorities to hold that an employer cannot make a solitary gift to his employee without rendering the gift liable to taxation under Sch. E. Nor do I think it matters that the gift is made during the period of service and not after its termination, or that it is made in respect of good, faithful and valuable service."

It does not seem to me that the words and meaning of the deeds of covenant can be affected or altered by any evidence as to how the wording of the deeds of covenant came about. It is not submitted on behalf of the taxpayers that the consideration stated in the deeds should be regarded as either fictitious or illusory. I agree with DANCKWERTS, J., that evidence is not admissible to contradict the plain terms of the deeds by attempting to show that the intentions of the parties were to give a meaning to the provisions of the deeds contrary to the words which the deeds plainly contain. If the evidence which the commissioners regarded as admissible was received and regarded only to the extent that it threw light on the question whether the taxpayers received remuneration for services, then I consider that there was no objection to it. But I consider that the case must be approached on the basis that the deeds of covenant fully mean what they state.

When, therefore, Mr. Bearsley received shares worth £36,000 in July, 1953, while he was still managing director, did he receive them as a profit from his office? Was he receiving remuneration for his services or was he receiving a personal gift?

The deeds of covenant show that the Hornby brothers had two desires in December, 1945. First, they wanted to show appreciation of Mr. Bearsley's past services in the employment of the company. Those services extended in the first place over the period of twelve years from 1907 to 1919. That was before Mr. Bearsley became a director. From 1919 Mr. Bearsley was a director and from 1936 he was a managing director. Secondly, the desire was that Mr. Bearsley would continue his then existing engagement with the company for four years from Dec. 30, 1945. Mr. Bearsley could only do so if the company wanted him to do so. The company was not a party to the deed of covenant.

A If Mr. Bearsley continued to hold office as managing director after Oct. 1, 1946 (when his ten-year contract was due to expire) then he would be paid by the company for his services in that office: he would be paid such sums (and they were considerable) as would be arranged by him with the company.

The continuing in office was made the consideration for a legally enforceable covenant to transfer the shares. It need not now be considered what would have been the position if Mr. Bearsley had been willing to continue to serve the company but the company had not required his services. In fact he continued to serve and he was still serving when he received the shares. He received them before he was actually entitled to receive them under the covenant, for he received them while Mrs. Clara Hornby was still alive.

Once Mr. Bearsley had continued to serve the company for the four-year period he became entitled to the shares on the death of Mrs. Clara Hornby. After serving for the four-year period he might then have retired—but he would still have been entitled to the shares. His receipt of the shares in July, 1953, had nothing to do with his employment as managing director at that time. If the shares had been transferred strictly in accordance with the deeds the transfer would not have been until within three months after October, 1953, when Mrs. Clara Hornby died. But the right to the shares would then have arisen whether Mr. Bearsley had already retired or not. If he had already retired from the company he would not have been assessable under Sch. E. He was, however, still in office, and he received what was worth £36,000. He certainly did not receive the shares in respect of any services rendered during that year. Nor did he receive them in respect of any services rendered since the end of the four-year period after the deeds of covenant. He would not have received them but for what he had done in the past, i.e., (a) in all the years before 1945 and (b) in the four years after Dec. 30, 1945.

But the question which arises is whether he received them as remuneration or as a personal gift. In one sense Mr. Bearsley received the shares by reason of his office. Had he not held the office he would not have had them. But that merely shows that he would not have had the shares (either as remuneration or as a gift) if he had not given many years of service to the company down to Dec. 30, 1949. The mere fact that the arrangement between the Hornby brothers and Mr. Bearsley resulted in the latter having a legally enforceable right does not in my judgment necessarily show that Mr. Bearsley was to receive remuneration so as to be chargeable under Sch. E. The Hornby brothers made it a condition of their promise that Mr. Bearsley would go on serving the company for four years. They did not exact from him a promise that he would continue to serve the company. I cannot think that, if Mr. Bearsley had decided to retire from the company within the period of four years from Dec. 30, 1945, he would have been in breach of contract vis-à-vis the brothers Hornby. It was for him and the company to decide whether he should continue. Mr. Bearsley could not, therefore, contract with the Hornby brothers in positive terms that he would serve the company. But the Hornby brothers in effect said, "Because of your good work in the past we will at some uncertain future date transfer to you some shares that will come to us provided that you go on serving the company for four years." It does not seem to me that the promise that they made has the attributes of remuneration or that it lacks the features of a personal gift. It was a personal gift which was to be made provided that further remunerated service was for a period rendered to a limited company that would pay full remuneration for the value of such service.

The shares were not, therefore, to be transferred as payment for services to be rendered in the four-year period. Indeed, the deeds recite that one part of the desire of the covenantors was to mark their appreciation of Mr. Bearsley's past services.

It may be difficult to describe in precisely accurate language the features of payments or benefits received which must attract tax and the features of those which will not. The general distinction as outlined by LORD CAVE, L.C., is between payments made by way of remuneration for services and payments made by way of personal gifts. Yet some payments may seem to have a blend of both of these elements. The tip given to the taxi driver is in one sense a gift; a particular tip may be somewhat above what would normally be expected by the taxi driver and may reflect a bountiful impulse. Yet all the tips received, including the specially generous one, must be regarded as being by way of remuneration for services. But, on the other hand, it seems to me that a payment which has the attributes of being a personal gift does not necessarily lose those attributes merely because the gift is in recognition of services or because the donor agrees to bind himself so as to be compellable at law to make the payment. So it seems to me that the fact that the position in the year 1945 was that Mr. Bearsley would only gain his benefit if to his past services he added that of staying the course for four more years does not cause his benefit when received to be remuneration for services rather than a gift.

The present case differs entirely from *Cameron v. Prendergast* (6) ([1940] 2 All E.R. 35). In that case a director wished to resign and a letter was written to him asking him not to do so, and he was told that

"in consideration of your acceding to this request, the company will, within twenty-one days or by such instalments as you will accept, pay you the sum of £45,000 and will embody their undertaking so to do in a formal deed reciting this letter."

The director did not send in his resignation, and two weeks later the company executed a deed which annexed the letter and provided that, for the consideration referred to in the letter, the company agreed to pay the director the sum of £35,000, on the date of the deed and a further £10,000 on Mar. 31 following. It was held that the sum received arose from the office as director and was properly assessable under Sch. E. The sum of £45,000 was the remuneration paid by the company to the director for his services as director. LORD RUSSELL OF KILLOWEN put the matter thus (*ibid.*, at p. 42):

"The question is whether the sum of £45,000 which was paid to Cameron was a profit from his directorship. I feel no doubt, upon the facts of this case, that it was. It was paid to him in his capacity of a director, and as a consideration for his agreeing not to cease giving his services as a director to the company—an agreement which, as LUXMOORE, L.J., pointed out, necessarily involves an agreement to continue to render those services. Money paid as a consideration for such a bargain appears to me to be clearly a profit from his directorship."

LORD ROMER said (*ibid.*, at p. 44):

"Nor does it matter that the sum is so large as to present the appearance of a capital, rather than of an income, payment. If a company chooses to pay a director's remuneration in a lump sum, it can, no doubt, lawfully do so, but the sum nevertheless represents income, whatever its amount, and will be taxable as such. Remuneration which, if paid by instalments over a number of years, would be income, is income though paid once and for all in a lump sum, just as much as the capital consideration for a sale, say, of land is capital, even though payable by instalments spread over a number of years."

The fact that a payment which can properly be regarded as a gift may involve a measure of recognition of faithful service was pointed out by LORD PHILLIMORE in the above cited passage from *Seymour v. Reed* (3) ([1927], 11 Tax Cas. 625). The cricketer in that case had given good service; he had deserved well of his supporters; he had given pleasure to lovers of the game; he had deserved well of the club whose fortunes he had advanced. But the gate money at his benefit

A match was held to be a personal gift and not a profit or perquisite arising from his employment. It was his little "nest egg", as LORD DUNEDIN called it in his speech, in the course of which he recalled LORD MACNAGHTEN's reminder that income tax is a tax on income.

The circumstance that a large payment is to be made by someone other than an employer may be a considerable indication, though by no means a conclusive one, that the payment is not by way of remuneration. Remuneration is, as a rule, something that an employer has arranged or contemplated or at least knows about. This is so even though payments may come other than from the employer and may depend on the liberality of others. In *Moorhouse v. Dooland* (4) ([1955] 1 All E.R. 93) the contract of employment laid it down in great detail when the cricketer could expect or receive the contents of collecting boxes sent round the cricket field. Remuneration for services is generally effected by systematic and recurring payments, though this is certainly not always so. Remuneration has further the element of reward or payment for some specific services rendered.

Where some payment, and particularly some non-recurring payment, is received from someone other than an employer, it will probably only have the attributes of remuneration in those classes of cases where it is reasonable to expect that remuneration would come from some other source than from the pocket of an employer. Thus, as pointed out above, the cricketer in *Moorhouse v. Dooland* (4) arranged with his employers that for his services he would receive certain amounts in addition to what they paid him direct; those amounts would accrue to him when his performances were sparkling; he could expect the payments and he was entitled to them. The taxi driver in *Calvert v. Wainwright* (11) ([1947] 1 All E.R. 282) was in the employment of a limited company. He received a definite wage, and tips were no part of the bargain. But he was clearly assessable in respect of the tips which he received from passengers in the capacity of taxi driver. A tip is in the ordinary way given as a remuneration for services rendered. Similarly, a waiter may expect to receive, and will usually receive, gratuities from those whom he serves; the waiter receives the gratuities in respect of his services; he receives them by way of remuneration for his services, even though the payments are voluntary and are not made by the employer of the waiter.

In the case of *Cooper v. Blakiston* (2) ((1908), 5 Tax Cas. 347) the voluntary Easter offerings given to the incumbent of a benefice were assessable. LORD LOREBURN, L.C., said (*ibid.*, at p. 355):

"In my opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present. In this case, however, there was a continuity of annual payments apart from any special occasion or purpose, and the ground of the call for subscriptions was one common to all clergymen with insufficient stipends, urged by the bishop on behalf of all alike."

It was pointed out by LORD ASHBOURNE (*ibid.*, at p. 356) that the offerings had been made for several years to the appellant as the vicar of East Grinstead and were made in response to a systematic appeal initiated by the bishop and supported by the churchwardens to induce collections to eke out slender stipends. In all the circumstances it was clear that the offerings were received by the vicar as vicar and that they formed part of the profits accruing by reason of his office.

In the passage which I have cited LORD LOREBURN pointed out that, where a sum of money is given to an incumbent substantially in respect of his services as

incumbent, it accrues to him by reason of his office. Where this is the case it matters not that the payment made is voluntary. If from the point of view of the recipient the money is received "in respect of services", or, as LORD CAVE put it in the later case of *Seymour v. Reed* (3), "by way of remuneration for services", then the receipt is, I think, a profit from the office held; or, in the language that applied in *Cowan v. Seymour* (5) ((1919), 7 Tax Cas. 372), it would be a profit "accruing by reason of" the office held. A profit may accrue by reason of an office when it comes to the holder of an office as such. Payments that come to the holder of an office as such are payments which from the recipient's point of view have the features of remuneration. The Easter offerings for the incumbent in *Cooper v. Blakiston* (2) (5 Tax Cas. 347) were given to the incumbent as such and were given to supplement income. In *Herbert v. McQuade* (1) ((1902), 4 Tax Cas. 489), a beneficed clergyman received for several years an annual grant from a body incorporated with the object of providing adequate remuneration for beneficed clergy; he received the annual sums by virtue of his office so that his remuneration in that office should be augmented. In those cases there was also what LORD PHILLIMORE in *Seymour v. Reed* (3) described as "an element of periodicity".

In contrast to those cases there might be cases (see the judgment of YOUNGER, L.J., in *Cowan v. Seymour* (5)) where a payment is made to someone by way of a gratuity on ceasing to hold an office—or there might be a gift after someone had left an office, or a gift by way of "testimonial" to someone still holding an office (see speech of LORD LOREBURN in *Cooper v. Blakiston* (2)), or there might be personal gifts to the holder of an office as marks of esteem and respect (see the speech of LORD ASHBOURNE in the same case): or there might be a donation honoris causa (see the judgment of LORD COLERIDGE, C.J., in *Turner v. Cuxon* (12) (1888), 22 Q.B.D. 150).

In the present case the transactions of the transfers of the shares seem to me to lack the elements of remuneration. Mr. Bearsley had been paid and was paid for his services by the company that employed him. It is important also to remember that in October, 1946, Mr. Bearsley's remuneration was revised. The directors took note of the fact that his agreement had expired and of the fact that, owing to the illness of Mr. Jones, additional duties were devolving on Mr. Bearsley, and of the fact that no increase in the salary of any director had been made since 1936. There was no suggestion of paying heed to any expectation that Mr. Bearsley might have of receiving shares. Mr. Bearsley's salary was raised; so also was his rate of commission on the net profits of the company. His work was not of a nature such that he would ever expect to look to any other source of remuneration than the company. From no other source could there be commissions and there were no gratuities. The shares were not measured in number so as to be equated to the worth of certain services rendered. It is plain that the shares would never have been transferred but for the fact that Mr. Bearsley had rendered years of valuable service. That service had helped to make the shares of Mr. Frank Hornby valuable. That circumstance might have led Mr. Frank Hornby to make some bequest of shares to Mr. Bearsley. But, when the brothers Hornby agreed in 1945 that they would in due course make over to Mr. Bearsley some part of the capital assets which later would be theirs, the arrangement would not in my judgment constitute remunerating Mr. Bearsley but was rather the making of a gift to him.

In their personal capacities and from their personal possessions and actuated by their personal motives of doing what they thought that their father might have done by his will, the brothers were willing to make a gift provided that Mr. Bearsley served the company for four years more. The gift might have accrued to Mr. Bearsley after he had retired and would in any event accrue at a time when a testimonial for a lifetime of faithful service would not be inapposite.

A The fact that the brothers entered into deeds of covenant does not by itself negative the view that the transactions were by way of gift. Donors are frequently willing to deny themselves the opportunity of changing their minds about their intended gifts. I agree with the learned judge that the acquisition of the shares was "linked up with" the services of Mr. Bearsley as an officer of the company. Mr. Bearsley had served in the past and was not to get his shares unless he served the company for four years from December, 1945. In one limited sense Mr. Bearsley was to receive his shares by reason of his office—for, if he had not served and held office in Meccano, Ltd., he would never have had the shares. But I do not think that it follows from this that the shares were profits from the office.

C In my judgment, the shares were not a profit from the office of managing director because they were not received by way of remuneration for services rendered as managing director. They were received while Mr. Bearsley was managing director, but they represented an expression of gratitude or a testimonial for what he had done, including what he had done before ever he became a director or managing director. Once the condition for the receipt of the shares was satisfied, then the shares were to be received by Mr. Bearsley whether he continued in office or not. The mere fact that when he received the shares he was still in office cannot by itself convert the receipt of the shares into a receipt as remuneration for services unless the receipt otherwise possessed that quality or attribute. The kind of gift which LORD PHILLIMORE envisaged as being free from liability to tax even though made by an employer to an employee and even though made in respect of faithful service does not lose its immunity because made while the employee still remains in service. Accordingly, the fact that someone who receives a benefit is the holder of an office does not by itself prove that what he received was a profit from the office. That has to be decided by considering on the evidence whether what was received was received as remuneration for the services rendered in the office.

E If contrary to the view which I have formed the shares which were transferred must be regarded as remuneration to Mr. Bearsley, then, as the deeds show, the remuneration (if such it was) was in respect of his services (a) in the years 1907 to 1919, (b) in the years from 1919 to 1936 during which he was a director, (c) in the years from 1936 to Dec. 30, 1945, when he was managing director, (d) in the four years from Dec. 30, 1945, to Dec. 30, 1949, during which he continued as managing director. I find it difficult to see why the entire remuneration, if such it was, should be regarded as being a profit "from" his office of managing director.

G On the view which I have formed the same general considerations apply to Mr. Hewitt's case as apply to Mr. Bearsley's case. The shares transferred to Mr. Hewitt were by way of gift or testimonial and not by way of remuneration. He was secretary from 1913 to 1951; he was a director from 1932 to October, 1953. He was assessed for the year 1953-54 because he was a director. The shares which he received in July, 1953, were partly in recognition of his work as secretary, and partly in recognition of his work as a director. In my judgment they did not when received constitute a profit from his office as director for the year 1953-54.

I For these reasons it does not seem to me that the decision of the Special Commissioners was founded on a misconception of the law or proceeded on a view of the facts which could not reasonably be entertained. I consider, therefore, that the taxpayers were not assessable in respect of the value of the shares which they received, and I would allow the appeals.

SELLERS, L.J.: In the tax period 1953-54 the taxpayer Mr. Hewitt was a director of Meccano, Ltd., until October, 1953, when he resigned on account of ill health. He had ceased to be secretary of the company in January, 1951.

The taxpayer Mr. Bearsley in the same tax period was managing director of the company.

On July 27, 1953, the two taxpayers received 8,000 shares each in Meccano, Ltd., on two transfers to each of them of 4,000 shares each from Mr. Roland and Mr. Douglas Hornby. The value to each of the taxpayers of the transferred shares was £36,000, and the Crown included in each case these sums in an assessment to income tax, Sch. E, making a total assessment of £39,022 in the case of Mr. Hewitt and £50,465 in the case of Mr. Bearsley. There is no indication that in the financial year under review, or indeed in any immediately preceding year, either of the taxpayers rendered any abnormal or unusual services to the company meriting such enhanced remuneration. On the contrary, Mr. Hewitt as a director only and in ill health would apparently have been much less active than in any year during his long tenure of the secretaryship on relatively modest remuneration.

On the face of things it would seem unreasonable and against good sense that shares in the hands of the Hornby brothers which were part of large holdings which were not subject to income tax except in respect of the dividends paid thereon should cease to be capital and become income of the recipients by the transfer to the two taxpayers, who from their long association with and their devotion to the company were well qualified to have some substantial stake and standing as shareholders of the company. It created a more equitable distribution of the share capital.

The Special Commissioners, who had heard substantially the same arguments as have been advanced before us on behalf of the Crown (and which appear to have been advanced similarly before DANCKWERTS, J.), held clearly that the value of the shares was not income from the office or employment of either of the taxpayers. Although this decision cannot be treated as if it were a finding of a jury, in so far as it embraces a view of the facts it is of real importance. It must, however, be regarded as a decision of mixed law and fact and therefore open to review.

The charging power relied on by the Crown is contained in r. 1 of Sch. 9 to the Income Tax Act, 1952*, dealing with the Rules applicable to Sch. E. The Crown do not allege that the £36,000 was in either case a salary, a fee, a wage or a perquisite, but they say it was a profit from the respective offices or employments of the taxpayers. The fundamental question is, in each case, was the £36,000 in share value transferred to each taxpayer a gift or a profit from his position with the Meccano company? Each had an office with the company. Was this windfall a profit "therefrom"?

At the outset it was intended to be a gift. It was not prompted by and was not in respect of any special services rendered to the donors. The transactions were inspired by high motives and with the intention of fulfilling moral obligations. The transactions could have been carried out in accordance with the intention of the Hornby brothers without any documents at all except the transfer forms, and there is no real reason to think they would not have been fulfilled. There was no need to introduce anything of a business character into them. In all the circumstances, so large a sum in value, and a transfer of shares in the company, indicate bounty and generosity rather than remuneration in respect of the taxpayers' respective employments. (The facts are to be contrasted with those in *Weight v. Salmon* (7) ((1935), 19 Tax Cas. 174), where clearly tax liability arose.)

These matters need not be stressed. Had it not been for the deeds, DANCKWERTS, J., would have found in favour of the taxpayers and would have been satisfied that the shares in question were gifts. Without the deeds I do not feel any doubt that that would have been the right view to take.

The judgment continues as follows ([1956] 3 All E.R. at p. 798):

* I.e., before the amendments effected by the Finance Act, 1956.

A "But the transaction was changed. It was conceived that it was desirable to introduce the element of consideration in order to make the promises legally enforceable, and the consideration which was selected was a promise by Mr. Bearsley and Mr. Hewitt to continue serving in their offices with the company for four years from the date of the deeds of covenant. In this way, the acquisition of the shares under the terms of the deeds irretrievably
B was linked up with the services of the taxpayers as officers of the company. It seems to me to be impossible to deny that, under the obligations created by the deed, the shares were received by the taxpayers by reason of their offices, and, therefore, as profits of these offices."

My Lord, JENKINS, L.J.'s judgment has taken from one of the deeds the recitals and cl. 1, and I do not repeat those extracts, but I would read in addition
C only cl. 3:

"If the covenantee shall die before he has become registered as the holder of the said four thousand shares then his legal personal representative shall be entitled to the benefit of the covenants and agreements hereinbefore contained."

D The company was not a party to the deeds. The continuation in the employment was, therefore, not in the hands of the taxpayers alone, and I do not read the deeds as containing a promise by the covenantee in each case to remain four years in his existing engagement with Meccano, Ltd. It would seem that if four further years of service were not fulfilled the consideration would have
E failed. There was, however, an express covenant by the Hornby brothers to transfer and assign the shares within three months of the death of Mrs. Clara Hornby, and as she was ninety-three when she died in October, 1953, it might have happened that the three months would have expired before the four years had run. There is no need to seek to solve complications which might have arisen in that event.

F Mr. Hewitt's written contract as secretary dated Apr. 1, 1937, and Mr. Bearsley's written contract as managing director dated Feb. 15, 1937, expired on Sept. 30, 1946, but both taxpayers were retained in their respective offices at enhanced remuneration by minutes of the directors in meetings held on Oct. 8 and 11, 1946. No provision seems to have been made for their duration, and both employments would appear to have been terminable by reasonable notice. As
G far as the issues arising on these appeals are concerned I see no difference between the cases of the two taxpayers. In my opinion the effect of each deed as drawn is that the service of four years as stipulated was a condition to be fulfilled before the Hornby brothers could be called on as a matter of law or legal obligation to transfer the shares within the specified date, that is, within three months after the death of Mrs. Clara Hornby, their mother. The fact that the transfer date
H was expedited has, as I see it, no effect on the questions involved in this appeal. In this way the transfer of the shares is "linked up" with the respective offices, but the question is whether that necessarily or on a reasonable view involves that the transfer was a payment of remuneration for services rendered to the company or a profit of the employment. I would not regard the transfer as having those attributes or as being of such a character.

I The effect of the deed was, as I appreciate it, to make the transfer contingent on the taxpayers' remaining four years with the company, but it imposed no duty or obligation on them to serve the company. Once the condition of four years' service had been fulfilled, as it in fact was by the end of 1949, the taxpayers became entitled to the shares whether they were in office, or in retirement, or dead, as cl. 3 of the deed makes the benefits accrue to the covenantee's estate in case of death before completed transfer. The two taxpayers were in fact in office with the company at the time of the receipt of the shares, but that was an irrelevant circumstance in no way affecting the transfer. Mr. Jones had died,

and the transfer was to his executors. Mr. Hewitt would have been in retirement if the transfer had been three months after Mrs. Hornby's death and had not been advanced. A

I would hazard this illustration, realising the pitfalls in so doing, but in an endeavour to reveal an essential feature of the case. If a father promised his son ten thousand shares in the family company, from his own holdings, if the son would remain four years with the company at normal and proper remuneration for his work with it, and the condition was fulfilled and the shares transferred, it would not in my view make the value of the shares remuneration or profit of the son's employment in the year in which the transfer took place, or at all. There would be a "link" with the business and the recipient's employment, but the character, nature and quality of the transaction, as I see it, would be the same, or substantially so, as if the father had made the same offer of shares to the son and fulfilled it on the basis that the son would not marry for four years. The contingency would be different, but the transfer would be a gift in each case. B C

The Special Commissioners have taken the view that such link as there was with the office or employment was not sufficient to make the transfer either remuneration or profit therefrom. In my judgment that was not a wrong view to take. Such a payment (treating it as £36,000 in money) cannot be related to any express or implied term of the taxpayers' contracts of employment or of their directorships or as any incident of that class of employment. Nothing of the kind was contemplated as a means of supplementing the remuneration which the company was from time to time agreeing to pay for the services of these two gentlemen. D E

I have read beforehand the judgment of my Lord, JENKINS, L.J., who has reviewed the authorities with such clarity and completeness that I have relied on the many extracts without repeating them or adding to them in this judgment. I would agree with DANCKWERTS, J., that none of the cases cited is conclusive. It is, I feel, hardly necessary for me to add that I have reached my decision with great deference, as it is not in accord with the conclusions of my Lord and the learned trial judge. F

I will deal briefly with the other issues raised before us, on which I am in agreement with my Lord, JENKINS, L.J., and with the learned judge. I do not think the evidence with regard to how the deeds came to be drawn up in the terms they were is admissible any further than the commissioners were prepared to allow it, but even if it can be regarded I doubt if it makes any effective difference. G

It is not, in my view, in harmony with the tax provisions that, if the transactions fell within the terms of Sch. E the income was the value of the rights acquired by the taxpayers when the deeds were entered into. I agree with the learned judge when he says ([1956] 3 All E.R. at p. 798):

"If the conclusion is correct that the transfers of the shares were profits of the taxpayers' offices and remuneration for the services to be performed by them, they were paid for those services when the shares were transferred to them (though the shares were not immediately realised), and assessable accordingly." H

As I think that conclusion is not correct, I would allow the appeals and restore the decision of the Special Commissioners.

Appeals allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Lightbounds, Jones & Co.*, agents for *Owen, Dawson & Wynn-Evans*, Liverpool (for the taxpayers); *Solicitor of Inland Revenue*.

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

DAVEY v. HARROW CORPORATION.

[COURT OF APPEAL (Lord Goddard, C.J., Jenkins and Morris, L.J.J.), March 25, 26, 27, 28, 29, April 16, 1957.]

Nuisance—Adjoining premises—Roots of trees causing damage to adjoining property—Liability of owner—Action for damages.

B

Nuisance—Thistles—Whether action will lie for damage from thistledown blown from neighbouring land.

Boundary—Hedge—Ordnance survey map—Line of boundary passing through centre of hedge.

C

An owner of land on which a tree grows is liable, if its roots or branches encroach on adjoining land and cause damage, to an action for damages for nuisance at the suit of the owner of the adjoining land; and it is immaterial whether the tree is planted or self-sown.

Lemmon v. Webb ([1894] 3 Ch. 1) considered.

Smith v. Giddy ([1904] 2 K.B. 448) considered; *Noble v. Harrison* ([1926] 2 K.B. 332) approved.

D

Semble: an action for nuisance can lie for thistledown being blown on to neighbouring agricultural land and causing damage (see p. 310, letter D, post).

Giles v. Walker ((1890), 24 Q.B.D. 656) criticised.

Per CURIAM: in our opinion, after *Fisher v. Winch* ([1939] 2 All E.R. 144) and the present case, courts in future can take notice of the practice of the Ordnance Survey [viz., that, where a boundary was delineated on the ordnance map by a line and there was a hedge at the boundary, the line on the map ran through the centre of the hedge] as at least prima facie evidence of what a line on the map indicates (see p. 307, letter E, post).

E

Appeal allowed.

[Editorial Note. This case should be considered with *Butler v. Standard Telephones and Cables, Ltd.* ([1940] 1 All E.R. 121), which seems to have been the first case decided in England (cf., as regards Ireland, *Middleton v. Humphries* ((1913), 47 I.L.T. 160) that an action lay for damage caused by encroaching tree roots; compare particularly, [1940] 1 All E.R. at pp. 130, 131.

F

As to the liability for damage caused by overhanging trees or by tree roots, see 3 HALSBURY'S LAWS (3rd Edn.) 368, 369, para. 704; and for cases on the liability for overhanging trees, see 2 DIGEST 64, 65, 403-412.

G

As regards damages for a continuing nuisance, see 24 HALSBURY'S LAWS (2nd Edn.) 90, para. 158; ANNUAL PRACTICE (1956), R.S.C., Ord. 36, r. 58.

As to the presumption of ownership where a boundary is a hedge and ditch, see 3 HALSBURY'S LAWS (3rd Edn.) 366, para. 699; and for cases on the subject, see 7 DIGEST 278-280, 101-117.]

H

Cases referred to:

(1) *Fisher v. Winch*, [1939] 2 All E.R. 144; [1939] 1 K.B. 666; 108 L.J.K.B. 473; 160 L.T. 347; Digest Supp.

(2) *Pickering v. Rudd*, (1815), 4 Camp. 219; 1 Stark. 56; 2 Digest 65, 411.

(3) *Lonsdale (Earl) v. Nelson*, (1823), 2 B. & C. 302; 3 Dow. & Ry. K.B. 556; 2 L.J.O.S.K.B. 28; 107 E.R. 396; 36 Digest (Repl.) 303, 486.

I

(4) *Lemmon v. Webb*, [1894] 3 Ch. 1; 63 L.J.Ch. 570; 70 L.T. 712; *affd.* H.L., [1895] A.C. 1; 64 L.J.Ch. 205; 71 L.T. 647; 59 J.P. 564; 36 Digest (Repl.) 305, 519.

(5) *Crowhurst v. Amersham Burial Board*, (1878), 4 Ex.D. 5; 48 L.J.Q.B. 109; 39 L.T. 355; 2 Digest 65, 412.

(6) *Humphries v. Cousins*, (1877), 2 C.P.D. 239; 46 L.J.Q.B. 438; 36 L.T. 180; 41 J.P. 280; *on appeal*, 46 L.J.Q.B. at p. 442; 36 Digest (Repl.) 288, 361.

- (7) *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 282, 334.
- (8) *Giles v. Walker*, (1890), 24 Q.B.D. 656; 59 L.J.Q.B. 416; 62 L.T. 933; 54 J.P. 599; 36 Digest (Repl.) 294, 402.
- (9) *Pontardawe Rural Council v. Moore-Gwyn*, [1929] 1 Ch. 656; 98 L.J.Ch. 242; 141 L.T. 23; 93 J.P. 141; Digest Supp.
- (10) *Job Edwards, Ltd. v. Birmingham Navigations*, [1924] 1 K.B. 341; 93 L.J.K.B. 261; 130 L.T. 522; 36 Digest (Repl.) 316, 628.
- (11) *Margate Pier & Harbour (Co. of Proprietors) v. Margate Town Council*, (1869), 20 L.T. 564; 33 J.P. 437; 36 Digest (Repl.) 273, 258.
- (12) *A.-G. v. Tod Heatley*, [1897] 1 Ch. 560; 66 L.J.Ch. 275; 76 L.T. 174; 36 Digest (Repl.) 271, 236.
- (13) *Smith v. Giddy*, [1904] 2 K.B. 448; 73 L.J.K.B. 894; 91 L.T. 296; 2 Digest 64, 407.
- (14) *Noble v. Harrison*, [1926] 2 K.B. 332; 95 L.J.K.B. 813; 135 L.T. 325; 90 J.P. 188; 36 Digest (Repl.) 285, 340.

Appeal.

The plaintiff appealed against an order of SELLERS, J., made on July 31, 1956, dismissing an action for (i) damages for injury to the plaintiff's dwelling-house, No. 41, George V Avenue, Pinner, Middlesex, and drains and land appurtenant thereto alleged to have been caused by roots of trees the property of the defendant corporation growing adjacent to the plaintiff's property; (ii) damages for alleged negligence in the felling of trees adjacent to the plaintiff's fence in that they damaged the fence and so negligently poisoned the roots of the trees that they continued to flourish and further to damage the plaintiff's property; and (iii) an injunction to restrain the corporation from continuing to injure the plaintiff's property by allowing the roots of the corporation's trees to grow thereunder. SELLERS, J., held that the trees were the property of the plaintiff. The grounds of appeal were that the judge had misdirected himself in specified ways (immaterial for the purpose of this report) in giving judgment for the corporation. The corporation contended inter alia that the trees were on ground owned by the plaintiff or his predecessors in title, and that the facts proved in evidence did not disclose any actionable nuisance caused, permitted or continued by the corporation and that the trees grew naturally on the land and by that fact alone could not in law constitute an actionable nuisance.

J. G. Strangman, Q.C., and G. C. Heseltine for the plaintiff.

Charles Russell, Q.C., and M. D. Van Oss for the defendants.

Cur. adv. vult.

Apr. 16. LORD GODDARD, C.J., read the following judgment of the court: This appeal is from a judgment of SELLERS, J., dismissing an action brought by the plaintiff, the owner in fee of a house and premises, 41, George V Avenue, Pinner, claiming damages for nuisance and for an injunction on the ground that the roots of trees the property of the defendant corporation, who are adjoining owners, have penetrated into his land and caused subsidence so that his house has been extensively damaged. The learned judge found that the plaintiff's house had been damaged by root penetration but that the trees from which they came were not the property of the corporation but of the plaintiff and that accordingly the questions of law which have been elaborately argued before this court did not arise and he gave judgment for the corporation. The corporation, in the course of correspondence which had continued for a considerable time before action, had always contended that the trees in question were their property, and in the defence originally delivered they made this admission; but some two years later they obtained leave to amend and alleged that the trees were at all times material on the land belonging to the plaintiff and his predecessors in title. After judgment it was found that material letters

- A and memoranda had not been disclosed by the corporation. Accordingly, application was made to the Court of Appeal, who directed further discovery and gave the plaintiff leave to call further evidence. Having seen these documents and heard the further evidence, this court has no doubt whatever that the trees were at the material time growing on the corporation's land. They have now been cut down by them. We shall in the course of this judgment deal more fully
- B with this matter, but it is regrettable that the corporation attempted to resile from the attitude which for years they had taken up with respect to ownership, and we regret that they were given leave to amend after their admission had stood on the record for so long. It was this question of fact more than anything else which accounts for the length of time the case took in the court below and in this court and led to the necessity of applying for leave to call further evidence.
- C The costs of this litigation may well exceed the amount of the damages which the learned judge assessed at £1,000 if his finding should be reversed, and the only satisfaction that we can find in this matter is that, as this court proposes to allow the appeal, the corporation will have to pay them. Now that we have seen the additional documents to which we have referred and heard the further evidence, the material facts can be succinctly stated.
- D The land in question was formerly part of a farm. In the various conveyances which form the plaintiff's title, the parcels conveyed are always described by reference to the Ordnance Survey. The field with which this action is concerned is numbered on the latest survey 1097; it bore a different number in earlier maps, but this is immaterial. The boundary to the south is delineated on the map by a line, and the evidence of an official from the Ordnance Survey Office, given
- E before us but not in the court below, was that the line indicated the centre of the existing hedge. This is in accordance with the invariable practice of the survey as was proved in *Fisher v. Winch* (1) ([1939] 2 All E.R. 144), and in our opinion, after that case and this, courts in future can take notice of this practice of the Ordnance Survey as at least prima facie evidence of what a line on the map indicates. In the present case there is a ditch, or the remains of one, on the south
- F side of the hedge, and the trees in question in this action were growing in the hedge. The hedge no doubt stood on a bank which we understand has almost disappeared. No doubt, therefore, the learned judge was justified, in the absence of the further evidence which was given before us, in applying the presumption that the bank and fence were the property of the landowner on whose side of the fence the ditch was not. In about 1937 the field numbered
- G 1097 was bought by a firm of builders, Messrs. Atherton, for the purpose of a building estate which has since been laid out and developed, and the plaintiff owns and occupies the house nearest to the hedge and bank. However, before any building was begun, Mr. Yarwood, a partner in Messrs. Atherton, wished, as a sensible precaution, to get the boundary agreed with the owners of the land
- H to the south. At that time the owners were the Harrow Urban District Council, and the defendant corporation are their successors. It seems that the council were proposing to provide a cemetery on or quite close to the adjoining land and desired to retain the bank and hedge with the trees on it as a useful screen and a contribution to the amenities of the neighbourhood.
- I In a letter of Sept. 28, 1937, addressed by the clerk to the council to solicitors for an intending lessee of part of their land who wanted to get the question of the boundary settled, the council claimed the fence, as it was described in the letter, and were anxious that the fence and bank should be preserved. This was further emphasised by letter of the same date from the clerk to the surveyor of the council. On Oct. 26 that year, Messrs. Atherton wrote suggesting a meeting on the site to agree the boundaries, and on Nov. 8 the clerk instructed the surveyor to arrange for one. This letter clearly indicates that some doubt was felt by the council as to the ownership of the hedge, and it is plain that they were

anxious that the boundary should be fixed so that it should be on the council's land. A

Accordingly, a meeting took place between Messrs. Atherton's foreman and a representative from the council's parks department. It was a meeting of the most informal description, held not to settle a dispute (for none had arisen) but to agree in a neighbourly fashion where the boundary fence of the building estate should be placed. For the council, their representative, who may perhaps B without offence be described as a head gardener, said that the council claimed the hedge, to which the builders' foreman said he had no objection but wanted his post and wire fence to be as near as possible to the hedge, and so it was agreed. Mr. Yarwood arrived and was told of the arrangement and was quite content with it, and so it was settled and the fence put up. We are quite sure that it never occurred to anyone that any serious alteration of the boundary was taking C place or that there was any intention to grant or convey anything. Had this been intended, it is hardly likely that the council would not have been represented by someone in a more responsible position or that letters would not have been exchanged recording what had taken place. The boundary was fixed to the satisfaction of those to whom the matter was left, and thereafter the council always treated the hedge as theirs. They cut and trimmed the grass and at some D time lopped and topped the trees. It is abundantly clear that, whatever the true position may have been before this meeting, thereafter the bank and fence with the trees on it were regarded as the property of the council, affording a convenient screen to their cemetery, and that they have been in undisturbed possession of it ever since. Their title after this lapse of time and, indeed, at the time when the present dispute arose could not be questioned. E

The evidence as to this meeting was not before the learned judge; had it been we do not doubt he would have held, as we do, that it effectually displaced the presumption based on the position of the ditch. It seems that in some places the wire fence was attached to the trees; when the trees were felled, some small amount of damage was done to the wire, and when complaint was made by the plaintiff, who by then was in possession of the house which had been built on the F site adjoining the bank, the council, in no uncertain terms, claimed the trees as theirs and complained of the attachment of the wire to them. We need not go further into this matter nor into the subject of the drain which the council laid in the land on the plaintiff's side of the fence. They certainly took up a somewhat arbitrary and discourteous position on this matter; but it had no real bearing on the case and the claim for damage done to the wire by the felling was G not pursued, so we need not further refer to it.

The agreement as to the boundary and the erection of the post and wire fence all took place in the late weeks of 1937. Thereafter the development of the estate proceeded and the house now the property of the plaintiff was, as we have said, built on the plot nearest the post and wire fence which marked the boundary of his property. Some twelve years later cracks appeared in the plaintiff's H property and suckers of elm were seen forcing their way up in his garden. From a letter of May 11, 1950, it appears that the plaintiff had first called attention to damage caused by the trees in August, 1949, and by the following May not only the plaintiff but the owner of No. 43, an adjoining house, was complaining that the trees, one of which was only eight feet from the boundary, were damaging I the houses. This letter shows that the council's officers were of opinion that the damage was being caused by root action and recommended that the trees be felled. It seems that this was done but the roots were left in the ground and were not poisoned, so that further suckers appeared and progressive damage was done to the plaintiff's premises. We need not deal at any length with this matter as the learned judge found that the damage was caused by the action of the roots. The probable cause was that, as the building of the house deprived the soil of some of the moisture which would otherwise have gone into the ground,

A the roots which were still active spread in search of other sources and thereby damaged the foundations. There is no appeal against that finding, nor indeed could there be. We have, therefore, to consider the points of law which it was unnecessary for the judge to decide, as he had held on the evidence before him that the trees were the property of the plaintiff and not of the defendants. The industry of counsel has led to the citation of a considerable number of cases

B to some of which we must refer; but the principles which have to be applied seem to be now well established.

Counsel for the defendant corporation does not dispute that, where a tree encroaches on a neighbour's land whether by overhanging branches or by the penetration of roots, the adjoining owner can abate the nuisance by lopping the branches or grubbing up the roots. That the encroachment is not regarded as trespass but as a nuisance is well settled—*Pickering v. Rudd* (2) ((1815), 4 Camp. 219), *Earl of Lonsdale v. Nelson* (3) ((1823), 2 B. & C. 302), *Lemmon v. Webb* (4) ([1894] 3 Ch. 1). In the last case in the Court of Appeal all members of the court treat encroachment of roots or branches as being on the same footing. KAY, L.J., who gave the longest and most elaborate judgment, said in terms that the encroachment of boughs and roots was a nuisance and for any damage occasioned

D an action on the case would lie. Counsel for the defendants submits that this part of the judgment, at least so much as says an action on the case would lie, is obiter, and invites us not to follow it. It is true that the actual point decided was that the adjoining owner could lop the branches which overhung his land without giving notice to the owner of the trees and that his right to do so was unaffected by the branches having overhung his land for more than twenty

E years. But this case went to the House of Lords ([1895] A.C. 1) and certainly nothing was said by way of disapproval of the judgment. The case has been cited again and again and has never been the subject of adverse comment. In our opinion, once it is established that encroachment by roots is a nuisance, it must follow that if damage is thereby caused an action on the case will lie. To this, however, the corporation say first that no action will lie unless it is shown

F that the offending trees were planted and were not self sown and that no action can be maintained where the damage is caused by natural growth or natural causes.

We cannot find that any distinction has ever been drawn between these two classes of trees, except possibly in *Crowhurst v. Amersham Burial Board* (5) ((1878), 4 Ex.D. 5), with which we will deal hereafter, nor do we see on what ground it could be. The nuisance consists in allowing the trees to encroach

G from the land of their owner into that of his neighbour. The owner must keep his trees in, just as he may not allow filth to escape from his premises on to that of his neighbour (see *Humphries v. Cousins* (6) (1877), 2 C.P.D. 239), though perhaps that case may be regarded as based on the doctrine of *Rylands v. Fletcher* (7) ((1868), L.R. 3 H.L. 330). If, however, the neighbour may abate the

H nuisance before it causes damage, we can see no good ground on which it can be said that he is not entitled to bring an action if damage does result. Perhaps the objection that no action will lie in respect of damage caused by natural growth presents more difficulty. No distinction of this sort is to be found in *Lemmon v. Webb* (4) or any of the other cases dealing with trees, but reliance is placed on *Giles v. Walker* (8) ((1890), 24 Q.B.D. 656; 62 L.T. 933) and *Pontardawe Rural*

I *Council v. Moore-Gwyn* (9) ([1929] 1 Ch. 656). The former case, which has not escaped criticism by text writers of great learning and eminence and which was cited but with caution by SCRUTTON, L.J., in *Job Edwards, Ltd. v. Birmingham Navigations* (10) ([1924] 1 K.B. 341), decided that no action lay where an owner had ploughed up forest land and in consequence a large growth of thistles sprang up and the thistledown was blown on to neighbouring land. The judgment of the Divisional Court is exceedingly short—LORD COLERIDGE, C.J., merely observing that he had never heard of such an action and that the alleged duty,

namely, to cut the thistles, could not exist as the thistles were the natural growth of the soil. LORD ESHER, M.R., was the other member of the court and is reported (62 L.T. at p. 934) as saying during the argument:

"This damage is not caused by any act of the defendant. Can you show us any case which goes so far as to say that, if something comes on a man's land for which he is in no way responsible, that he is bound to remove it, or else prevent its causing injury to any of his neighbours?"

Apparently counsel did not reply, but, had he known of *Margate Pier & Harbour (Co. of Proprietors) v. Margate Town Council* (11) ((1869), 20 L.T. 564), it would have been a complete answer. In that case the harbour authority were held liable for a nuisance caused by the accumulation of seaweed washed up by the action of wind and tides into the harbour. LUSH, J., giving the judgment of the Divisional Court, which was almost as short as that in *Giles v. Walker* (8), said that he had no doubt whatever that it was the duty of the appellants to prevent the accumulation of seaweed so that it should not become a nuisance, whether produced by natural or artificial causes. Neither was this case cited in *Pontardawe Rural Council v. Moore-Gwyn* (9), though it had been emphatically approved by A. L. SMITH, L.J., in the well-known case of *A.-G. v. Tod Heatley* (12) ([1897] 1 Ch. 560). It may be that the court was disinclined to regard thistle-down as sufficiently noxious to be dignified as a nuisance, and in 1890 agriculture was perhaps the least regarded of British industries. We think such an action today, especially if founded on nuisance and not on negligence, as was *Giles v. Walker* (8), might well be decided differently. At any rate, this case did not deal with encroaching trees.

We must now say a word with regard to *Crowhurst v. Amersham Burial Board* (5) as counsel for the defendants relied on it in support of his contention that it was only if a tree was artificially brought to the land that there could be liability. The defendants in that case had planted a yew tree very close to the plaintiff's land and it grew through the railings separating the two properties. The plaintiff's horse ate some of the leaves which are poisonous to animals and for the death of the horse the plaintiff sued. Now, it is quite true that the Chief Baron's judgment was founded on *Rylands v. Fletcher* (7), that a dangerous thing had been brought on to the land and allowed to escape. That, no doubt, was a simple ground for finding liability in that case. It was because the tree was poisonous that the damage was caused, and no damage would have resulted but for that fact, though the encroaching branches could have been cut back. On the other hand, in the equally well-known case of *Smith v. Giddy* (13) ([1904] 2 K.B. 448; 73 L.J.K.B. 894), the branches of a tree by overhanging the land of a neighbour spoilt his crop and it was held that the owner of the tree was liable, and though the court treated the case as analogous to *Crowhurst v. Amersham Burial Board* (5) we can find no indication in the judgment that there was any finding that the trees had been planted artificially or that it was on that ground that it was held that the defendant was liable. In the LAW JOURNAL report (73 L.J.K.B. at p. 896) KENNEDY, J., said that, whether *Rylands v. Fletcher* (7) applied or not it was good law that a man had no right to maintain on his land, and, instead of confining it, to allow it to thrust itself on to that of his neighbour, something which thereby did damage, and he further said that he did not see any reason why an action should not lie in that case or why the only right of the neighbour should be to go to the expense of lopping down the branches himself.

Finally, in *Noble v. Harrison* (14) ([1926] 2 K.B. 332), a Divisional Court consisting of ROWLATT and WRIGHT, JJ., distinctly held that there was no difference between trees planted and trees self-sown. In our opinion it must be taken to be established law that, if trees encroach whether by branches or roots and cause damage, an action for nuisance will lie, and we would therefore allow

A the appeal and direct judgment to be entered for the plaintiff for £1,000, the damages assessed by the judge below.

It is only right that I should acknowledge the assistance that I have obtained in preparing this judgment from DR. GOODHART'S essay "Things naturally on the land" published in his *ESSAYS ON LAW AND JURISPRUDENCE*.

B *Appeal allowed. Leave to appeal to the House of Lords refused.*

Solicitors: *Howlett & Clarke* (for the plaintiff); *William Charles Crocker* (for the defendants).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

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ANGLO-SAXON PETROLEUM CO., LTD. v. ADAMASTOS SHIPPING CO., LTD.

[COURT OF APPEAL (Denning, Parker and Sellers, L.JJ.), April 8, 9, 10, 11, 16, 1957.]

E

Shipping—Charterparty—Construction—Incorporation of U.S. Paramount Clause—Application to charterparty of United States Carriage of Goods by Sea Act, 1936—Whether Paramount Clause must be rejected as insensible—Whether loss or damage excepted by s. 4 (2) (a) of the Act includes loss of services of vessel—Whether damages assessed solely in relation to the voyage in which the breach occurred—United States Carriage of Goods by Sea Act, 1936 (Public Statutes No. 521), Preamble, s. 4 (1), (2), s. 5, s. 13.

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Contract—Exception clause—Need for clear words to exempt party from liability.

G

An oil tanker was chartered from the owners by a voyage charterparty which was to remain in force for as many consecutive voyages as the vessel could perform within a period of about eighteen months. By cl. 1 the vessel "being tight, staunch and strong, and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted" was to proceed to the port of loading. Clause 9 of the charterparty contained the usual exception of act of God, perils of the sea and accidents of navigation even when occasioned by negligence of the crew and from "any latent defect in the machinery not resulting from want of due diligence". The charterparty incorporated the U.S. "Paramount Clause" which was attached to the charterparty and was in these terms: "This bill of lading shall have effect subject to . . . the Carriage of Goods by Sea Act of the United States . . . which shall be deemed to be incorporated herein . . . If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further". Section 5 of the U.S. Act provided that the Act should "not be applicable to charterparties". Owing to mechanical breakdowns, the first of which occurred on the voyage to the port of loading, and owing to other breakdowns and incidents she lost 106 days. The charterers claimed damages. It was found that, in the main, the breakdown of the machinery was due to incompetence of the engine room staff amounting to unseaworthiness, but that the owners had exercised due diligence in appointing the staff; in one

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respect, however, the ship was unseaworthy and the owners had not exercised due diligence to make her seaworthy. Under s. 4 (1) and (2)* of the U.S. Act the owners would not be liable for "loss or damage arising from unseaworthiness unless caused by want of due diligence" on their part and would not be responsible for "loss or damage arising or resulting from act, neglect or default of the master . . . or the servants" of the owners in the management of the ship. Section 3 (1) of the U.S. Act bound the owners before and at the beginning of the voyage to exercise due diligence to " (a) make the ship seaworthy . . . (c) make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation ". The U.S. Act also contained general provisions, one of which was s. 13 stating that the Act applied to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade.

On the questions whether the incompetence of the engine room staff and consequent damage to the machinery and delay to the ship was a breach of the terms of the charterparty for which the owners were liable, and if so whether damages for each breach were to be assessed solely in relation to the voyage on which the breach occurred,

Held: the shipowners were liable in damages for all loss of use of the ship by the charterers for the following reasons—

(i) owing to the incompetence of the engine room staff the owners were in breach of the following obligations expressly or impliedly imposed on them by the charterparty, viz., (a) that the ship should be seaworthy at the beginning of successive voyages (*Giertsen v. Turnbull & Co.*, 1908 S.C. 1101, distinguished by DENNING, L.J.), (b) that the ship should be maintained in a seaworthy condition throughout the voyages (*Tynedale Steam Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.*, [1936] 1 All E.R. 389, distinguished), (c) that the shipowners should carry out their part of the contract with reasonable care and skill and (d) that the ship should sail to the port of loading for each successive voyage with all reasonable despatch, and

(ii) the paramount clause did not except the shipowners from liability because (i) it should be rejected as insensible in relation to this charterparty for, in particular, the reason that the charterparty was a world-wide voyage charterparty and, if the United States Act were to be applied to the charterparty it would be necessary to select the enactments of that Act which were to be applied and thus to make a new contract for the parties, which the court would not do (see p. 318, letters D and E, and p. 319, letter I, post; *Nicolene, Ltd. v. Simmonds*, [1953] 1 All E.R. 822, applied); and (ii) in order to except the shipowners from liability under their warranty of seaworthiness clear and precise words were needed, but the paramount clause was neither clear nor precise (*Petrofina S.A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa* (1937), 42 Com. Cas. 286, followed).

Per DENNING, L.J.: if s. 4 (2) (a) of the United States Carriage of Goods by Sea Act, 1936, were to be applied so as to protect shipowners under a

* Section 4 of the Carriage of Goods by Sea Act of the United States, approved Apr. 16, 1936, provides, so far as relevant " (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied . . . Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

" (2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of ship . . . "

- A charterparty, the parties would intend it to protect the shipowners from a claim for loss of services (see p. 318, letters A and B, post).

Decision of DEVLIN, J. ([1957] 1 All E.R. 673) reversed.

- [**Editorial Note.** Although in this instance the Court of Appeal rejected as insensible a clause purporting to apply to a charterparty an Act enacting the Hague Rules, it does not follow that in other cases particular provisions of the Hague Rules as enacted by legislation cannot be successfully applied to a charterparty. The criterion is that the parties should identify the rules which they intend to apply so that the degree of inconsistency and incongruity which was reached in the present case may be avoided. See, particularly, per PARKER, L.J., at p. 319, letters F and G, post).

- C The United States Carriage of Goods by Sea Act, 1936, gives legal effect to the Hague Rules of 1921; the text of the Act is printed in SCRUTTON ON CHARTERPARTIES (16th Edn.) 546-552. The corresponding English statute is the Carriage of Goods by Sea Act, 1924, for which, see 23 HALSBURY'S STATUTES (2nd Edn.) 884.

- D As to the construction of charterparties, see 30 HALSBURY'S LAWS (2nd Edn.) 365, para. 542; and for cases on the subject, see 41 DIGEST 305, 1670 et seq.]

Cases referred to:

- (1) *Giertsen v. Turnbull & Co.*, 1908 S.C. 1101; 45 Sc.L.R. 916; 16 S.L.T. 250; 41 Digest 360, g.
- (2) *Tynedale Steam Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.*, [1936] 1 All E.R. 389; 154 L.T. 414; Digest Supp.
- E (3) *Stafford Allen & Sons, Ltd. v. Pacific Steam Navigation Co.*, [1956] 2 All E.R. 716.
- (4) *Nicolene, Ltd. v. Simmonds*, [1953] 1 All E.R. 822; [1953] 1 Q.B. 543; 3rd Digest Supp.
- (5) *Petrofina S.A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa*, (1937), 42 Com. Cas. 286; Digest Supp.
- F (6) *Leeds Shipping Co., Ltd. v. Duncan Fox & Co., Ltd.*, (1932), 37 Com. Cas. 213; Digest Supp.
- (7) *Minister of Food v. Reardon Smith Line, Ltd.*, [1951] 2 T.L.R. 1158; [1951] 2 Lloyd's Rep. 265; 2nd Digest Supp.
- (8) *Nelson Line (Liverpool), Ltd. v. Nelson & Sons, Ltd.*, [1908] A.C. 16; 77 L.J.K.B. 82; 97 L.T. 812; 41 Digest 474, 3056.
- G (9) *Minister of Materials v. Wold Steamship Co., Ltd.*, [1952] 1 Lloyd's Rep. 485.

Interlocutory Appeal.

- H The charterers appealed and the shipowners cross-appealed from a decision of DEVLIN, J., reported [1957] 1 All E.R. 673, reversing in part the award in the form of a Special Case of the umpire, JOHN MEGAW, Q.C. The umpire had awarded that the shipowners were liable to the charterers (the claimants) for breach of the charterparty, subject to the court affirming his affirmative answers to questions whether the owners were in breach of the charterparty in that:

- (1) the Saxon Star was not seaworthy when she sailed from Baltimore on July 27, 1950;
- I (2) the breakdown of the machinery of the vessel between Baltimore and San Juan was caused by the negligent acts or omissions of the engine-room staff;
- (3) the vessel was not maintained in seaworthy condition during the voyage from Baltimore to Curacao;
- (4) the vessel was not seaworthy when she sailed from Curacao on Aug. 19, 1950;
- (5) the vessel was not maintained in seaworthy condition during the voyage from Curacao to Recife;

(6) the breakdown of the machinery of the vessel between Curacao and Recife was caused by the prior negligent acts or omissions of the engine-room staff; A

(7) the vessel was not seaworthy when she sailed from Buenos Aires on Oct. 5, 1950;

(8) the breakdowns of the machinery of the vessel between Buenos Aires and Curacao (save only the breakdowns of the windlass) were caused by the negligent acts or omissions of the engine-room staff; B

(9) the vessel was not maintained in seaworthy condition during the voyage from Buenos Aires to Curacao;

(10) the owners failed to ensure that the vessel performed her service under the charterparty with all convenient despatch.

The facts appear in the judgment of DENNING, L.J.

A. A. Mocatta, Q.C., and S. O. Olson for the charterers. C

Ashton Roskill, Q.C., T. G. Roche, Q.C., and Basil Eckersley for the shipowners.

Cur. adv. vult.

Apr. 16. The following judgments were read.

DENNING, L.J.: The facts are so well and fully set out in the award of the umpire that I will only state them in outline. D

The case concerns the misfortunes that befell an oil tanker called the Saxon Star. She was owned by the Adamastos Shipping Co. and chartered to an oil company, the Anglo-Saxon Petroleum Co., Ltd. Our task is to construe the charterparty. It was neither a time charter nor a single voyage charter, but a consecutive voyage charter. It was made in London on May 25, 1950. Clause 1 said: E

“That the said vessel being tight, staunch and strong, and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted, shall, with all convenient despatch, sail and proceed to ”

one of several named ports and there load a full and complete cargo of oil. Clause 43 said that the charterparty was F

“to remain in force for as many consecutive voyages for which vessel can tender for loading within a period ”

of eighteen months expiring on Dec. 31, 1951. The vessel was to carry oil from one part of the world to another at specified rates of freight per ton per voyage or a return cargo of fresh water at a lump sum. G

Before entering on the chartered service, the vessel was surveyed and repaired at Baltimore in the United States. On July 27, 1950, she entered on the charter. She sailed from Baltimore for Curacao in the Dutch West Indies to load her first cargo under the charterparty, but on the way she broke down and had to be towed into San Juan (Puerto Rico) for repairs. This breakdown was due to the incompetence of the engine-room staff in not handling properly a minor trouble. Some repairs were done at San Juan, but they were not done properly. H
The boilers were left in a condition in which they were likely to leak. She got to Curacao and loaded a cargo of oil for carriage to Buenos Aires. She set sail from Curacao on Aug. 19, 1950, but within three or four days the boilers began to leak and continued leaking so badly that she had to put into Recife, the port of Pernambuco, Brazil, for repairs. She was there for a fortnight and properly repaired, and left on Sept. 19 for Buenos Aires, where she docked on Oct. 2 and discharged her cargo of oil. She then picked up a cargo of fresh water from the river and set sail back to Curacao. On the way back, there was continuous trouble with the machinery. This again was all due to the incompetence of the engine-room staff: so much so that when she arrived at Curacao on Nov. 5, “the plant of the ship was again in complete chaos”. At Curacao she discharged her cargo of fresh water and took on a cargo of oil. Some repairs were done at Curacao, but only sufficient to enable her to go to the United States I

A for much more extensive repairs. She eventually left Curacao on Nov. 30 for New Jersey. She got there on Dec. 12 and, having discharged her cargo, went in for extensive repairs which took nearly two months. Eventually, on Feb. 10, 1951, she left and there was no more trouble. Thereafter, during the period of the charterparty, the vessel functioned satisfactorily.

B The findings of the umpire show that the root trouble was the incompetence of the engine-room staff. The owners at all times exercised due diligence properly to man the ship. They believed they appointed competent men at the start and, when the troubles arose, they made changes. For instance, they made changes in the engine-room staff at San Juan and at Buenos Aires: but still the staff remained incompetent until Nov. 30, 1950, when the whole lot were changed at Curacao on the way back. The charterers say that, as a result of these
C troubles, they lost the services of the vessel for 106 days: and, inasmuch as freight rates rose much during the period of the charter, they have lost over £80,000 on this account. The owners deny liability. They contend that their only obligation was to exercise due diligence themselves personally and that they have done it.

D On one matter, however, the owners admitted liability. Having regard to the findings of the umpire, they admitted that repairs were not properly executed at San Juan, with the result that there was leakage from the boilers on the way to Recife, for which they are liable: but they say that that was a comparatively minor matter because the machinery was all properly repaired at Recife. The judge thought that, in view of the way the umpire had phrased para. 58 of his award, this admission of the owners left him (the judge) with nothing to do but to affirm the award; but, at the request of the parties, he answered three questions as if they had been asked by the umpire. I cannot help thinking that the judge construed the award with too rigid an eye. The umpire stated the questions of law very clearly in para. 56* of his award and I think that we should do our best to answer them.

E The real question is whether the incompetence of the engine-room staff and consequent damage to the machinery and delay to the vessel was a breach of the terms of the charterparty. Unless the owners are protected by the exempting clauses, I think that they were clearly in breach of the charterparty on any one or more of the following grounds: (i) The owners were under an express, or alternatively an implied, obligation to ensure that the vessel was in seaworthy condition at the beginning of each successive voyage, that is to say, when she
G sailed from Baltimore on July 27, from Curacao on Aug. 19 and from Buenos Aires on Oct. 5, 1950. (*Giertsen v. Turnbull & Co.* (1) (1908 S.C. 1101), concerned a time charter which is different.) In fact, this vessel was not seaworthy at any of those points because she was not manned by a competent engine-room staff. (ii) The owners were under an express obligation to maintain the vessel in a seaworthy condition during each of the successive voyages, perils of the sea
H excepted. Their obligation was, I think, an absolute obligation to ensure the vessel was throughout in a seaworthy condition, save only when the vessel was rendered unseaworthy by perils of the sea, or perhaps by any of the excepted perils in cl. 9. The introduction of the exception "perils of the sea" would be meaningless unless the obligation to maintain was an absolute obligation to ensure that the vessel remained efficient. (*Tynedale Steam Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.* (2), [1936] 1 All E.R. 389, depended on the particular words of that charterparty.) This obligation to maintain was broken by the fact that the machinery broke down on the voyages from Baltimore to Curacao, from Curacao to Recife, and from Buenos Aires to Curacao. Those breakdowns were not due to perils of the sea, but to the incompetence of the engine-room staff. (iii) The owners were under a duty to carry out their part

* The questions stated by the umpire in para. 56 were those printed at p. 313, letter I, to p. 314, letter B, ante.

of the contract with reasonable care and skill. They failed in that duty by the incompetence and consequent negligence of the engine-room staff. (iv) The owners were under an express or alternatively an implied obligation to sail and proceed with all convenient despatch to the nominated port of loading for each successive voyage and to proceed on and complete such voyage with all reasonable despatch. They broke this obligation by the delays which took place unless they can show some just cause or excuse for them.

Such being *prima facie* the obligations of the shipowners, the question is whether they are saved by the exempting clauses of the charterparty. There is an exempting clause, No. 9, which exempts the shipowners from liability, *inter alia*, for "perils of the sea", "accidents of navigation even when occasioned by negligence" and from "any latent defect in the machinery not resulting from want of due diligence". This clause does not avail the shipowners, because the trouble was not due to "perils of the sea", the accidents were not "accidents of navigation", and the defects in the machinery were not "latent". In these circumstances, the shipowners fall back on the "Paramount Clause" which was expressly incorporated in the charterparty and annexed to it by a typed slip in these words:

"Clause Paramount. This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved Apr. 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

It is a strange thing to find a shipowner relying on the Paramount Clause to exempt himself from liability. Historically, its purpose was to make him liable. Shipowners used to insert clauses in bills of lading exempting themselves from all liability, no matter how much they or their servants were at fault. The purpose of the Hague Rules, speaking broadly, was to prevent shipowners from availing themselves of all these wide exemptions and to render them liable for want of due diligence to make the ship seaworthy and other matters: but, so long as they used due diligence in these regards, they were relieved from liability for subsequent negligence of their servants in the navigation or in the management of the ship. These rules have been given the force of law for outward bills of lading from England by the Carriage of Goods by Sea Act, 1924, and in carriage of goods to or from the United States by the United States Carriage of Goods by Sea Act, 1936. When a Paramount Clause is incorporated into a contract, the purpose is to give the Hague Rules contractual force: so that, although the bill of lading may contain very wide exceptions, the rules are paramount and make the shipowners liable for want of due diligence to make the ship seaworthy and so forth. We had an example of this last year in *Stafford Allen & Sons, Ltd. v. Pacific Steam Navigation Co.* (3) ([1956] 2 All E.R. 716).

In the present case, the shipowners seek to turn a paramount clause to their own advantage. They seek to use it to exempt themselves from liability: and they do it, not in a bill of lading for which it was designed, but in a charterparty. Although the charterparty on its true construction puts them, as I think, under an absolute obligation to provide a seaworthy ship (without any exception to avail them), nevertheless the shipowners say that the Paramount Clause cuts this down to an obligation only to exercise due diligence to make the ship seaworthy: and, as the umpire has held that they exercised due diligence, they say that they are not liable. Again, although the charterparty on its true construction leaves them liable for the neglect and defaults of the engine-room staff in the management of the ship, nevertheless the shipowners say that the Paramount

- A Clause relieves them from responsibility for loss or damage arising or resulting from it.

There is no doubt that the Paramount Clause is incorporated into the contract. It is so expressly by cl. 52 and it is one of the contract documents. But what does it mean? It is useless to ask what was the intention of the parties, because I do not suppose they brought their minds to bear on it at all. It looks as if

- B they pulled a common form of Paramount Clause out of the drawer and pinned it to the charterparty without reading it. How otherwise can anyone explain the opening words: "This bill of lading" when it was not a bill of lading at all but a charterparty? And it is quite certain that the parties did not read the provisions of the Carriage of Goods by Sea Act of the United States (which is deemed to be incorporated), for, if they had, they would have seen that it says
- C that "the provisions of the Act shall not be applicable to charterparties". What, I ask, is the use of incorporating into a charterparty an Act which says it is not to apply to charterparties? It simply does not make sense.

We are aware, however, that a Paramount Clause in these words is often attached to charterparties in the very way in which it was done in this case: see SCRUTTON ON CHARTERPARTIES (16th Edn.), pp. 456 and 464. Let us, therefore,

- D try to make sense of the clause and give some meaning to it without relying on the phantom guide of the intention of the parties. As soon as we do this, we find that we have to put our English language to the most uncomfortable contortions and distortions. I will state some of them. (i) We must strike out the words "bill of lading" in the Paramount Clause and write "charterparty" instead. (ii) We must then treat the Carriage of Goods by Sea Act of the United
- E States as if it were written into the charterparty and, having done that, we must strike out, as it were with a blue pencil, the words "The provisions of the Act shall not be applicable to charterparties". Those operations are drastic enough, but they are simple compared with the problems that remain. (iii) There is a provision in the Act [s. 13] which says that

- F "This Act shall apply to all contracts for carriage by sea to or from ports of the United States in foreign trade."

Are we to strike out the words "to or from ports of the United States in foreign trade"? I do not quite know why we should strike out those words, but on the other hand it seems rather absurd to incorporate them into this charterparty.

- G It is a world-wide charterparty and, if the Paramount Clause is to apply, one would think that it should apply throughout the contract of carriage. It would be strange if the shipowners are not liable for the negligence of the engine-room staff on the voyage from Baltimore to Curacao, but are liable for their negligence on the voyage from Curacao to Buenos Aires. To remove this strangeness, we would have to say, as the judge has done, that the words "to or from ports of the United States in foreign trade" are inapplicable to this contract. (iv) The
- H Act only applies to contracts for the carriage of goods, and the term "carriage of goods" is defined [by s. 1 (e)] to cover

"the period from the time when the goods are loaded on to the time when they are discharged from the ship."

- I This provision is intelligible enough in regard to a bill of lading, but it leads to incongruous results when it is sought to apply it to this charterparty. If it is incorporated literally into the charterparty, it means that the Paramount Clause does not apply to all the voyages under the charter, but only to the cargo-carrying voyages. It does not apply, therefore, to the voyage from Baltimore to Curacao, but it does apply to the voyage from Curacao to Buenos Aires. This seems odd. One would have thought that the shipowner would be liable for the negligence of his engine-room staff on both voyages or on neither. The judge has felt unable to remove this odd result. He has said that the Act

applies to the cargo-carrying voyages but not to the others. (v) The Act, in s. 4 (2) (a), exempts the shipowners from liability "for loss or damage" arising or resulting from the neglect of the staff in the management of the ship. In a bill of lading this exemption is intelligible. It exempts the shipowner from loss or damage in relation to the loading and handling of the goods and so forth: see s. 2 of the Act. But how is this to be applied to this charterparty, and in particular to the claim in this case, where there is no loss or damage in relation to goods, but only loss of services of the vessel? The judge seems to have thought that such loss was not covered by the Act, so that the shipowners remained liable despite the Paramount Clause. I should have thought that if this clause is to be applied so as to protect the shipowners under a charterparty, the parties would intend it to protect the owners from a claim for loss of services.

All these problems arise, of course, from the fact that the parties inserted this Paramount Clause (which is designed for a bill of lading) without giving a thought whether it could be sensibly applied to a charterparty. They now present it to this court and ask us to make sense of it. The answer is that we cannot. If we seek to incorporate the Act, or, as I prefer to put it, the Hague Rules, and read the words literally, we find the parties say at one and the same time that the Hague Rules are to apply and yet are not to apply. If we reject the obvious contradictions and inconsistencies, and seek to apply the rest of the Hague Rules in their ordinary meaning, we are left with such incongruous results that no one can suppose that the parties ever intended to produce them. If we reject the contradictions, inconsistencies and incongruities, and put something in their stead, we shall be making for the parties a contract which we may think it reasonable but to which they have never subscribed, because it would bear no relation to the written words. And I have good reason for thinking that we might differ from the judge, and between ourselves, as to what would be reasonable. This all leads me to the conclusion that this Paramount Clause cannot sensibly be applied to this charterparty. It must be rejected as insensible in this setting: see *Nicolene, Ltd. v. Simmonds* (4) ([1953] 1 All E.R. 822). I would emphasise the setting. This is an attempt by the shipowner to escape from liability which otherwise would be imposed on him by his contract and by the law. We have repeatedly refused to allow a party to a contract to escape from his just liability under it by reason of an exempting clause, unless he does so by words which are perfectly clear, effective and precise: see *Petrofina S.A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa* (5) ([1937], 42 Com. Cas. 286). The shipowners' claim to exemption fails on that ground if on no other. I would answer each of the questions* asked by the umpire in para. 56 (1) to (10) by saying "Yes".

PARKER, L.J.: I agree. This case raises difficult questions of construction, but first it is necessary to ascertain what are the contract documents. These consist of (1) the printed form dated May 25, 1950, signed by the parties and headed "Tank Vessel Voyage Charterparty", (2) the typed clauses Nos. 24 to 52 attached which are expressly incorporated by the provision at the foot of the printed form, (3) the named clauses referred to in cl. 52 and attached—these include the "Paramount Clause"—and (4) the addendum made on May 26, 1950.

It is clear, therefore, that the Paramount Clause forms part of the contract, just as if it was set out therein as a numbered clause. It purports in turn to incorporate the provisions of the Carriage of Goods by Sea Act, 1936, of the United States, and accordingly it is contended that the provisions of that Act are also incorporated in the contract and form part of the contract documents. However, before that can be said to be the effect of the clause, I think that it falls to be construed. Thus, the clause begins "This bill of lading" and it is

* These questions are printed at p. 313, letter I, to p. 314, letter B, ante.

A into "This bill of lading" that the provisions of the Act are incorporated. It further provides that

"If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."

B Accordingly, the provisions of the Act are only incorporated into the contract and only prevail over any term of the charterparty repugnant to such provisions if, as a matter of construction, it is permissible to read "This charterparty" for "This bill of lading" throughout the clause.

C Again, even if it is permissible to do this, it is clearly necessary to read in some words of limitation into the clause. The provisions of the Act are designed to apply to bills of lading. The Act expressly provides that they shall not apply to charterparties. They are designed to apply and are only apt to apply to a single cargo-carrying voyage. They are quite inapt to apply to successive charterparty voyages. The Act expressly provides that they shall not apply except in the case of contracts of carriage by sea to or from ports of the United States in foreign trade, whereas this is a world-wide charter. Accordingly, it would be necessary to imply some term into the clause limiting the provisions D of the Act that are to be incorporated as contract terms.

The above remarks are sufficient to show the difficulties in construction which arise. The parties have, however, agreed to the incorporation of the clause into a commercial document and the court, where it is possible, should resolve those difficulties according to recognised rules of construction. Only in the last resort will the court recognise defeat and disregard as nonsense what commercial E men have agreed on. The parties may well have intended that the Hague Rules should apply; but have they expressed that intention in the words used? They have not done so in clear words. At the best, they have done so only, as the learned judge said, in a slap-dash way. At the worst, they have expressed themselves in such ill-thought-out terms that it is impossible to feel sure what they intended. As is pointed out in SCRUTTON ON CHARTERPARTIES (16th Edn.), F at pp. 456 and 464, parties often do incorporate provisions of an Act which embodies the Hague Rules: see *Leeds Shipping Co., Ltd. v. Duncan Fox & Co., Ltd.* (6) ((1932), 37 Com. Cas. 213), and *Minister of Food v. Reardon Smith Line, Ltd.* (7) ([1951] 2 Lloyd's Rep. 265). In all cases which have come before the courts, however, the parties have, so far as I can ascertain, identified the provisions which they intended to apply and have provided that

G "This charterparty shall be deemed to be a contract for the carriage of goods by sea to which"

the provisions in question shall apply. This is the first case which has come before the courts in which this clumsy method has been adopted of simply incorporating the Paramount Clause.

H Clearly this clause read literally as a term of the charterparty is nonsense. It was suggested by counsel for the charterers that it could be read as applying to bills of lading issued under the charterparty, but the short answer is that it does not say so. He also suggested that it was inserted in the expectation that any bill of lading issued under the charterparty would contain a provision that all other conditions were to be as per charterparty, but I cannot accept that as a possible reason. For myself, however, I would be prepared to read "This bill of I lading" as "This charterparty" if thereby certainty as to intention could be discovered. And, if this were done, I would go further and strike out as insensible the provision of the Act which excluded charterparties. However, it is at that stage that, as I think, the difficulties become insurmountable. What provisions are to be treated as incorporated? This charter is, as I have said, for successive charterparty voyages and world wide in its scope. It is clearly not possible to select those provisions which the court thinks reasonable to apply in all the circumstances. That would be to make a new contract between the parties.

The only safe method of exclusion would be to reject only those provisions or parts of provisions which would be insensible. But, if this is done, one is left with such a jumble of provisions that it is, in my judgment, quite impossible to feel sure what the parties intended. Accordingly, I feel constrained to reject the whole of the Paramount Clause as insensible. A

Moreover, the owners are trying to invoke this clause to exempt themselves from the warranty of seaworthiness. To achieve that result clear, effective and precise words are required: see LORD WRIGHT in *Petrofina S.A. of Brussels v. Compagnia Italiana Trasporto Olii Minerali of Genoa* (5) ([1937], 42 Com. Cas. 286). In my judgment, the Paramount Clause as incorporated in the charter-party fails to achieve that result. I think that the words of LORD LOREBURN, L.C., in *Nelson Line (Liverpool), Ltd. v. Nelson & Sons, Ltd.* (8) ([1908] A.C. 16) are very much in point. He said this (*ibid.*, at p. 19): B

“But in truth I think the clause, taken as a whole, so ill thought out and expressed that it is not possible to feel sure what the parties intended to stipulate. The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain; and such a contract is not proved by producing language which may mean that and may mean something different . . . [*ibid.*, at p. 20] I am afraid it is useless to draw the attention of commercial men to the risks they run by using confused and perplexing language in their business documents. Courts of law have no duty except to construe them when a question arises; but it is often very difficult. And sometimes what the parties really intended fails to be carried out because ill-considered expressions find their way into a contract.” C

In the result, I find it unnecessary to deal with the other points dealt with by the learned judge on the basis that the provisions of the Act were incorporated. There remain, however, certain other points which have to be determined, and I can give my views quite shortly. (1) This is not a time charter but a charter for successive voyages. In these circumstances, I think that the obligation to provide a seaworthy vessel applies at the commencement of each of the charter-party voyages. I agree with the umpire on this point. (2) Even if I am wrong in the above, I think that the obligation to maintain in cl. 1, which extends over the whole period of the charter, amounts to an undertaking that the vessel would remain tight, staunch and strong and in every way fitted for the successive voyages, “perils of the sea excepted”. The nature of the obligation to maintain must depend on the exact words used: see *Tynedale Steam Shipping Co., Ltd. v. Anglo-Soviet Shipping Co., Ltd.* (2) ([1936] 1 All E.R. 389), and *Minister of Materials v. Wold Steamship Co., Ltd.* (9) ([1952] 1 Lloyd's Rep. 485). In its present form it can, I think, only be read as a continuing warranty of seaworthiness. Whether it is also subject to the exceptions in cl. 9 it is unnecessary to determine, since in the circumstances of the case they do not apply. (3) I think that the effect of cl. 43* is to make the express provision in cl. 1, that the vessel should proceed to the first port of loading with all convenient despatch, applicable to each charterparty voyage. I do not think damages for breaches of this obligation are confined to the voyage in which each breach occurs. It seems to me that the effect of cl. 43 is that the delays can be aggregated and damages claimed for any loss of use of the ship. In other words, the charterers are entitled to the use of the vessel for as many consecutive voyages for which the vessel can tender, the owners performing their obligations in regard to convenient despatch subject to the express exceptions. (4) Subject to the express exceptions, I think that it is an implied term of the charterparty that the owners and D

* Clause 43 provided that: “This charterparty is to remain in force for as many consecutive voyages for which vessel can tender for loading within a period of about [eighteen] months, counting from the date of vessel's readiness to load on first voyage.” E

A their servants will exercise reasonable skill and care. Again I think that by reason of cl. 43 damages for any breach do not fall to be assessed solely in relation to the voyage in which the breach occurs.

For these reasons, I would allow this appeal and uphold the findings of the umpire in regard to each of the first ten breaches set out in para. 56 of the award*.

B **SELLERS, L.J.:** The main issue in the case, as it has been dealt with before both the courts, is the extent of the protection given by the contract to the shipowners in respect of their prima facie responsibility, express or implied, found in the charterparty, for the seaworthiness of the vessel.

C Clause 9 of the charterparty provided certain exceptions, but it was not submitted before us that they exempted the shipowners from the present claims of the charterers. The protection that the shipowners seek is the protection which they would have if the provisions of the Hague Rules, as applied to a contract of carriage of goods on a bill of lading, governed the respective obligations and duties under the charterparty.

D A typed clause at the foot of the charterparty provided that "Clauses 24-52, as attached, are deemed incorporated in this charterparty". The last of the attached documents was one headed "Paramount Clause" and it was in the terms which have already been read. The clause as it stands was expressly incorporated into the contract, but the problem is: What does it mean, what is its effect? The learned umpire expressed the view in his award that the clause did not entitle the shipowners to rely on the provisions of the Carriage of Goods by Sea Act, 1936, of the United States in relation to the charterparty or their obligations thereunder. **DEVLIN, J.**, in his judgment ([1957] 1 All E.R. 673 at pp. 678-680) has found a way to read the United States Act into the terms of the charterparty, and has then construed some of its provisions in the setting of the charterparty and held that, notwithstanding that the Act expressly applies to contracts for carriage by sea to and from ports of the United States in foreign trade, that has to be disregarded, and he held that the protection afforded by the Act applied to all the cargo-carrying voyages within the limits of the contractual ports, which are practically world wide. On the other hand, the learned judge was constrained to hold that the provisions of the Act do not apply to a non-cargo-carrying voyage (*ibid.*, at p. 679). On this view the vessel would run, as it were, sometimes under the Hague Rules and sometimes not. This would depend on whether or not there was any cargo in the holds. Even a voyage with a special cargo of water to Curacao (for cargo it would be) would be under the Hague Rules, although the same voyage in ballast would not. Further, on the basis of the incorporation of the Act, I can see no adequate justification for striking out the provisions as to United States ports as insensible, although it would seem eminently reasonable so to do. Therefore, the incidence of the Hague Rules would again depend on whether the voyage was to or from an American port. This, as I see it, would be chaotic and not contractual.

H The charterparty was entered into in London. The vessel was described as a United States tank vessel and she was at the time of the charter in Chester, Pennsylvania. It is difficult to understand why the American Paramount Clause was introduced into the attached documents if all that was desired was that the Hague Rules should be made applicable to the charterparty. There is no qualification of the clause, no modification of the Act, and in addition to the express terms of the clause itself applying it to bills of lading, the Act, when read, clearly states that it does not apply to a charterparty.

I It was contended for the charterers, and it might be, that the clause being a bill of lading clause was inserted to apply to bills of lading issued in the course of the charterparty voyages. There is nothing to say so and a good deal would have to be implied. On the other hand, to give the clause effect as the shipowners submit requires even more imagination and a drastic elimination or

* These breaches are set out at p. 313, letter I, to p. 314, letter B, ante.

substitution of all words which offend against the applicability of the clause to a charterparty. It seems to me that this would be doing what the parties did not do themselves, and would be giving to provisions a certainty and a clarity which they do not possess. Where the court can be certain of the contractual intention, then matters which conflict with the intention may be disregarded as insensible, but if very little seems to fit in with the accepted provisions of a contract and a position of uncertainty and doubt arises—as I think it does here—it would be passing out of the realm of construction if one proceeded to cull or create contractual terms out of the muddled material. A B

My Lords in both their judgments have revealed the difficulties and contradictions which arise in attempting to fit the United States Carriage of Goods by Sea Act, 1936, into the charterparty by way of the Paramount Clause. I agree with the reasoning and conclusions of those judgments and I do not wish to add to their detailed analyses of the clause and its effect. It may well be that the construction of the Hague Rules (or the provisions of the United States Carriage of Goods by Sea Act) simpliciter would be different from the construction of any given provision in the setting of a charterparty when it would fall to be construed in its association with all other relevant terms. As I would hold that there was no incorporation, the other questions decided by the learned judge do not arise for further consideration. C D

The form of the charterparty is a voyage charterparty, but cl. 43 of its terms provides that it is to remain in force for as many consecutive voyages for which the vessel can tender for loading within a period of about eighteen months, counting from the date of the vessel's readiness to load on the first voyage, the last cargo to be loaded on or about Dec. 31, 1951. E

The charterers claim that they have lost voyages which they could have fulfilled but for the breaches of contract of the shipowners. If liability of the shipowners is established, the basis of the charterers' claim would, in the light of the contract, be correct. Their loss during the period of time during which they should have had the use of the ship for consecutive voyages falls to be assessed. I would reject the shipowners' argument to the contrary. F

As a succession of voyages was contemplated and contracted for, it would in my opinion involve that at the commencement of each voyage the vessel was seaworthy as stipulated by cl. 1 and as required under the common law obligation to provide a seaworthy ship, including competent officers and crew; and that on each occasion the vessel would with all convenient despatch sail and proceed to the nominated port and complete the voyage with reasonable despatch. In so far as the warranty of seaworthiness is express in the charterparty, it has been made continuing by the words "to be maintained in such condition during the voyage", the only exception being "perils of the sea". A vessel is maintained in a watertight condition by the necessary inspections and surveys, replacements and repairs. It does not seem to me to be maintained in a watertight condition if it is allowed to leak and is then repaired with despatch and diligence, as was argued for the shipowners. As the greatest care of maintenance and large expenditure thereon cannot in all circumstances ensure seaworthiness, an exception such as is provided in the charterparty, "perils of the sea excepted", seems appropriate. G H

Although it was argued on behalf of the shipowners to the contrary (if I have correctly followed the argument), I would add finally that the shipowners are liable, unless expressly exempted, for failure to carry out the contract by reason of lack of reasonable care and skill of the master and crew. In this case, although apparently due diligence and care was taken by the shipowners, a competent engine-room staff was not established, even though the members were changed, and the incompetence or negligence of one or more of the engineer officers was largely responsible for the breakdowns of the engines and the consequent delays. I

- A I agree that the appeal should be allowed and that the provisional findings of the umpire should be upheld. I would answer the ten questions* in the affirmative.

Appeal allowed: cross-appeal dismissed. Leave to appeal to the House of Lords granted.

- B Solicitors: *Waltons & Co.* (for the charterers); *Constant & Constant* (for the shipowners).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

C Re WOLDINGHAM CHURCHYARD.

[SOUTHWARK CONSISTORY COURT (The Chancellor, E. Garth Moore, Esq.), April 11, 1957.]

Ecclesiastical Law—Costs—Tombstone erected in churchyard without faculty or incumbent's permission—Stonemasons' oral undertaking to customer to obtain necessary permission—Faculty subsequently granted in part—Stonemasons ordered to pay costs of all parties and to bear costs of removal of part of tombstone.

- D A confirmatory faculty was sought for a tombstone which had been erected in Woldingham churchyard. The tombstone consisted of a cross on a boulder, curbs and chips. The stonemasons who had erected the tombstone had given an oral undertaking to the customer that they would obtain the necessary permission for carrying out the order but in fact they erected the tombstone without having obtained either a faculty or the incumbent's permission.

- E **Held:** (i) that a confirmatory faculty would be granted for the cross on the boulder only and that the curbs and chips should be removed; and
- F (ii) that the cost of the removal of the curbs and chips would be borne by the stonemasons and further that the stonemasons would bear all the costs of all the parties in the cause.

[As to faculty for erection of tombstone or monument in a churchyard, see 13 HALSBURY'S LAWS (3rd Edn.) 416, para. 923, note (u); and for cases on the subject, see 19 DIGEST 288, 786.]

- G As to costs where work done without necessary faculty, see 13 HALSBURY'S LAWS (3rd Edn.) 517, 518, para. 1112, note (k); and for cases on subject of costs, see 19 DIGEST 334, 335, 1457-1472.

For the Faculty Jurisdiction Measure, 1938, s. 3 (1), see 7 HALSBURY'S STATUTES (2nd Edn.) 215.]

H Petition.

- I In this case a firm of stonemasons, Chas. E. Ebbutt & Sons, Ltd., and their customer, one Lancaster, petitioned, by petitions dated Oct. 12, 1956, and Oct. 19, 1956, respectively, for a faculty for the erection of a memorial stone. Appearances in opposition were entered by the incumbent and by the Archdeacon of Kingston. The petitions were consolidated. The stonemasons appeared by their manager. The customer appeared by his solicitor. The incumbent and the Archdeacon of Kingston appeared in person.

MR. CHANCELLOR GARTH MOORE: There are two consolidated petitions, one by a firm of stonemasons, and the other by their customer, for a confirmatory faculty to authorise the retention of a monument put into the churchyard of Woldingham parish church. The monument is a tombstone and consists of a cross on a boulder, curbs and chips, all of Cornish granite. It is the

* These questions are printed at p. 313, letter I, to p. 314, letter B, ante.

sort of monument for which it is unlikely that a faculty would have been granted had one been sought. In fact no faculty was sought nor was the permission of the incumbent given. A

The customer gave the order for the monument to the stonemasons on Apr. 18, 1956, and they gave him an oral undertaking that they would first get the necessary permission. On Sept. 1, 1956, permission for the erection of the monument was sought by them from the incumbent, who informed them that, if they wished to erect this type of monument, they must first obtain a faculty from this court. On Sept. 3, 1956, no permission having been granted nor a faculty obtained, the monument was nevertheless put in by the stonemasons. It must be emphasised that strictly speaking only this court can give permission for the erection of a tombstone in a churchyard though in most cases the chancellor is content to delegate the power to the incumbent. By entering the churchyard and erecting the monument after the incumbent had refused permission the stonemasons were guilty of a gross trespass. Further they were guilty of a breach of contract between themselves and their customer by not obtaining the necessary permission for the erection of this monument. For both of these they have rendered themselves liable to actions for damages in the common law courts. B C D

I am prepared in the present case, though only out of consideration for the family of the deceased, to grant a confirmatory faculty in respect of the cross on the boulder, only; the curbs and chips must be removed and their removal is a condition precedent to the grant of a faculty in respect of the cross and boulder. Further, the cost of removal of the curbs and chips must be borne by the stonemasons, and they must be removed within a month. If within the month the curbs and chips are still in position, then the order will lie to the customer who will have a further month in which to remove them and to satisfy the condition on which the cross and boulder may remain, and any cost incurred by him will be paid by the stonemasons. If they are not removed within this period, then the order will go to the incumbent for a further month, and likewise his costs will be paid by the stonemasons. Lastly, if the curbs and chips are still in position after three months, then the order will lie to the Archdeacon to remove them, and the cost incurred by him will be paid by the stonemasons. E F

The stonemasons will further pay all the costs of all the parties to this suit. If there is any repetition of this sort of behaviour by them, they are likely to find themselves banned from carrying out any work in consecrated ground in this diocese, and perhaps the neighbouring Diocese of Canterbury also will be notified of this ban. The customer in the present case was entitled to rely on the stonemasons to comply with the requirements of the law, and no feeling can be entertained for him other than one of sympathy. The stonemasons have no excuse for not observing the law and if they really do not already know it, they had better acquaint themselves with it speedily. It is intolerable that persons should without leave put things on ground which does not belong to them, and, if any monumental masons are under the impression that they can do this sort of thing and get away scot-free, the order as to costs in this case may disillusion them. G H

Order accordingly.

Solicitors: *Walker, Smith & Way*, Chester (for the customer).

[*Reported by C. D. VOELCKER, ESQ., Barrister-at-Law.*]

A

SCENE ESTATE, LTD. v. AMOS.

[COURT OF APPEAL (Denning, Parker and Sellers, L.JJ.), April 4, 5, 1957.]

Agriculture—Agricultural holding—Letting for grazing for period of three months—Letting renewed every three months twenty-one times—At time of original letting each party expected renewals but there was no contract for renewals—Whether letting in “contemplation” of the use of the land only during some specified period of the year—Agricultural Holdings Act, 1948 (11 & 12 Geo. 6 c. 63), s. 2 (1), proviso.

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By a written agreement made on Jan. 20, 1950, landlords agreed to let for a rent and a farmer agreed “to take the right to use for grazing purposes only and not otherwise . . . the H. Golf Course . . . for three months from the date of this agreement”. Shortly before each three months expired the agreement was renewed in writing. There were twenty-one such renewals in all; each was a new agreement. At the time of the original agreement both parties thought that it would be renewed every three months for at least a year, and probably more, but there was no agreement to that effect. The landlords would never have let the land to the tenant for a period which would have given the tenant security of tenure under the agricultural holdings legislation; and the tenant knew this. The landlords claimed possession, after the expiry of the last period of three months, on the ground that the letting was within the proviso to s. 2 (1) of the Agricultural Holdings Act, 1948, as being “made (whether or not the agreement expressly so provides) in contemplation of the use of the land only for grazing or mowing during some specified period of the year” and so was excepted from the security of tenure afforded by the Act.

Held: the letting was within the proviso and the landlords were therefore entitled to possession because

F

(i) on the facts there had been a series of successive lettings each of three month’s grazing, not one continuous letting,

(ii) each party had merely an expectation that the letting would be renewed every three months for a year or more, and no letting was made “in contemplation of” the land being used under it for a period of a year or more.

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Per CURIAM: the word “contemplation” in the proviso to s. 2 (1) of the Agricultural Holdings Act, 1948, covers the case of a sham agreement or where the agreement is in fact only for grazing or mowing and for a specified period of a year but is silent on these matters; but where the agreement is genuine and is express on these matters the court should not look beyond it (see p. 328, letters D to G, and p. 329, letter G, to p. 330, letter A, post).

Appeal dismissed.

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[As to lettings or licences within the proviso to s. 2 (1) of the Agricultural Holdings Act, 1948, see 1 HALSBURY’S LAWS (3rd Edn.) 254, para. 554, text and note (k).]

For the Agricultural Holdings Act, 1948, s. 2 (1), see 28 HALSBURY’S STATUTES (2nd Edn.) 29.]

I Cases referred to:

(1) *Reid v. Dawson*, [1954] 3 All E.R. 498; [1955] 1 Q.B. 214; 3rd Digest Supp.

(2) *Land Settlement Assn., Ltd. v. Carr*, [1944] 2 All E.R. 126; [1944] K.B. 657; 114 L.J.K.B. 33; 171 L.T. 121; 2nd Digest Supp.

Appeal.

This was an appeal by the defendant, the tenant, from an order of HALLETT, J., dated Dec. 21, 1956, granting a claim by the plaintiff, the landlords, for possession

of agricultural land, an old golf course, near Hythe, let by the landlords to the tenant on successive three monthly tenancies for grazing only, the last of which tenancies had expired. The facts appear in the judgment of DENNING, L.J. A

R. E. Megarry, Q.C., and Ian Percival for the tenant.

Scott Henderson, Q.C., and S. L. Newcombe for the landlords, were not called on.

DENNING, L.J.: This case concerns an old golf course near Hythe. It is owned by Scene Estate, Ltd. They, the landlords, allowed a farmer, Mr. John Reuben Amos (herein called "the tenant"), to have some 150 acres for the purposes of putting some of his cattle on it. Now the landlords want to terminate the arrangement with the tenant. The tenant, however, claims that under the Agricultural Holdings Act, 1948, he is entitled to remain there. B

It is well-known that since 1948 a tenant of agricultural land is in a strong position: he can stay in occupation for life unless the owner gets the Minister's consent or fulfils some other statutory provision enabling him to evict the tenant. The whole question in this case is whether the arrangement which took place was such as to entitle the tenant to the benefit of the Act. This depends on s. 2 (1) of the Act of 1948, which this court has already considered in *Reid v. Dawson* (1) ([1954] 3 All E.R. 498). Under that sub-section any agreement for a tenancy of agricultural land, even for less than a year, or a licence to occupy agricultural land for less than a year, gives rise to a right to remain indefinitely, except that there is a proviso that the sub-section shall not apply (and these are the important words): C

" . . . in relation to an agreement for the letting of land, or the granting of a licence to occupy land, made (whether or not the agreement expressly so provides) in contemplation of the use of the land only for grazing or mowing during some specified period of the year . . . " D E

We have to consider whether the agreement in this case comes within that proviso.

Now let me state the history of this matter. This golf course had been requisitioned during the war and it was bought by the landlords in 1947. The tenant was a neighbouring farmer, and he was very anxious to be allowed to put his cattle on the land. The landlords, however, did not want to let him have it on a tenancy which would become indefinite, and almost permanent, under the Agricultural Holdings Act, 1948, so they inquired of their lawyers whether there was a way in which they could let him have the land for grazing, but still not tie it up in his hands for his life. The tenant, who wanted to get the grazing, was ready to agree to any legal arrangement to that end, because he knew that he would not get the grazing unless he entered into an agreement which enabled the landlords to get possession when they desired. On Jan. 20, 1950, an agreement was drawn up and signed whereby the landlords agreed to let and the tenant agreed F G H

"to take the right to use for grazing purposes only and not otherwise All those fields, meadow or pastureland . . . known as the Hythe Golf Course in the parish of Hythe in the County of Kent for the period of three months from the date of this agreement." I

So the landlords let the tenant this land, for grazing purposes only, for a period of three months.

Just looking at that agreement by itself, it is quite plain that it was expressly within the proviso and that it left the owner free to regain his land at the end of the three months. Now, however, comes the difficulty: at the time when the agreement was made both parties thought that it would be renewed at the end of the three months, and so on, a renewal every three months. Indeed, the tenant did quite a lot of work to the fencing to keep his cattle in, and he would not have

A done it unless he had thought that the agreement would be renewed every three months. In order to avoid being caught by the Act, the lawyers seem to have advised the landlords in this way: just before the three months are up, write a letter giving the tenant a renewal, or extension, if you please, for another three months. That is what was done. Every three months a letter was written. I take one at random. On Jan. 8, 1952, for instance, after the arrangement had
B been running for many months, Col. Butler, the agent of the landlords, wrote to the tenant:

C "With reference to your extended grazing tenancy held under an agreement dated Jan. 20, 1950, the eighth extension of which expires on the 19th inst., I am authorised to inform you that upon payment of a sum of £27 0s. 9d. you may reoccupy the said land for a further period of three months commencing Jan. 20, on the same terms and conditions as are stated in the aforesaid agreement, except that the date of termination of the tenancy shall now be Apr. 19, upon which date all stock shall be removed from the said land, and possession of the land given up."

D So what happened was this: just before the end of every three months, a letter was written saying that on payment of the specified amount the tenant could re-occupy the land for a further three months. He paid for, and received, extension after extension. In 1954 another agreement was drawn up, in which the acreage was altered and the amount of rent varied accordingly: but otherwise it was the same as before. That went on up to 1955. There were twenty-one of these extensions, one every three months.

E Let me first dispose of an argument which has been put forward by junior counsel for the tenant. It seems to me reasonably plain that this was not one continuous letting but a series of successive lettings to the tenant. In the beginning there was a letting of three months' grazing. Then there was a letting of the next three months' grazing. Every three months there was a new agreement, and each agreement was on the face of it within the proviso, so that the
F tenant apparently did not get the benefit of the Act.

When the tenant went first to lawyers, they told him that he had no right to remain. Then he took further advice and some other lawyers told him that there was a good argument that he was protected under the Act, and so eventually the case came to this court. Leading counsel for the tenant relies on the words in the sub-section,

G "made (whether or not the agreement expressly so provides) in contemplation of the use of the land only for grazing or mowing during some specified period of the year."

H Pointing to the word "contemplation", he says that the courts are not concerned with what the parties have said in the formal documents, or even with what they have said outwardly one to the other. He says that the contemplation of the parties can be discovered by looking inside their minds, and that, on the evidence, here both sides contemplated that the arrangement would continue for at least a year and probably longer: and that therefore the tenant was protected.

So far as the facts are concerned, the judge summarised the evidence very fairly in these words:

I "Col. Butler [he is the agent for the landlords] whose evidence was in some respects vague, but in all respects notably candid, told me that he himself expected and assumed that the tenant would continue in occupation of the land for more than three months, certainly one year, perhaps two, because he thought that the land would not be required by the landlords for any other purpose for a year or more, but he said that this was only his own assumption and that he never communicated it to the tenant. The tenant himself conceded, in answer to his own counsel, that he did not remember Col. Butler saying anything to him about extensions, but he also no doubt

expected and assumed that he would be able to remain in possession of the land for longer than three months, for the same reason as that stated by Col. Butler. He did not suggest that there was ever any sort of agreement that his tenancy would be renewed from time to time, and I feel quite sure that he can never have had any hope of obtaining such an agreement from the landlords."

In other words, each party had it at the back of his mind that the agreement would be renewed from time to time every three months, but each kept it to himself and did not actually make a stipulation about it. It was just an expectation. It is argued before us that, on that finding and on the evidence (which I need not go through because the judge has summarised it sufficiently) it was in the contemplation of both parties that the agreement would extend for a long time, not merely for three months or a specified period of the year, but much longer; and that therefore the tenant was protected in his occupation.

I do not think the word "contemplation" in the proviso should be given the meaning which leading counsel for the tenant seeks to put on it. In my opinion the object of the word "contemplation" in the proviso is this: It is to protect a landlord who has not expressly inserted a provision that it is for grazing only or for mowing only or that it is for a specified part of a year: when nevertheless both parties know that that is what is contemplated. Often a landlord may let a field to a man by word of mouth saying: "You can have the field this year the same as you had it last year". Both sides mean it to be for grazing only, and mean it to be only for a few weeks of the spring, but they do not say so expressly. In such circumstances, even though nothing is expressed in the agreement, nevertheless the landlord can still take advantage of the proviso. That seems to me to be the real object of introducing the "contemplation" of the parties. It would also cover the case of a "sham" agreement. Suppose, for instance, the written agreement did not really represent the true transaction. The parties might contemplate the use of the land for ploughing up, but falsely describe it as for grazing; or they might contemplate a letting for two years and falsely put in three months. A sham agreement of that kind would not come within the proviso, because, despite the express words, the parties intended a different state of affairs. It seems to me that those are the two cases which the legislature had in mind: and I find it difficult to visualise any other. Apart from those cases, the courts should be guided by the terms of the agreement, express or implied, and by nothing else: for in the ordinary way it is from those terms alone that the contemplation of the parties can be gathered.

On the findings of the judge, I think that this is a case where the contemplation of the parties can only be gathered from the documents which passed between them. I look on the agreements (as the judge did) as being successive arrangements for grazing for three months, one period of three months following another, a new arrangement each time. Each one of those arrangements comes within the proviso to s. 2 (1) and is not caught by the Act. The proviso in s. 2 (1) of the Act was inserted in favour of landlords, and here we find a tenant seeking to divert it to his own purposes. I do not think he should be allowed to do so. The tenant fully understood all the time that he was not to be protected by the Act, and he is not protected. I agree with the judge and would dismiss the appeal.

PARKER, L.J.: I agree. Section 2 (1) of the Agricultural Holdings Act, 1948, applies the provisions of that Act to agreements "for the letting of land, or the grant of a licence to occupy land" (which is agricultural land) where the period of letting or licence is for only part of the year. In doing so, Parliament has overcome the difficulty which arose as a result of the decision in *Land Settlement Assn., Ltd. v. Carr* (2) ([1944] 2 All E.R. 126). A landlord is, however, able to let or licence the use of agricultural land without bringing himself within

A the Act if he can show that the conditions of the proviso are fulfilled. Quite clearly the onus is on him, the landlord, to satisfy the court that the agreement in question was

“ . . . made (whether or not the agreement expressly so provides) in contemplation of the use of the land only for grazing or mowing during some specified period of the year . . . ”

B These words are not altogether easy to construe, but this at any rate is clear: first, that “ specified period of the year ” is equivalent to “ specified part of the year ”—that is the effect of the decision of this court in *Reid v. Dawson* (1) ([1954] 3 All E.R. 498). Secondly, that the “ contemplation ” must be, not only that the use of the land shall be only for grazing or mowing, but that the period of use shall be only a period which is less than a year. It seems to me that, as a matter of grammar and ordinary reading, the word “ only ” must apply not only to the use but to the period; and, indeed, if it were not so, the words “ some specified period of the year ” would be quite unnecessary, because this is a proviso to a section which is only dealing with tenancies which are for part of a year. C Thirdly, it seems to me that the “ contemplation ” must be mutual, both on the part of the landlord and of the tenant. D Fourthly, that you judge the contemplation as at the commencement of the agreement, if there is but one agreement, or, if (as here) there is a succession of agreements, then at the beginning of each agreement; because, unless the landlord satisfies the court that the required “ contemplation ” exists in respect of each, then, from the time of the agreement in respect of which he fails to show the necessary contemplation, the provisions of the Act will apply. E Lastly, it seems to me clear, by reason of the words in parentheses—“ whether or not the agreement expressly so provides ”—that it is permissible, in certain cases at any rate, to go outside the agreement and see what the “ contemplation ” was from extrinsic evidence.

Difficult questions remain as to what is meant by “ contemplation ”, and as to the exact circumstances in which you can look at extrinsic evidence. F A landlord may (as here) desire to be in a position to develop land which is agricultural land at some indefinite future date. Accordingly, he lets the land expressly for mowing and expressly for a period which is short of a year. That is the only obligation in the agreement. At the same time, however, he does not expect to be able to develop it for, say, a year or two, and he expects that his tenant will be allowed to remain on; and the tenant has the same understanding. G The question then is: Is the original agreement made in contemplation of use for mowing and grazing for three months, or is it made in contemplation of use for mowing and grazing for one or two years? For myself, I think that the words “ made in contemplation of ” are stronger than “ made in expectation of ”. Prima facie it seems to me that an agreement is not made in contemplation of something being done under it unless there is power and obligation to do that very thing. H There is no power in the tenant to stay for more than three months and no obligation in the landlord to allow him to do so. Beyond three months the matter is purely a matter of expectation. However, if that is so, what (it is said) is the effect of the words in parentheses, “ whether or not the agreement expressly so provides ”? In my judgment, those words do not require a different construction. They are apt, and perfectly apt, to enable one to look outside I the agreement or the licence in order to ascertain the terms where the agreement is silent on it. If the agreement is express on the subject, then I do not think that one is entitled to look beyond it, unless it is for the purpose of showing that the agreement is a complete sham. In other words, in the case of a genuine agreement which expressly says that the lease is for grazing or mowing only, and expressly says that the period is a period of less than a year, there is no right to look beyond the agreement itself.

For those reasons, I would dismiss this appeal.

SELLERS, L.J.: I, too, agree that this appeal should be dismissed and would uphold the judgment of the learned judge. I so entirely agree with the reasoning of both my Lords in their judgments that I do not wish to add anything myself. A

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Ranger, Burton & Frost*, agents for *Girling, Wilson & Harvie*, Canterbury (for the tenant); *Arthur E. & C. Burton*, agents for *Worthington-Edridge & Ennion*, Folkestone (for the landlords). B

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

RICHARDSON v. LONDON COUNTY COUNCIL AND OTHERS. D

[COURT OF APPEAL (Denning, Parker and Sellers, L.JJ.), April 12, 15, 16, 1957.]

Person of Unsound Mind—Mental defective—Application for leave to bring action against detaining authorities—"Substantial ground" for contention that authority acted in bad faith or without reasonable care—Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 330 (2), as substituted by Mental Treatment Act, 1930 (20 & 21 Geo. 5 c. 23), s. 16 (1). E

Person of Unsound Mind—Mental defective—Place of safety—Order for removal of defective to place of safety—Whether defective "found neglected"—Subsequent order for detention made by judicial authority in 1925 on petition of one parent—Other parent abroad—Whether other parent's consent in writing necessary—Mental Deficiency Act, 1913 (3 & 4 Geo. 5 c. 28), s. 15 (1), s. 6 (3), proviso (a). F

In 1922, when R. was eighteen years old, he had a nervous breakdown. His parents sent him to an approved home, where he remained for some nineteen months in the care of Dr. C., and then sent him to a farm, where he proved to be unmanageable. His mother had to remove him from the farm. At the time his father was a police officer in India, and his mother, who was staying in lodgings in London, could find nowhere for R. to stay permanently. Accordingly on Jan. 30, 1925, R. was taken to the L. County Council by his mother, his uncle and Dr. C. Doctor C. told the council that R. was entirely beyond the control of his parents, and that two doctors were prepared to certify him as a mental defective. R.'s mother was anxious that he should be put under immediate restraint. R. was examined by the council's medical officer, and was then taken by the council to a place of safety and was there detained, pursuant to s. 15 (1) of the Mental Deficiency Act, 1913,* as a person whom an officer of the council had "found neglected" and had "reasonable cause to believe to be a defective". A few days later R.'s mother presented to the judicial authority a petition, supported by certificates from a specialist and Dr. C. that R. was a mental defective, asking that R. be sent to a certified house (where the petitioner would pay for him) in the area of the M. County Council. The consent in G
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* The relevant terms of s. 15 (1) of the Mental Deficiency Act, 1913, are printed at p. 334, letter C, post.

- A writing of R.'s father was not obtained*. The judicial authority made the order, and R. was sent from the place of safety to the certified house. In March, 1925, R. attained twenty-one years of age, and thereupon his case was reconsidered by three visitors, two of whom considered him to be defective while the third considered that he was not defective. R., therefore, continued to be detained. Some time later R.'s father died; R.'s mother
- B was no longer able to pay for him and so began to arrange for his transfer to an institution where the local authority could pay for him. Before the transfer had been arranged, R. escaped; on recapture he was taken to an institution of the M. County Council where he remained for a few months, during which time he retained a solicitor, who wrote on his behalf to the M. County Council, who then said that they intended to present another
- C petition to a judicial authority, but they later decided not to do so. The explanation of this that was offered was that there was a question whether the M. County Council was entitled to pay for R. in the institution and it was found that regulations enabled this to be done. Finally, in October, 1925, the Board of Control made an order that R., who had threatened violence on a number of occasions, was of dangerous propensities, and removed him to a suitable institution. In 1954 R. was released. He applied to the
- D High Court, pursuant to s. 330 (2) of the Lunacy Act, 1890†, for leave to bring actions against the L. County Council, the M. County Council and the Board of Control on the ground that his detention had been unlawful. Under s. 330 (2) leave must not be given unless the court is satisfied that
- E "there is substantial ground for the contention" that the proposed defendants had "acted in bad faith or without reasonable care".

Held: leave to bring proceedings should not be granted to R. because he had not shown substantial ground for a contention that any proposed defendant had acted in bad faith or without reasonable care, and in particular—

- (i) public authorities who acted in good faith and in a reasonable manner
- F were protected by s. 330 (2) of the Lunacy Act, 1890, against proceedings, although they might have acted without jurisdiction or have placed on an enactment a construction which, if erroneous, was yet one that the enactment was reasonably capable of bearing (*Shackleton v. Swift*, [1913] 2 K.B. 304, applied; see p. 339, letter B, and p. 340, letter A, post), and
- G (ii) the action of the L. County Council in taking R. to a place of safety in January, 1925, should be viewed in the light of the law as it stood at that time (viz., before the decision in *R. v. Board of Control, Ex p. Ratty*, [1956] 1 All E.R. 769) and, at that date, the view that the words "found neglected"

- * The requirement of consent is enacted in proviso (a) to s. 6 (3) of the Mental Deficiency Act, 1913, which, as amended by the Mental Deficiency Act, 1927, s. 4, is in the
- H following terms, so far as is relevant:

- "(3) If the judicial authority is satisfied that the person to whom the petition relates is a defective and is also satisfied that he is subject to be dealt with under this Act, the judicial authority may, if he thinks it desirable to do so in the interests of such person, make an order . . . ordering him to be sent to an institution . . . Provided that—(a) where the petition is not presented by the parent or guardian, the order shall not be made without the consent in writing of the parent or guardian, unless it is proved to the satisfaction of the judicial authority that such consent
- I is unreasonably withheld, or that the parent or guardian cannot be found, [or that, by reason of the parent or guardian being abroad, any attempt to obtain his consent would result in undue delay in dealing with the petition,] but consent shall not be deemed to be unreasonably withheld if withheld with the bona fide intention of benefiting the defective."

The words between square brackets were added by the Mental Deficiency Act, 1927, s. 4. The term "parent or guardian" includes a person who undertakes or performs towards the defective the duty of a parent or guardian (see s. 71 (1) of the Act of 1913).

† The relevant terms of s. 330 (2) of the Lunacy Act, 1890, are printed at p. 333, letter D, post.

in s. 15 (1) of the Mental Deficiency Act, 1913, were satisfied where a feeble-minded person's parents were unable to control him and he required the care and control referred to in s. 1 (1) (c) of the Act of 1913, was a view of the law that it was reasonable to hold (*R. v. Judge Radcliffe, Ex p. Oxfordshire County Council*, [1915] 3 K.B. 418, considered; see p. 336, letter E, post), and

(iii) the consent of R.'s father to the judicial authority's order made on the petition of R.'s mother in February, 1925, was not required by s. 6 (3) of the Mental Deficiency Act, 1913, as the father's consent could not have been obtained within any reasonable time owing to his being unavoidably away in India (see p. 337, letter C, post); *R. v. Judge Radcliffe, Ex p. Oxfordshire County Council*, [1915] 3 K.B. 418, distinguished).

Per CURIAM: "substantial" grounds [within s. 330 (2) of the Lunacy Act, 1890] are not capable of precise definition . . . (per DENNING, L.J.) there must be solid grounds for thinking that there was want of reasonable care or bad faith (see p. 339, letter D, post) . . . (per PARKER, L.J.) "substantial" means something short of certainty but considerably more than bare suspicion (see p. 339, letter I, post).

Appeal dismissed; cross-appeal allowed.

[**Editorial Note.** The Court of Appeal approached the question whether the public authorities concerned acted without reasonable care by having regard to the state of the law as it was at the time of their acts. The decision in the present case does not, therefore, overrule *R. v. Board of Control, Ex p. Ratty* ([1956] 1 All E.R. 769) on the construction of the words "found neglected". That decision remains authority for the view that those words (in s. 2 (1) (b) (i) of the Act of 1913) import physical suffering, but in any future case it will be material to compare that decision with the dictum (see p. 336, letter B, post) that, apart from authority, it would be reasonable to hold, on the construction of s. 15 (1) of the Act of 1913, that a feeble-minded person is neglected if he is not given the care which he ought to have.

As to leave to take proceedings against persons acting under the Lunacy etc. Acts, see 21 HALSBURY'S LAWS (2nd Edn.) 509, para. 923, text and note (f); and for cases on the subject, see 33 DIGEST 271, 272, 1893-1896.

As to petitions presented without consent of the defective's parent or guardians, see 21 HALSBURY'S LAWS (2nd Edn.) 465, para. 831; and for a case on the subject, see 33 DIGEST 272, 1897.

For the Lunacy Act, 1890, s. 330 and the Mental Deficiency Act, 1913, s. 6 (3) (a), s. 15 (1), as amended, see 17 HALSBURY'S STATUTES (2nd Edn.) 1155, 1192, 1199.]

Cases referred to:

- (1) *R. v. Board of Control, Ex p. Ratty*, [1956] 1 All E.R. 769; [1956] 2 Q.B. 109; 120 J.P. 153.
- (2) *R. v. Radcliffe (Judge), Ex p. Oxfordshire County Council*, [1915] 3 K.B. 418; 84 L.J.K.B. 2196; 113 L.T. 991; 79 J.P. 546; 33 Digest 272, 1897.
- (3) *Woodward v. Oldfield*, [1928] 1 K.B. 204; 96 L.J.K.B. 796; 136 L.T. 731; 91 J.P. 151; Digest Supp.
- (4) *Shackleton v. Swift*, [1913] 2 K.B. 304; 82 L.J.K.B. 607; 108 L.T. 400; 77 J.P. 241; 33 Digest 272, 1896.

Appeal.

The applicant appealed against orders of HAVERS, J., dated Mar. 1, 1957, which refused him leave to bring actions against the London County Council and the Middlesex County Council for breach of statutory duty and negligence resulting in his alleged unlawful detention under the Mental Deficiency Act, 1913. The Board of Control cross-appealed against the order of HAVERS, J.,

A of the same date which gave the applicant leave to bring such an action against the Board of Control.

The facts appear in the judgment of DENNING, L.J.

John Thompson, Q.C., and J. F. F. Platts-Mills for the applicant.

F. H. Lawton for the London County Council.

B *John Wilmers* for the Middlesex County Council.

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.), and Rodger Winn for the Board of Control.

DENNING, L.J.: Mr. Ralph Edward Gosselin Richardson, the applicant, is now fifty-three years of age and he has been in an institution of one kind or another ever since 1925, as being a feeble-minded person under the Mental Deficiency Acts*. After thirty years he was released, and now he seeks to bring an action in the courts against the public authorities, on the ground that his detention was unlawful. It has been provided by Parliament that an action of such a kind is not to be allowed to proceed unless the person bringing it first gets the leave of the High Court. The Lunacy Act, 1890, s. 330 (2), as substituted by the Mental Treatment Act, 1930, s. 16 (1), provides that

“ . . . leave shall not be given unless the court is satisfied that there is substantial ground for the contention that the person, against whom it is sought to bring the proceedings, has acted in bad faith or without reasonable care.”

E The judge below was not satisfied that there was any substantial ground for such a contention against the London County Council or the Middlesex County Council, but held that there was such a ground against the Board of Control. We have to consider here the applicant's appeal seeking leave to proceed against the London County Council and the Middlesex County Council, and the cross-appeal of the Board of Control saying that leave ought not to be granted to proceed against them.

F The applicant was born in India on Feb. 17, 1904. His father was an officer in the Indian police, and his mother was out there with her husband. He came to England when he was four years old. He was in a preparatory school here and in public schools, and when he was eighteen he passed the Oxford Senior Local Examination with honours in French; but not long afterwards he seems to have had a breakdown. He became very difficult and from May 23, 1923, until G January, 1925, he was placed by his parents in an approved home which was run by a Dr. Harry Corner. Then, shortly before he was twenty-one, on Jan. 9, 1925, he was sent to work, as a trial, on a poultry farm at Heathfield in Sussex. He did not stay there long. On Jan. 28—that is under three weeks later—his mother took him away. It is recorded that he had been threatening violence to the H farmer with whom he worked and the farmer said he was quite unmanageable. His mother brought him to London. She had no place to take him, because she herself was only in lodgings; so she took him temporarily to relatives in a flat. We do not know how welcome he was with those relatives, but within two days it became urgent to find other accommodation for him. The applicant's uncle apparently came up from Ringwood, and went with the mother and the boy I to the London County Council. They were accompanied by Dr. Corner, who had had the applicant in the approved home for the previous eighteen months.

* Section 1 of the Mental Deficiency Act, 1913, as substituted by s. 1 of the Mental Deficiency Act, 1927, is, so far as relevant, as follows: “(1) The following classes of persons who are mentally defective shall be deemed to be defectives within the meaning of this Act:— . . . (c) Feeble-minded persons, that is to say, persons in whose case there exists mental defectiveness which, though not amounting to imbecility, is yet so pronounced that they require care, supervision and control for their own protection or for the protection of others . . .”

Dr. Corner told the London County Council that the applicant was entirely beyond the control of his parents and that two doctors were prepared to certify him as a mental defective. Mrs. Richardson, the mother, was anxious that the applicant should be put under immediate restraint pending the completion of private arrangements for his reception into a proper institution. He was examined by the medical officer of the London County Council. The outcome of that talk and examination was that the London County Council, through their officers, took him to what is called "a place of safety"*, the St. Mary Abbott's Hospital. In so doing, they purported to act under the authority of s. 15 (1) of the Mental Deficiency Act, 1913, which provided:

"If any officer of the local authority authorised in that behalf or any constable finds neglected, abandoned, or without visible means of support or cruelly treated any person whom he has reasonable cause to believe to be a defective, he may take such person to a place of safety, and such person may be there detained until a petition under this Act can be presented."

So, pursuant to that section, the applicant was taken to St. Mary Abbott's Hospital.

Within a few days, a petition was presented, as the Act required, to a judicial authority asking that steps should be taken in respect of the applicant; and the petition was made by the mother. She presented it, asking that an order might be made for sending him to Normansfield in Middlesex. That is a certified house† which had been approved by the authorities for the reception of mental defectives where she, the mother, would have to pay for him. Her petition was supported by a certificate by Sir Maurice Craig, a specialist in these matters, and by Dr. Corner, both of whom gave full details of their reasons for believing him to be a mental defective. That petition being made and so supported, the case came before the judicial authority, a specially appointed magistrate‡, and he, after hearing the matter, made an order, in apparently proper form, finding that the applicant "is a feeble-minded person, is a defective within the meaning of the Mental Deficiency Act, and is subject to be dealt with under the Act by reason of the following circumstances: by reason of being neglected and not under proper care and control". That order was made on Feb. 11, 1925, and by virtue of it the applicant was taken from the St. Mary Abbott's Hospital, the place of safety, to Normansfield, a paying home, where he remained, his mother presumably being responsible for the cost of his maintenance in that home.

Shortly after he went to Normansfield, he became twenty-one, and thereupon under a statutory provision in that behalf§ his case was reconsidered. It was reconsidered on Mar. 24, 1925, by three visitors; and it appears that there were also present Sir Maurice Craig, Mr. Langdon-Down (the doctor from Normansfield), Dr. Corner (the doctor who had had him at the approved home beforehand), the mother's solicitors, and a solicitor representing the applicant, the alleged defective. From such records as there are, it appears that all of them were of opinion that he was mentally defective, save one visitor who recorded an opinion the other way. In the result, seeing that there was not a unanimous opinion of the visitors in favour of his discharge, he continued to be detained at Normansfield.

* The term "place of safety" is defined in s. 71 (1) of the Mental Deficiency Act, 1913, as meaning "any . . . institution, any place of detention, and any hospital . . . the occupier of which is willing to receive temporarily persons who may be taken to places of safety under this Act".

† A certified house is a house in which defectives are received by the owner for his private profit and in respect of which a certificate has been granted under s. 49 of the Mental Deficiency Act, 1913; see *ibid.*, s. 71 (1).

‡ I.e., appointed under s. 10 of the Lunacy Act, 1890.

§ I.e., s. 11 (2), proviso, of the Mental Deficiency Act, 1913.

- A A little later the applicant's father died. His mother was left without means and could not pay for him at Normansfield any longer. Accordingly, steps were taken to get him transferred to an institution where the local authority would pay for him*. Before that happened, he escaped from Normansfield and was found two days later as he was coming out of Ripon Cathedral. He was taken back, not to Normansfield, but to an institution at Brentford, where
- B arrangements could be made for the local authority to pay for him. He was kept in that institution for a few months. During that time he applied for a Poor Person's Certificate, under the old Poor Persons Rules, to bring an action before the court, and a solicitor wrote a few letters on his behalf, but did not carry it further. Ultimately, on Oct. 2, 1925, the Board of Control made an order that he was of dangerous propensities and he was removed to the Rampton
- C Institution. He remained there, or in other institutions, until the year 1954, when he was released.

Such being his history, the applicant seeks to bring an action complaining that from the beginning his detention was unlawful. To do this, he has to satisfy the court that there are substantial grounds for the contention that there was bad faith or want of reasonable care. I will go through the principal contentions.

- D The first complaint is of the conduct of the London County Council on Jan. 30, 1925. On that day the applicant's mother, with his uncle and a doctor, took him along to the London County Council. The officers of the London County Council said that they found him neglected and that they had had reasonable cause to believe him to be a defective, and so they took him to a place of safety. On behalf of the applicant it is contended that there was no possible justification for
- E the suggestion that he was "found neglected", and that there must have been a want of reasonable care at least on the part of the London County Council: and that there might even have been bad faith, in that they may have realised that it was doubtful whether they had any power in law to detain him, but nevertheless, in order to support the mother's wishes, they took a chance on it and found him "neglected" when he was not so in fact.

- F I cannot help thinking that that contention only sees the light of day because of the decision of the Divisional Court last year in *R. v. Board of Control, Ex p. Ratty* (1) ([1956] 1 All E.R. 769), where the court said that the words "found neglected" strongly suggested that the defective must be found through neglect in some degree of distress; and that the word "neglected" must be construed as meaning physically suffering from a lack of essentials through want of reason-

- G able care. Applying that case, it is said that this youth was not in the least "neglected" or "found neglected". He was being paid for by his mother; he was taken along in the care of his mother; he could not be said to be "found neglected" simply because he was beyond her control. I do not think that we ought to look at this case in the light of the decision in *Ex p. Ratty* (1). We ought to look at it as the law stood in 1925. At that time the courts were not disposed

- H to give such a narrow construction to the word "neglected" as they have since done in *Ex p. Ratty* (1). In 1915, in *R. v. Judge Radcliffe, Ex p. Oxfordshire County Council* (2) ([1915] 3 K.B. 418), the Divisional Court (consisting of LORD READING, C.J., sitting with DARLING and LUSH, J.J.) had considered the very point. Counsel had there contended (*ibid.*, at p. 424)

- I "that the words 'found neglected', etc., point to some person, e.g., some officer of the local authority, finding the defective homeless or uncared for . . ."

The court said that, although that was no doubt one kind of case contemplated by the section (*ibid.*)

* Section 49 (2) (b) of the Mental Deficiency Act, 1913, forbids a local authority to contribute to the expenses of defectives ordered to be sent to, or placed in, a certified house.

"... we think that it would be a too narrow view to take of the section if we were to say that a parent himself may not petition on one of these grounds." A

In view of that case, I think that any person interpreting in 1925 the words "found neglected" would have given a wider interpretation to them than was given in 1956.

Looking at the words apart from authority, it seems to me reasonable to hold —or at least that a reasonable person might hold—that a feeble-minded person is "neglected" if he is not given the care which he ought to have, or is not under the control which he ought to be, both for his own good and for the good of others. It is obvious, of course, that if his parents and relatives are indifferent to their responsibility to him, not caring whether he runs wild or not, then he is neglected. He is neglected by his parents and relatives. Suppose, however, that his parents and relatives are not indifferent. They are anxious to do all they can for him but simply cannot manage it, so that he gets past their outstretched hands and runs wild all the same. He is outside their control. He is not neglected by them; but many people would say that he is neglected by the community at large. If his parents and relatives cannot give him the care and control which he ought to have, then the responsibility falls on the rest of the community and, unless and until they do something about it, he is neglected, not by his parents, but by the community at large. It is for that very reason that Parliament has seen to it that there are officers to represent the community, such as a constable or an officer of a local authority, who can act on behalf of the community at large and undertake the responsibility that falls on them. If they find a feeble-minded person "neglected" in the sense that I have mentioned, then it might well be thought that, on the true construction of this statute, one of those officers can take him to a place of safety. That seems to me to be the interpretation which the court had in mind in 1915 in *R. v. Radcliffe* (2), and which might reasonably be had in mind by the public authorities in 1925, when they acted as they did in this case. B C D E

The present contention that this youth was not "neglected" can only be based on the decision in 1956 in *Ex p. Rutty* (1). It was not apparent to anyone's mind in the year 1925. For present purposes, *Ex p. Rutty* (1) must be put on one side. When that is done, I cannot see any substantial ground for saying that the London County Council were at fault in any way in acting on the basis that this youth was, in the circumstances, "found neglected". They had reliable medical evidence that he was a mental defective. He had been in an approved home for eighteen months, on a farm for just under three weeks, and his mother had had to bring him back to London. She was in lodgings and had put the youth out with a cousin. How long would this cousin keep him? Who could take care of him? He was beyond the control of his parents and could not be looked after by them. So long as nothing was done to bring him under control, he was neglected by the community at large. In the circumstances, I should have thought there was reasonable ground for holding him to be "found neglected". F G H

The second complaint arises from the conduct of the judicial authority who on Feb. 11, 1925, made an order for the detention of this youth. The judicial authority acted on the footing that he was "found neglected", thus giving those words the same interpretation as the London County Council, and confirming the reasonableness of their conduct. But this particular complaint arises from s. 6 (3) of the Mental Deficiency Act, 1913*, which prohibits the making of an order in certain circumstances without the consent in writing of "the parent"; and it is said in this case that, as the mother was the petitioner, the "parent" concerned was the father, and his consent ought to have been obtained. This is the ground on which the judge gave leave for an action to be brought against I

* The terms of s. 6 (3) are printed in the footnote at p. 331, ante.

A the Board of Control. The contention is based on some observations in *R. v. Radcliffe* (2) ([1915] 3 K.B. at p. 423) which appear to say that in such a case, if the mother is the petitioner, the father must give his consent. In that case, however, father and mother were living together, and the observations must be restricted to such a case. When the parents are not living together, but the father is absent for some reason—in *Woodward v. Oldfield* (3) ([1928] 1 K.B. 204), the father was in penal servitude, and one can imagine many other cases, a father away at sea, or a prisoner-of-war—I cannot think that the consent of the father would be a necessary condition. He would not come within the definition of “parent” in this Act, because he would not at the relevant time be a person who undertakes or performs the duty of a parent or guardian. In this case the father was in India. In 1925 there were no air mail letters that could get to and fro in a short time. It might take weeks or months to get into touch with the father. In my opinion, when the father is unavoidably away so that his consent cannot be obtained within any reasonable period of time, in such a case the consent of the mother is sufficient*, even though she is the one who makes the petition.

D In these circumstances, I should have thought it could not be said that the judicial authority had acted without jurisdiction; but, in any case, I do not see that the Board of Control can be blamed. It may be that in some circumstances they ought to take steps to rectify a mistake by the judicial authority. Here, however, there was no mistake, or at any rate no want of care by them. The chairman of the board looked into this matter himself and gave a decision on it. He wrote:

E “As the father is in India, I think we may assume the mother is properly acting.”

That shows that the point was carefully considered. In these circumstances, I can see no ground for the contention that there was any want of reasonable care or any bad faith in the Board of Control in not insisting on the father's consent.

F So much for the order of the judicial authority, from which the whole of the remaining detention flows. But I have yet to deal with the position of the Middlesex County Council. They only took part in the detention of the applicant after he left the private home in Normansfield and went into their institution at Brentford. There is some obscurity how he actually came to be there. He was given leave of absence, under the regulations in that behalf, from Normansfield, and taken to this institution in Middlesex. It has been suggested that the Middlesex County Council, soon after they had the applicant in their institution, were very uneasy about the legal position and took steps to validate it. There are letters produced showing that he was told that the Middlesex County Council were about to present a petition to a judicial authority for an order to send him to a certified institution. They later dropped the idea, and it is suggested that the reason was because in the meantime the applicant went to a solicitor, Mr. H Brooker Ward. He did it under the Poor Persons procedure. Mr. Brooker Ward wrote letters to the Middlesex County Council, obviously leading up to an action. Soon afterwards the Middlesex County Council wrote to Mr. Brooker Ward on Aug. 5 that they were going to continue to hold him under the existing “Continuation Order”, and then wrote a letter on Aug. 14 saying that they were not going to proceed with the petition.

I It is said that that shows something in the nature of bad faith: that the Middlesex County Council saw there was something wrong with the detention and that, instead of taking steps to clear it up, they in effect took their chance and kept him there. I cannot see that there is any substantial ground for this

* The court is here concerned with the law as it stood in 1925; proviso (a) to s. 6 (3) of the Mental Deficiency Act, 1913, was amended by the Mental Deficiency Act, 1927, s. 4, in the manner shown in the footnote where the enactment is printed at p. 331, ante, and the amendment makes statutory provision covering this point.

contention. At the most, there is a suspicion, and I should have thought a very flimsy suspicion at that; and in addition we have been given a possible explanation. I say "possible explanation" because, after this length of time, the full facts cannot be discovered; but it seems very likely that all that happened was this:—the question arose whether the local authority had any authority to pay for the applicant in this institution at Brentford. It was thought at one time they would have to go through the procedure again of taking him to a place of safety and have another petition to the judicial authority. Hence the letters. But the Board of Control seem to have pointed out that that was unnecessary, because there was power under the regulations* to transfer him from a certified house to an institution, and that thereupon arrangements could be made for payment by the local authority. It was for that reason the county council did not go on with the proposed petition. When that explanation is proffered, any suspicion flies out of the window. I see no ground for allowing this man to bring an action against the Middlesex County Council.

Next we come to Oct. 2, 1925, when the Board of Control made an order that the man was to be removed to the Rampton Institution, on the ground that he was of dangerous propensities. It is said that the Board of Control did not exercise reasonable care in this regard: but I can see no ground for that contention. The reports made show that the applicant had threatened violence on a number of occasions. In order to show the deplorable state of the applicant then, I will read what the people at Normansfield said:

"An assistant pigman under whom he has worked at Normansfield informs me that he does not work well and that he is unstable. He says that he masturbates openly and does not conceal the fact that he discussed with him the question of raping a sow. He also says that he considers that he is a danger to other people and that he would be quite likely to do them an injury with a knife or other weapon if he had a grudge real or fancied against them."

Another man said

"he imagined everyone is his enemy; he cannot work with other people; that he cannot control people nor can he be controlled."

In addition, he threatened to shoot Dr. Corner. Moreover, when there was a suggestion that he should be moved from Brentford to another home, several other homes refused because of his condition. In the circumstances, I can see no ground for suggesting that the Board of Control were wanting in reasonable care in the steps that they took to have him removed to the Rampton Institution.

In conclusion, I may say that this seems to be one of the very cases which Parliament had in mind when they said that such an action as this should not be brought without the leave of the court. It is an unfortunate feature of mental illness that those afflicted by it do not realise the need for their being under the care and control of others. They resent it, much as a small child or a dumb animal resents being given medicine for its own good, and they are apt to turn round and claw and scratch the hand that gives it. See how the applicant, this unfortunate Mr. Richardson, has turned round, not only on the public authorities, but on his own mother. She is now eighty-one. He accuses her in these proceedings of wickedly presenting the petition for his detention. He says the petition by his mother "was presented in bad faith and without exercising reasonable care and negligently by her". Surely, if any impartial persons look at the known facts, they would see that the poor woman was at her wits end to know what to do with her son. She went to the London County Council as a last resort, and only presented a petition on their suggestion. Although he has

* The present regulations, which are subsequent to those relevant to the material date in the present case, are the Mental Deficiency Regulations, 1948 (S.I. 1948 No. 1000), regs. 86-91 of which relate to the transfer of patients from one institution to another.

A made these allegations against her, I am glad to see that he has not sought to make her a defendant to this action for damages, though if his case is true she is the origin and cause of all his troubles. If he were a man of sound mind, I should have thought his attack on his mother was reprehensible, but as he was a sick creature, feeble-minded, incapable of telling right from wrong, he should be excused. In any case, I do not think that he should be at liberty, after all these years, to bring an action against the public authorities who were concerned in his case.

Parliament has wisely provided that the applicant is not to be allowed to bring an action of this kind unless there is substantial ground for believing the proposed defendants to have been guilty of want of good faith or want of reasonable care. This court, in *Shackleton v. Swift* (4) ([1913] 2 K.B. 304), made it clear that this protection is not to be construed narrowly. That case shows that, although these public authorities may have misconstrued the Act and although they may have done things which there was no jurisdiction to do, nevertheless so long as they acted in good faith and in a reasonable manner, they are to be protected from having actions brought against them. That was so under the Act of 1913. The Mental Treatment Act, 1930, gives even greater protection. It puts the burden of proof the other way round. It puts the burden of proof on the man who seeks to bring such an action. It goes further. It says that not only must there be reasonable grounds, but there must be substantial grounds for the contention. I do not think it possible to define what are "substantial grounds". Suffice it to say that there must be solid grounds for thinking that there was want of reasonable care or bad faith.

E Looking at the whole of this case, it seems to me that no substantial ground is shown here for bringing these actions. I would therefore dismiss the appeal in the case of the London County Council and the Middlesex County Council, I would allow the appeal of the Board of Control, and make the appropriate order.

PARKER, L.J.: I entirely agree with all that my Lord has said, and I would only add a few words on the principles on which the court should act in exercising its discretion under s. 16 of the Mental Treatment Act, 1930. In the first place, it is quite clear that it is not enough for an applicant to show that the order under which he has been detained was made without jurisdiction, or, indeed, was bad on its face. Those would be good grounds in proceedings for habeas corpus or for certiorari; but here, as the section itself shows, the considerations are entirely different, because under s. 330 (1) of the Act of 1890 (as substituted by s. 16 (1)) it is provided that a person concerned with the reception of a mental deficient

"... shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground unless he has acted in bad faith or without reasonable care."

H Then by s. 330 (2), as so substituted, it is provided that leave of the court

"... shall not be given unless the court is satisfied that there is substantial ground for the contention that the person, against whom it is sought to bring the proceedings, has acted in bad faith or without reasonable care."

I The word "substantial" is not easy to define. Indeed, it is probably incapable of precise definition; but I take it that it means something more than "reasonable ground", which were the words used in s. 330 of the Lunacy Act, 1890, before it was amended by s. 16 (1) of the Act of 1930. It is, I think, at the opposite end of the scale (if I may use that expression) to a flimsy ground. It is something short of certainty, but something considerably more than bare suspicion. "Bad faith" speaks for itself, and so does "without reasonable care", in the ordinary case; but what is the position when a person concerned has in good faith misconstrued the words of the statute? For myself, I take it to be the law that in such a case, provided the statute could, in the mind of that

person, who is not a lawyer, reasonably be thought to bear that construction, it cannot be said that he has acted without reasonable care. That was said quite clearly by VAUGHAN WILLIAMS, L.J., in *Shackleton v. Swift* (4) ([1913] 2 K.B. 304), to which my Lord has referred. The short summary of his view is found in the middle of p. 316, where he says this:

"Under those circumstances, in my judgment, without going at further length through the Act of Parliament, I decide this question upon the ground that this Act of Parliament gives special protection to those officers and others acting under the powers of this Act in cases where, although they may have misconstrued the Act and although they may have done things which there was no jurisdiction to do, they have acted in good faith and in a reasonable manner."

Of course, if the words of the statute are so clear and precise that they are incapable, even in the mind of a layman, of bearing the construction in question, then that would be evidence of lack of reasonable care, if not of bad faith.

Applying those principles to the present case, I agree with the learned judge that the applicant has not brought himself within the section in regard to the proposed action against the London County Council. Clearly they had reasonable cause to believe that the applicant was a defective. It is true that they use a rather broad description of their views in saying that there are "prima facie grounds for a suspicion that", but if one looks at Mr. Leeming's minute, a contemporary document, it is perfectly clear that Dr. Corner, in whose care the applicant had been, accompanied the mother, and that the London County Council were told that two doctors were prepared to certify. In my view, they clearly had grounds for that belief.

However, then it is said—and this is the crux of the case against the London County Council—that this applicant was not "found neglected" within the meaning of the statute, so as to enable him to be sent to a "place of safety". It is perfectly clear that the circumstances must be considered. As my Lord has said, the mother and uncle were asking, as a matter of urgency, that the applicant should be put under immediate restraint. He had been to a mental home, he had been let out on licence to a farm without success, and he had been brought back from the farm and housed with the mother of a cousin. That was the situation on Jan. 30, 1925, when the mother and uncle brought him before the London County Council. His mother said that she was unable to exercise proper control over him, and certainly was not in a position to give him the care, supervision and control which his mental state demanded. It seems to me that in those circumstances a perfectly possible construction of the Act, and prima facie a reasonable construction of the Act, would be that a person is "found neglected" who needs the care, supervision and control referred to in s. 1 (1) (c) of the Act. Indeed, that was the view taken by the judicial authority. I suspect that that was the view taken by the applicant's own advisers (and he had advisers from time to time) throughout the period of his restraint, because if that was thought to be the wrong construction, as was decided in *Ex p. Rutty* (1) ([1956] 1 All E.R. 769), habeas corpus proceedings would no doubt have been taken. It seems to me perfectly clear that, but for *Ex p. Rutty* (1) and the law as expounded there, these proceedings would never have been heard of, and for the very good reason that until *Ex p. Rutty* (1) it was thought generally that the words "found neglected" in s. 2, and again in s. 15, should be given a wide construction.

As regards the proposed action against the Middlesex County Council, without going through the matter in detail, it seems to me that the case as presented to the court is really one of bare suspicion. It is suggested that the council realised or suspected that the original order was bad, that they were minded to initiate a petition themselves to regularise the position, and that it was only when a solicitor on behalf of the applicant intervened that they changed their mind and

A hoped that nothing more would be heard of the matter. Apart from the fact that the Middlesex County Council never saw the order at all, and therefore could have no grounds whatever for suspecting any irregularity, the letters which have now been disclosed show on their face a perfectly innocent explanation.

As regards the Board of Control, the real case made against them by counsel for the applicant, who has put forward every possible argument on behalf of the applicant, is this, that they should have seen from the order itself that it was bad. In other words, he says the order was bad on its face, that the board exercising reasonable care would have noted that, and that it would then become their duty to discharge the applicant. Whether or not it is their duty in any such case to take proceedings to discharge an applicant, it is unnecessary to determine, because there was nothing irregular on the face of the order. The same point arises in regard to the word "neglected", with which I have already dealt.

C The only other point is the point with which my Lord has fully dealt, namely, the fact that, on the face of the order, only the consent of one parent was obtained. Again it seems to me that the Board of Control could reasonably interpret the provision in s. 6, in the circumstances of this case, as requiring only the consent of the mother which was indeed the view taken by the judicial authority.

D Counsel for the applicant made a number of smaller points against the Board of Control. He said, as I understand it, that they would have seen the dissenting opinion of Dr. Leeson on the reconsideration on the applicant attaining twenty-one years of age*, and he says that they should have made further inquiries, or again should have discharged the applicant. Even if they did see that opinion, I doubt whether they were bound to take any steps whatever, nor do I see what they could have done. The statute provides that the applicant shall only be released on attaining twenty-one if the visitors agree to that course. They did not all agree to that course, and accordingly he had to stay, as he did, under the statute, in the institution.

Finally, it is said that the Board of Control failed to take reasonable care in making the order of transfer to Rampton. I think counsel for the applicant F realises that that is perhaps his weakest point, because for the reasons given by my Lord, there was ample evidence on which the Board of Control could act.

Accordingly, I would dismiss the applicant's appeal and allow the appeal of the Board of Control.

G **SELLERS, L.J.:** I so entirely agree with the judgment delivered by my Lord (probably the last, we regret, that he will deliver in these courts)† that I hope it will not be showing any lack of appreciation to the skill, discretion and tenacity of counsel's argument on behalf of the applicant if I add no further words of my own.

Appeal dismissed: Board of Control's cross-appeal allowed.

Solicitors: *Robert K. George* (for the applicant); *J. G. Barr* (for the London County Council); *Kenneth Goodacre* (for Middlesex County Council); *Solicitor, Ministry of Health* (for the Board of Control).

[Reported by *HENRY SUMMERFIELD, ESQ., Barrister-at-Law.*]

* Dr. Leeson was the visitor who then considered that the applicant was not mentally defective: the facts as to this report are set out more fully in the judgment of DENNING, L.J., at p. 334, letters G and H, ante.

† Lord Justice DENNING became a Lord of Appeal in Ordinary on Apr. 18, 1957.

NOTE.

R. v. THOMAS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Stable, JJ.), April 1, 1957.]

Criminal Law—Vagrancy—Living on earnings of prostitution—Room let nightly to prostitute at inflated rent—Whether landlord guilty of offence—Vagrancy Act, 1898 (61 & 62 Vict. c. 39), s. 1, as amended by the Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5 c. 20), s. 7 (1), (5).

[As to the crime of living on the earnings of prostitution, see 10 HALSBURY'S LAWS (3rd Edn.) 676, para. 1294.]

For the Vagrancy Act, 1898, s. 1, as amended by the Criminal Law Amendment Act, 1912, s. 7 (1), see 5 HALSBURY'S STATUTES (2nd Edn.) 923.]

Case referred to:

(1) *R. v. Silver*, [1956] 1 All E.R. 716; 40 Cr. App. Rep. 32.

Application.

The applicant, Andrew Babatunde Thomas, applied for leave to appeal against conviction. The applicant had been charged, under s. 1 of the Vagrancy Act, 1898, with knowingly living wholly or in part on the earnings of prostitution, and with another offence, and had been tried on indictment* at the Central Criminal Court. The evidence given on behalf of the prosecution showed that the applicant, knowing a woman to be a convicted prostitute, agreed to let her have the use of his room between the hours of 9 p.m. and 2 a.m., at a charge of £3 a night. After the case for the prosecution had been closed, counsel for the applicant, stating that he did not propose to call evidence, submitted that, by reason of the direction given to the jury in *R. v. Silver* (1) ([1956] 1 All E.R. 716), it was not open to the jury to find that the applicant had committed any offence against s. 1 of the Act of 1898, as amended by the Criminal Law Amendment Act, 1912, s. 7 (1), and that, therefore, there was no case to answer. In his judgment on this point, given in the absence of the jury, and reported ante, at p. 181, PILCHER, J., held that where, as in the present case, there was evidence that an accused person had let a room at a grossly inflated rent to a prostitute for the express purpose of allowing her to ply her immoral trade, it was for the jury to determine whether the accused person was in fact knowingly living wholly or in part on the earnings of prostitution; and he directed the jury accordingly when they returned. The applicant was convicted of both offences and sentenced to imprisonment.

The applicant did not appear and was not represented.

STABLE, J., delivered the judgment of the court: This is an application for leave to appeal against conviction for, among other things, living on the immoral earnings of a prostitute. The learned judge, refusing to follow some observations in *R. v. Silver* (1) ([1956] 1 All E.R. 716), directed the jury that, if the applicant was receiving a payment of £3 a night and allowed the prostitute to have the use of his bedroom for the purposes of carrying on her trade of prostitution in his room, he was living on the immoral earnings of that prostitute. In our judgment, the direction of the learned judge was right and the observations in *R. v. Silver* (1), so far as they conflict with the observations of the learned judge in this case, were wrong. It was a perfectly plain case and there is no

* By the Criminal Law Amendment Act, 1912, s. 7 (5), a person charged with an offence under the Vagrancy Act, 1898, may, instead of being proceeded against as a rogue and vagabond, be proceeded against on indictment.

- A question about it that the applicant was living on immoral earnings. The application for leave to appeal is dismissed.

Application dismissed.

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

B

C
KELSEN v. IMPERIAL TOBACCO CO. (OF GREAT BRITAIN AND IRELAND), LTD.

[QUEEN'S BENCH DIVISION (McNair, J.), April 30, May 1, 1957.]

- D *Trespass—Air space—Advertisement sign on adjoining building projecting some eight inches into air space above one-storey shop—Right of occupier of shop to injunction requiring sign to be removed.*

Landlord and Tenant—Lease—Lease of one-storey shop—Shop flanked on two sides by higher buildings—Whether air space above shop demised to tenant.

Estoppel—Estoppel in pais—Estoppel by conduct—Representation of future intention not constituting estoppel.

- E By an assignment made in April, 1946, the plaintiff acquired the lease of a shop and the business of a tobacconist which had been carried on there under the terms of the lease. The premises, which were situated at the corner of a street, consisted of one ground floor room with a flat roof on top. On the two front sides the shop was bounded by streets and on one side at the back was an adjoining building of some three storeys. During the currency of the lease, the defendants, who were wholesale tobacconists, displayed three advertising signs on the wall of the adjoining building above the shop. The signs, which were composed of sheet metal mounted on a frame, were fixed against the wall but, on account of the mounting, protruded a distance of some four inches into the air space above the flat roof of the shop. In April, 1948, the plaintiff's landlords gave to the owners of the adjoining building consent to the defendants erecting a large new sign in place of the existing signs. In December, 1948, the landlords of the shop granted a new lease of the shop to the plaintiff. By cl. 1 of the lease, which contained the parcels, the premises demised to the plaintiff, were expressed to be subject to "all rights and easements to any of the adjacent property", and by cl. 2 (9) the plaintiff covenanted not to permit any sign or advertisement to be posted on or affixed to or over any part of the exterior of the shop and premises (except on the shop front). In January, 1950, no new sign having yet been erected on the adjoining building, its owners again obtained the permission of the landlords of the plaintiff's shop for the defendants to substitute a new large advertising sign for the existing three smaller ones. The new sign was erected by the defendants in 1950, with the plaintiff's knowledge. Its total length was about twenty feet and the maximum distance by which part of the sign projected from the wall of the adjoining building was eight inches. From time to time the defendants' servants had access to the sign, from the plaintiff's shop and with his knowledge, to carry out maintenance work and repairs. In December, 1953, as a result of business disputes between the plaintiff and the defendants, the plaintiff asked the defendants to remove the sign. After the disputes were settled, the plaintiff, on being asked by the defendants whether he
- F
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- I

still wanted the sign removed, replied that it could remain. Further business disputes having arisen between the parties, the plaintiff gave notice to the defendants to remove the sign, and, the defendants having failed to do so, brought an action against them for trespass.

Held: (i) the air space above the shop was part of the premises demised to the plaintiff, since on the true construction of the lease of December, 1948, there was nothing to displace the prima facie conclusion that the demise of the premises included the air space above the shop.

Martyr v. Lawrence ((1864), 2 De G. J. & Sm. 261) applied; *Gifford v. Dent* ([1926] W.N. 336) considered.

(ii) when in January, 1950, the plaintiff's landlords consented to the substitution of the new sign, they could not derogate from their demise of the air space in December, 1948, to the plaintiff.

(iii) the plaintiff's conduct in allowing the sign to remain on the wall of the adjoining building from 1950 onwards did not estop him from subsequently requiring it to be removed, because (a) he had, at most, merely represented to the defendants that he would not object to the sign in future, and representation of an intention did not give rise to an estoppel (*Jorden v. Money*, (1854), 5 H.L. Cas. 185, followed); and (b) on the facts, the defendants had not been induced by the plaintiff's conduct to act to their prejudice to such an extent as to entitle them to continue to display the sign.

(iv) the invasion of the plaintiff's air space by the sign amounted to a trespass on the part of the defendants, and not merely to a nuisance (*Gifford v. Dent*, [1926] W.N. 336, applied); and, on the facts of the case, although the injury to the plaintiff's legal rights was small, he was entitled to a mandatory injunction requiring the defendants to remove the sign (dictum of A. L. SMITH, L.J., in *Shelfer v. City of London Electric Lighting Co.* ([1895] 1 Ch. at p. 322) considered; *Goodson v. Richardson* ((1874), 9 Ch. App. 221) applied).

[As to what constitutes trespass to land, see 33 HALSBURY'S LAWS (2nd Edn.) 6, para. 9; and as to trespass to air space, see 5 HALSBURY'S LAWS (3rd Edn.) 248, para. 583.

As to the grounds for granting an injunction to prevent a trespass, see 33 HALSBURY'S LAWS (2nd Edn.) 17, para. 26; and for cases on the subject, see 43 DIGEST 402, 403, 244-259.

As to representation of intention not giving rise to an estoppel, see 15 HALSBURY'S LAWS (3rd Edn.) 224, para. 424, and as to the need for intention that the representation should be acted on, see *ibid.*, p. 228, para. 430; and for cases on the subject, see 21 DIGEST 292-294, 1041-1051, 298-300, 1072-1081.]

Cases referred to:

- (1) *Martyr v. Lawrence*, (1864), 2 De G. J. & Sm. 261; 4 New Rep. 312; 10 L.T. 677; 28 J.P. 580; 46 E.R. 375; 19 Digest 41, 217.
- (2) *Gifford v. Dent*, [1926] W.N. 336; 71 Sol. Jo. 83; 31 Digest (Repl.) 184, 3160.
- (3) *Jorden v. Money*, (1854), 5 H.L. Cas. 185; 23 L.J.Ch. 865; 24 L.T.O.S. 160; 10 E.R. 868; 21 Digest 292, 1041.
- (4) *Pickering v. Rudd*, (1815), 4 Camp. 219; 1 Stark. 56; 171 E.R. 70; 43 Digest 373, 20.
- (5) *Clifton v. Bury (Viscount)*, (1887), 4 T.L.R. 8; 43 Digest 374, 23.
- (6) *Kenyon v. Hart*, (1865), 6 B. & S. 249; 5 New Rep. 402; 34 L.J.M.C. 87; 11 L.T. 733; 29 J.P. 260; 122 E.R. 1188; 25 Digest 367, 152.
- (7) *Wandsworth Board of Works v. United Telephone Co.*, (1884), 13 Q.B.D. 904; 53 L.J.Q.B. 449; 51 L.T. 148; 48 J.P. 676; 26 Digest 328, 607.

- A (8) *Shelfer v. City of London Electric Lighting Co., Meux's Brewery Co. v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34; *subsequent proceedings*, [1895] 2 Ch. 388; 28 Digest 415, 408.
- (9) *Goodson v. Richardson*, (1874), 9 Ch. App. 221; 43 L.J.Ch. 790; 30 L.T. 142; 38 J.P. 436; 28 Digest 402, 298.

B **Action.**

The plaintiff, Joel Kelsen, who was the lessee of a tobacconist's shop known as No. 407 and No. 407B, City Road, Islington, brought an action against the defendants, Imperial Tobacco Co. (of Great Britain and Ireland), Ltd., claiming (i) damages for trespass, and (ii) an order that the defendants should forthwith
C remove an advertising sign, which had been erected by the defendants on the flank wall of the premises adjoining the plaintiff's premises and known as 409, City Road, in such manner that the sign projected over the plaintiff's premises, or, alternatively, an injunction restraining the defendants from allowing or permitting the sign to project over the plaintiff's premises.

The premises, 407 and 407B, City Road, were situated at the corner of City
D Road and Torrens Street, being bounded on the two front sides by streets and at the back, on one side, by No. 409, City Road, a building of some three storeys, and being flanked, on the other side, by the wall of another property. The premises consisted of a single ground floor shop, ten feet deep and about twenty feet in length, with a flat roof on top. The air space above the flat roof was thus a cube, the base of which was ten feet by twenty feet, and which extended
E upwards some forty or fifty feet. In the flat roof was a skylight which had never been used by the plaintiff.

The owners in fee simple of the plaintiff's premises were Improved Industrial Dwellings Co., Ltd. (referred to hereinafter as "the landlords"). At some date previous to 1946 the landlords granted a lease of the premises for use as a tobacconist's shop. In April, 1946, the plaintiff, who was a retail tobacconist
F and owned a number of shops in that capacity, acquired the lease of the premises and the tobacconist's business which had been carried on under the lease. During the currency of the lease the defendants displayed three advertising signs on the wall of 409, City Road, above the plaintiff's shop. The signs, which were composed of sheet metal mounted on a frame, were fixed against the wall, the whole being flush against the wall but protruding from the wall some four inches on account
G of the mounting. In April, 1948, the defendants asked the owners of 409, City Road, for permission to put up a new sign on the wall in place of those which were already there, and the owners of No. 409 obtained in April, 1948, the consent of the landlords of the plaintiff's premises to the substitution. This consent was obtained by correspondence, the material letter, dated Apr. 26, 1948, and written on behalf of the landlords of the plaintiff's premises, read:

H " [The landlords] will have no objection to the advertisement shown on the sketch returned herewith being substituted for the existing sign."

Although a preliminary survey of the work which would be required to effect the substitution was carried out, the alteration was not made for two years.

I On Dec. 21, 1948, the plaintiff was granted a new lease of 407 and 407B, City Road, for a term of seven years from Dec. 25, 1948. In January, 1950, the defendants again approached the owners of 409, City Road, in regard to the substitution of a new advertising sign, and by a letter dated Jan. 4, 1950, the owners of No. 409 again asked the plaintiff's landlords for their approval. In a letter dated Jan. 9, 1950, the landlords wrote:

" In reply to your letter of [Jan. 4.] there will be no objection from [the landlords'] point of view for your clients, the [defendants], fixing the new

advertisement sign on the above buildings, provided always that any damage done to [the landlords'] property will be made good at their expense."

Following on the permission given in that letter, and with the knowledge of the plaintiff, the new sign was erected in November, 1950. The sign consisted of the letters making up the words "Players Please". The maximum distance by which the front of the letters projected from the wall was eight inches. The total length of the sign was about twenty feet, and it had a depth of eight or ten feet. From time to time employees of the defendants had access to the sign from the plaintiff's shop for the purpose of carrying out maintenance and repairs, with the plaintiff's knowledge.

Business disputes having arisen between the plaintiff and the defendants in regard to the quota of the defendants' products supplied to the plaintiff when the products were in short supply, the plaintiff, on Dec. 1, 1953, wrote to the defendants saying:

"Since your sign reading 'Players Please' above our shop can only act as a magnet to draw people in, we feel that this is more than unfair and we must ask you to be good enough to remove it as soon as possible as it would help us considerably in having not to refuse so many people per day and making the life of our staff a little easier."

The quota having been increased, the defendants asked the plaintiff whether he still wanted the sign removed, and he replied that it could stay. Further business disputes having arisen between the plaintiff and the defendants, by a letter dated Aug. 24, 1955, the plaintiff gave formal notice to the defendants to withdraw the "Players Please" sign from above his shop. The plaintiff's lease of December, 1948, was replaced in 1955 by another lease in similar terms.

C. Lawson for the plaintiff.

H. E. Francis for the defendants.

McNAIR, J.: In this case the plaintiff, Mr. Joel Kelsen, who is the lessee of a one-storey tobacconist's shop at No. 407 and No. 407B, City Road, brings this action against the Imperial Tobacco Co. (of Great Britain and Ireland), Ltd. seeking to obtain from the court an injunction requiring the defendants to remove from the wall above his one-storey shop a large advertising sign showing in letters the words "Players Please", that sign projecting into the air space above the plaintiff's shop a distance of some eight inches. The plaintiff claims that the defendants, by fixing that sign in that position, have trespassed on his air space and that they threaten to continue to trespass unless restrained by the court.

The defence, in substance, takes this form. First, it was said that the air space above the one-storey shop was never demised to the plaintiff, and that, accordingly, the whole basis of the claim failed. Alternatively, it was said that, if the air space above the one-storey shop was conveyed to the plaintiff, he was not entitled to the remedy which he sought for the following reasons: (i) It was submitted that, if the terms of the lease were closely examined, it would be seen that, whatever rights in the air space were conveyed thereby to the plaintiff, those rights were subject to any prior right having been granted by the landlords to other parties for the use of the air space, and the defendants alleged that, before the lease was granted to the plaintiff, the landlords had given permission to the owners of the neighbouring premises, No. 409, City Road, on whose wall the sign was hung, to have the sign fixed in that position. (ii) It was submitted that, so long as the landlords of the shop did not withdraw their consent and the express licence from them continued in existence, the plaintiff, who, it was alleged, knew that the sign was going up and was being maintained, had no

- A right to withdraw the implied licence which he could be said to have given. The basis of that submission was that the plaintiff, by his conduct in allowing the sign to go up and to be maintained during the succeeding years, had created a position which operated as an equitable estoppel against him. (iii) The defendants submitted that in any event the plaintiff's remedy, if any, on the facts of the case, was not a remedy in trespass but a remedy in nuisance, because a mere invasion of superincumbent air space did not amount to trespass, but amounted merely to nuisance, and that, on the facts, no nuisance existed, because it was conceded that the presence of the sign in this superincumbent air space did the plaintiff no harm. (iv) The defendants submitted that the appropriate remedy, if any remedy at all were available to the plaintiff, was in damages and not by way of an injunction.
- C That briefly is the outline of the case. [His Lordship then stated the facts and, having read the letter* of Jan. 9, 1950, from the plaintiff's landlords to the owners of 409, City Road, said:] That is the effective licence which is relied on by the defendants, but it is to be observed that that licence, if any, was, first, a licence or permission granted to the owners of No. 409 and not to the defendants, and, secondly, that it was granted at a time when the lease of 1948 had already taken effect. Therefore, if it be the fact that by the lease of 1948 the landlords had parted with their rights over the superincumbent air space, they would not be in a position to give their permission in derogation of the rights of the plaintiff as lessee. [After reading the plaintiff's letter, dated Dec. 1, 1953, asking the defendants to remove the sign, His Lordship said:] It is reasonably plain that the plaintiff was purporting to use what he claimed to be his right to call on the defendants to remove the offending sign as part of the commercial pressure which he could exercise on them in order to induce them to increase his quota. And so, in fact, it worked out, because shortly thereafter his quota was increased, and, the quota having been increased, the representative of the defendants asked him whether he now wanted the sign removed, and the plaintiff said, no, it could stay. The importance of that incident, which is relied on by the plaintiff, is that it does show that he was, at quite an early stage, claiming the right to call for the removal of the sign.
- F [Having concluded the statement of the facts, His Lordship continued:] The first question which I have to decide is: What rights, if any, in the air space were conveyed to the plaintiff? It is common ground that, *prima facie*, the lease of the land includes the lease of the air space above, and it seems to me also
- G *prima facie* that the lease of a single storey ground floor premises would include the lease of the air space above. That seems to be supported by *Martyr v. Lawrence* (1) ((1864), 2 De G.J. & Sm. 261), to which I was referred by counsel for the plaintiff. It is said, however, on behalf of the defendants that, if the lease of December, 1948, which was replaced in 1955 by another lease in identical terms, is examined, it shows a contrary intention, that is, an intention merely to convey the shop and nothing more. The material clauses of the lease are as follows. Clause 1 contains the parcels, which are described as follows:
- H

- I "All that shop with the rooms and cellars (if any) attached situate and being in City Road and known as numbers 407 and 407B City Road in the borough of Islington and County of London Together with all rights easements and appurtenances thereunto belonging subject nevertheless to all rights and easements over the pavement belonging to the lessors in front of the demised premises and to all rights and easements to any of the adjacent property . . ."

The lessee's covenants set out in cl. 2 contain a covenant, in cl. 2 (7), that the lessee shall not carry on or permit to be carried on on the said premises without the consent in writing of the lessors any trade or business other than that of a

* See p. 345, letter I, to p. 346, letter A, ante.

tobacconist. Clause 2 (8) and cl. 2 (9) contain the covenants which were relied on by the defendants, namely: A

“(8) That the lessee shall not nor will at any time place or exhibit outside the said shop and premises or any part thereof any article for sale or otherwise nor make use of the forecourt of the said shop for any other purpose than that of access to the said shop and premises. (9) That the lessee will not permit or suffer any written printed painted or other notice sign or advertisement whatsoever to be posted written or painted on or affixed to or over any part of the exterior of the said shop and premises (except on the shop front) and also shall not nor will alter the construction or appearance of the said shop or any part thereof.” B

It is said that cl. 2 (8) and cl. 2 (9) show an intention that the plaintiff shall not have any rights outside the shop and, in particular, shall have no rights in the air space above the shop. In my judgment, however, those two sub-clauses really work the other way. The lease seems to me to indicate that, without those particular restrictions placed on the plaintiff by cl. 2 (8) and cl. 2 (9), he would have unlimited rights of user in the air space and the exterior parts of the shop. Since he is only restricted by cl. 2 (9) to not permitting or suffering advertisements to be fixed to or over any part of the exterior of the shop, it seems to me that that limitation necessarily implies that he has the full use of the air space subject to that restriction. Similarly, by cl. 2 (8), he is restricted from exhibiting or placing outside the shop any article for sale or otherwise or making use of the forecourt; because it might be said, as, indeed, I think has been said in one of the cases to which I have been referred, that, without such a restriction, the lessee is entitled to the full use of the space immediately above his forecourt and immediately above any basement which may be subject to the lease. Accordingly, I can find nothing in the lease which displaces the *prima facie* conclusion which one would otherwise reach that the air space above the demised premises is part of the premises conveyed. C D E

In support of the contrary argument, counsel for the defendants submitted that the plaintiff did not require the use of the air space. That may well be so, but it does not seem to me to lead to the conclusion which was sought to be drawn from it, namely, that the air space was not conveyed. At this stage it is relevant that I should refer to the decision of ROMER, J., in *Gifford v. Dent* (2) ([1926] W.N. 336), and for the present purposes I refer only to that part of his decision where he held that the tenants of a shop on the ground floor of certain premises and of the basement which projected under the pavement had a right in the air space superimposed on that basement. Although the full terms of the lease in *Gifford v. Dent* (2) are not stated, the learned judge seems to have reached a conclusion which is in line with the conclusion which I have already reached in the present case. I shall have to refer to *Gifford v. Dent* (2) again in another connexion where it is even more relevant. F G H

The next point taken was that, even if the air space above the ground floor shop was conveyed by the lease, yet it was to be taken as “subject to all rights and easements to any of the adjacent property”, which, as a matter of construction, must be taken to mean all rights and easements belonging to the owners of, and appertaining to, the adjacent property. It was submitted that, inasmuch as the landlords had granted a right to the owners of the adjacent property, 409, City Road, to permit the defendants to put their sign out from the wall of No. 409, the plaintiff’s rights in the air space must be taken as subject to the right granted to the owners of the adjacent property. I think that there are two answers at least to that point. First, on the facts the permission under which this sign was put out was the permission granted in January, 1950, and not the permission granted in 1948. Accordingly, the landlords, having on my construction of the lease already parted with all rights in the air space to the plaintiff, I

- A had no right to grant any permission to the adjacent owners or to the defendants. The second answer, it seems to me, is that on the construction of the material documents nothing in the nature of a real right in derogation of a possible lessee's rights was created by these letters*. It is not suggested seriously that any easement was created, and it seems to me that there was merely a statement made to the owners of the adjacent property that the freeholders of the shop
- B would take no objection to the freeholders of No. 409 granting permission to the defendants to fix an advertisement. That does not seem to me to be a right of easement within the true construction of cl. 1 of the lease.

- The next point taken was that the plaintiff, by his conduct in allowing the sign to remain in position from 1950 onwards, was estopped thereafter from ever objecting to the sign remaining there. The first point about that contention
- C which seems to be strange is that, if the defendants had come direct to the plaintiff as the owner of the air space above his shop and asked him expressly for his permission and he had granted his permission expressly, it is rightly conceded that such an express liberty given by the plaintiff would be revocable, at least on reasonable notice, unless by the express terms of the agreement or licence the plaintiff had debarred himself from terminating on reasonable notice.
- D If that is the position with regard to express notice, it is very difficult to see how the position of the plaintiff can be worse if the permission relied on is merely an implied permission, as, indeed, it must be, because there is no evidence or suggestion that he ever expressly granted permission. Nor do I think that any real case of estoppel, as I understand that doctrine, is made out on the facts of this case. There is no representation by the plaintiff of any existing fact which he
- E now seeks to deny. The highest it can be put against the plaintiff is that by his conduct he must have conveyed to the defendants the fact that he would not object in the future. That seems to me to be exactly the kind of position which the House of Lords in *Jorden v. Money* (3) ((1854), 5 H.L. Cas. 185) and similar cases have held not to constitute an estoppel. Nor can I see that the facts, as proved, give rise to any equitable estoppel, because I cannot see how, in any way,
- F the defendants were induced to act to their prejudice to such an extent as would entitle them, as they would be entitled on their argument today, to a continuance of the exhibition of that sign for ever, or, at any rate, during the length of the plaintiff's lease. It may well be that they got good consideration for the expenditure which they incurred in putting up the sign by having it exhibited for the period of seven years during which it has been exhibited up to date. Further-
- G more, it must be borne in mind, if any question of equitable estoppel is under consideration, that in 1953 the plaintiff gave clear notice to the defendants that he claimed a right to have the sign removed and that he would exercise that right unless the defendants were more amenable to him as regards his quota. In fact, they did become more amenable under that pressure, the quota was in-
- H creased, and they were allowed to maintain the sign in position. Accordingly, I reach the conclusion that nothing which has happened has deprived the plaintiff of the right which he has in the air space as conveyed to him by the lease.

- That leads me to the next and, in some ways, most interesting point of the case, namely, whether an invasion of an air space by a sign of this nature gives rise to an action in trespass or whether the rights, if any, of the owner of the air
- I space are limited to complaining of nuisance; for, if his rights are so limited, it is clear on the facts of this case that no nuisance was created, since the presence of this sign in the position which it occupied on the wall of the adjoining premises caused no inconvenience and no interference with the plaintiff's use of his air

* The letters are printed, so far as relevant, at p. 345, letters H and I, ante. There were two letters, one written in April, 1948, and the other written in January, 1950, the latter being the letter giving the permission under which the new sign was erected, but the former being relevant to any possible contention that an easement had been granted before the lease of December, 1948.

space. The question of trespass by invasion of the air space has been the subject of considerable controversy. One starts with the decision of LORD ELLENBOROUGH in *Pickering v. Rudd* (4) ((1815), 4 Camp. 219), where the trespass alleged was that the defendant had broken and entered the plaintiff's close by nailing on the defendant's own house a board which projected several inches from the wall and so far overhung the plaintiff's garden. LORD ELLENBOROUGH, in 1815, said (*ibid.*, at p. 220):

"I do not think it is a trespass to interfere with the column of air superincumbent on the close. I once had occasion to rule upon the circuit, that a man who, from the outside of a field, discharged a gun into it, so as that the shot must have struck the soil, was guilty of breaking and entering it. A very learned judge, who went the circuit with me, at first doubted the decision, but I believe he afterwards approved of it, and that it met with the general concurrence of those to whom it was mentioned. But I am by no means prepared to say, that firing across a field in vacuo, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit*, at the suit of the occupier of every field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded. If any damage arises from the object which overhangs the close, the remedy is by an action on the case."

HAWKINS, J., followed that decision and took the same view in *Clifton v. Viscount Bury* (5) ((1887), 4 T.L.R. 8), where he was dealing with the passage of bullets fired from a musketry range, the bullets passing some seventy-five feet above the surface of the land and not striking the land. He held that that was not trespass, but, if anything, was nuisance.

An early doubt as to the correctness of LORD ELLENBOROUGH's statement was expressed by BLACKBURN, J., in *Kenyon v. Hart* (6) ((1865), 6 B. & S. 249 at p. 252), and it seems to me that since that date there has been a consistent line of authority to the contrary. For instance, in *Wandsworth Board of Works v. United Telephone Co.* (7) ((1884), 13 Q.B.D. 904), one of the questions at issue was whether a telephone line running across a street constituted a trespass as against the local authority in whom the street was vested. The main contest in the case was as to the extent of the vesting in the local authority, the conclusion being reached that they did not have vested in them the air space above the street beyond what was necessary for its use as a street; but I think that each of the learned lords justices in that case was quite clear in his conclusion that, if the street and the air space above it had been vested in the local authority, the passage of a telephone line through that air space would have constituted a trespass and not a mere nuisance. I need not elaborate my judgment by citing the passages from the three judgments in that case.

In *Gifford v. Dent* (2), ROMER, J., clearly took the view that a sign which was erected on the wall above the ground floor premises, which had been demised to the plaintiff, and projected some four feet eight inches from the wall constituted a trespass over the plaintiff's air space, that air space being the column of air above the basement which projected out under the pavement. ROMER, J., said ([1926] W.N. at p. 336):

"If he was right in the conclusion to which he had come that the plaintiffs were tenants of the forecourt and were accordingly tenants of the space above the forecourt *usque ad coelum*, it seemed to him that the projection was clearly a trespass upon the property of the plaintiffs."

- A That decision, I think, has been recognised by the text-book writers, and, in particular, by the late PROFESSOR WINFIELD*, as stating the true law. It is not without significance that in the Air Navigation Act, 1920, s. 9 (1), which was replaced by s. 40 (1) of the Civil Aviation Act, 1949, the legislature found it necessary expressly to negative the action of trespass or nuisance arising from the mere fact of an aeroplane passing through the air above the land. It seems
- B to me clearly to indicate that the legislature were not taking the same view of the matter as LORD ELLENBOROUGH in *Pickering v. Rudd* (4), but were taking the view accepted in the later cases, such as *Wandsworth Board of Works v. United Telephone Co.* (7), subsequently followed by ROMER, J., in *Gifford v. Dent* (2). Accordingly, I reach the conclusion that a trespass, and not a mere nuisance, was created by the invasion of the plaintiff's air space by this sign.
- C There remains for my consideration the final point urged by learned counsel for the defendants that the proper remedy in this case is a remedy in damages and not by way of injunction. In that connexion I was referred to a classic statement by A. L. SMITH, L.J., in *Shelfer v. City of London Electric Lighting Co.* (8) ([1895] 1 Ch. 287), regarding the principles to be applied in deciding whether an injunction should be granted or damages awarded. A. L. SMITH, L.J., said
- D (*ibid.*, at p. 322):

"Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction. There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorised by this section. In any instance in which a case

E for an injunction has been made out, if the plaintiff by his acts or laches has disintitiled himself to an injunction the court may award damages in its place."

In the present case I do not find that there has been any such disintitlement by reason of the acts or laches of the plaintiff. The learned lord justice

G continued (*ibid.*):

"So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out. In my opinion, it may be stated as a good working rule that—(1.) If the injury to the plaintiff's legal rights is small, (2.) And is one which is capable of being estimated in money, (3.) And is one which can be adequately compensated by a small money payment, (4.) And the case is one in which it would be oppressive to the defendant to grant an injunction:—then damages in substitution for an injunction may be given. There may also be cases in which, though the four above-mentioned requirements exist, the defendant

H by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disintitiled himself from asking that damages may be assessed in substitution for an injunction."

I have no doubt at all that in the present case I have a discretion, which I have to exercise judicially, to award damages in lieu of an injunction, if I see fit. It is true that the injury to the plaintiff's legal rights in this case is small. The sign

* See WINFIELD ON TORT (6th Edn.) (1954), p. 379.

in his air space does him no harm and does not diminish his enjoyment. I doubt whether it is a case in which one can estimate the damage in terms of money, because the damages, if estimated at all, would have to be stated to be nominal. I do not find, however, that it would be in any way oppressive to the defendants to grant an injunction. It is true that considerable expense, stated to be some £220, was incurred some seven years ago in erecting the sign, but I have no evidence at all whether the defendants have not had good value for that expenditure. I know that Messrs. Gallagher are apparently prepared today to pay £75 a year for a smaller advertisement in a less prominent position. Furthermore, I think it is relevant in this connexion that the defendants throughout the case have been insisting on the right to display this advertisement as a matter of right. I think that that is a circumstance which the court is entitled to take into account in determining whether a small money payment with a declaration of right should be sufficient or whether an injunction should be granted. Cases in which an injunction has not been granted on the ground of hardship have, I believe, been mostly cases in which there has been some accidental invasion of the plaintiff's rights. I was referred by counsel for the plaintiff to *Goodson v. Richardson* (9) ((1874), 9 Ch. App. 221), where a strong Court of Appeal held that the mere fact that the invasion of the highway in that case did not cause any serious damage to the owner of the highway did not disentitle him from an injunction. I am further impressed by the fact that, if I refuse to grant an injunction in this case, there is nothing to prevent the defendants from continuing to display the sign, and leaving it to the plaintiff to put forward a subsequent claim for damages in a further action. If I were to decide that an appropriate remedy would be a small money payment of nominal damages, I would be, in effect, saying that, although such implied licence, if any, as the defendants had has been determined, nevertheless, the defendants are entitled to continue to display their sign.

In my judgment, bearing in mind that both parties, in pursuance of what they claimed to be their business interests, have attempted to bring commercial pressure to bear one on the other, this is a proper case in which the court should direct that there should be a mandatory injunction that such portion of the sign as projects over the plaintiff's premises be removed within twenty-eight days.

Judgment for the plaintiff.

Solicitors: *Jaques & Co.* (for the plaintiff); *Trower, Still & Keeling*, agents for *W. Sommersville*, Bristol (for the defendants).

[Reported by E. COCKBURN MILLAR, *Barrister-at-Law.*]

A

BRITISH TRANSPORT COMMISSION v. WESTMORLAND
COUNTY COUNCIL.

BRITISH TRANSPORT COMMISSION v. WORCESTERSHIRE
COUNTY COUNCIL.

B

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm), March 4, 5, 6, 11, May 14, 1957.]

Highway—Dedication—Footpaths over and under railway—Presumption of dedication—Whether dedication incompatible with objects of statutory corporation—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 16.

C

A bridge over a railway and a bridge under a railway were constructed by statutory railway undertakers at about the time of the construction of the railways. The bridges afforded accommodation crossings over and under the railways and were constructed under statutory obligation for the convenience of the owners and occupiers whose lands were severed by the railways, but there were no public or private rights of way at the crossings when they were constructed. Subsequently, members of the public so used the crossings and paths leading thereto and therefrom as to justify the inference of dedication of public rights of way if the railway undertakers and their successors in title had capacity to dedicate. The footpaths over and under the railways by means of the bridges were marked on provisional maps by both the respondents pursuant to their obligations under the National Parks and Access to the Countryside Act, 1949. The appellants, who were the successors in title to the railway undertakers, sought declarations that no public rights of way existed over or under the bridges in question.

D

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Held: the test whether a statutory corporation, such as the appellants, could validly dedicate to the public a right of way over their land was whether the dedication was compatible with the statutory purposes for which the corporation had acquired the land; the question of incompatibility was one of fact to be determined by a consideration of the probabilities reasonably foreseeable or of the likelihood whether the right of way would interfere with the adequate fulfilment of the statutory purposes, and, in the present cases, the dedication of the rights of way was not incompatible with the appellants' statutory purposes.

R. v. Inhabitants of Leake ((1833), 5 B. & Ad. 469) and *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.* ([1926] A.C. 355) applied.

H

Ayr Harbour Trustees v. Oswald ((1883), 8 App. Cas. 623) and *Paterson v. St. Andrews Provost* ((1881), 6 App. Cas. 833) distinguished.

Dictum of SIR GEORGE JESSEL, M.R., in *Mulliner v. Midland Ry. Co.* ((1879), 11 Ch.D. at p. 623) disapproved (see, particularly, p. 365, letter F, post).

Semble: the question whether the grant of a right of way was in fact incompatible with a corporation's statutory purposes should be determined at the date when it is before the tribunal of fact (see p. 361, letter H, to p. 362, letter C, p. 365, letter A, p. 369, letter H, and p. 372, letter A, post).

I

Decision of the COURT OF APPEAL ([1956] 2 All E.R. 129) affirmed.

[As to capacity of statutory corporations to dedicate the surface land vested in them for use as a highway, see 16 HALSBURY'S STATUTES (2nd Edn.) 222, para. 268; and for cases on the subject, see 26 DIGEST 290-292, 225-243.

For the Railways Clauses Consolidation Act, 1845, s. 16, see 19 HALSBURY'S STATUTES (2nd Edn.) 603.]

Cases referred to:

- (1) *R. v. Leake (Inhabitants)*, (1833), 5 B. & Ad. 469 (110 E.R. 863); 2 Nev. & M.K.B. 583; 26 Digest 290, 225.
- (2) *Ayr Harbour Trustees v. Oswald*, (1883), 8 App. Cas. 623; 11 Digest (Repl.) 103, 5.
- (3) *Grand Junction Canal Co. v. Petty*, (1888), 21 Q.B.D. 273; 57 L.J.Q.B. 572; 59 L.T. 767; 52 J.P. 692; 26 Digest 290, 226.
- (4) *Foster v. London, Chatham & Dover Ry. Co.*, [1895] 1 Q.B. 711; 64 L.J.Q.B. 65; 71 L.T. 855; 11 Digest (Repl.) 123, 151.
- (5) *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.*, [1896] 2 Q.B. 439; 65 L.J.Q.B. 625; 75 L.T. 239; 11 Digest (Repl.) 139, 210.
- (6) *Taff Vale Ry. Co. v. Pontypridd Urban District Council*, (1905), 93 L.T. 126; 69 J.P. 351; 26 Digest 291, 228.
- (7) *South Eastern Ry. Co. v. Cooper*, [1924] 1 Ch. 211; 93 L.J.Ch. 292; 130 L.T. 273; 88 J.P. 37; 19 Digest 108, 687.
- (8) *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.*, [1926] A.C. 355; 95 L.J.Ch. 587; 134 L.T. 673; 90 J.P. 77; Digest Supp.
- (9) *Mulliner v. Midland Ry. Co.*, (1879), 11 Ch.D. 611; 48 L.J.Ch. 258; 40 L.T. 121; 43 J.P. 573; 11 Digest (Repl.) 122, 145.
- (10) *Paterson v. St. Andrews Provost*, (1881), 6 App. Cas. 833; 26 Digest 292, 241.
- (11) *R. v. Wycombe Ry. Co.*, (1867), L.R. 2 Q.B. 310; 36 L.J.Q.B. 121; 15 L.T. 610; 31 J.P. 197; 11 Digest (Repl.) 112, 73.
- (12) *Pugh v. Golden Valley Ry. Co.*, (1880), 15 Ch.D. 330; 49 L.J.Ch. 721; 42 L.T. 863; 30 Digest (Repl.) 218, 607.
- (13) *Emsley v. North Eastern Ry. Co.*, [1896] 1 Ch. 418; 65 L.J.Ch. 385; 74 L.T. 113; 60 J.P. 182; 11 Digest (Repl.) 146, 252.
- (14) *Great Western Ry. Co. v. Solihull Rural District Council*, (1902), 86 L.T. 852; 66 J.P. 772; 26 Digest 290, 227.
- (15) *Great Western Ry. Co. v. Talbot*, [1902] 2 Ch. 759; 71 L.J.Ch. 835; 87 L.T. 405; 19 Digest 111, 714.
- (16) *South Eastern Ry. Co. v. Warr*, (1923), 21 L.G.R. 669; 26 Digest 291, 232.
- (17) *Great Central Ry. Co. v. Balby-with-Hexthorpe Urban Council, A.-G. v. Great Central Ry. Co.*, [1912] 2 Ch. 110; 81 L.J.Ch. 596; 106 L.T. 413; 76 J.P. 205; 26 Digest 292, 240.
- (18) *South Eastern Ry. Co. v. Associated Portland Cement Manufacturers (1900), Ltd.*, [1910] 1 Ch. 12; 79 L.J.Ch. 150; 101 L.T. 865; 74 J.P. 21; 19 Digest 26, 112.
- (19) *Midland Ry. Co. v. Gribble*, [1895] 2 Ch. 827; 64 L.J.Ch. 826; 73 L.T. 270; 19 Digest 81, 490.
- (20) *A.-G. v. London & South Western Ry. Co.*, (1905), 69 J.P. 110; 26 Digest 292, 239.
- (21) *Caledonian Ry. Co. v. Turcan*, [1898] A.C. 256; 25 R. (Ct. of Sess.) 7; 35 Sc. L.R. 404; 11 Digest (Repl.) 195, 489.
- (22) *Edinburgh Magistrates v. N.B. Ry. Co.*, (1904), 6 F. (Ct. of Sess.) 620; 41 Sc. L.R. 492; 12 S.L.T. 20; 26 Digest 281, 177r.

Appeals.

Consolidated appeals by the British Transport Commission from orders of the Court of Appeal (SINGLETON, JENKINS and HODSON, L.JJ.), dated Mar. 22, 1956, and reported [1956] 2 All E.R. 129, affirming orders of the Queen's Bench Divisional Court (LORD GODDARD, C.J., STABLE and ASHWORTH, JJ.), dated Jan. 23, 1956, and reported [1956] 1 All E.R. 321, on Cases Stated by justices for the County of Westmorland and justices for the County of Worcester, respectively. The facts in *British Transport Commission v. Westmorland County*

A Council are set out in the opinion of VISCOUNT SIMONDS, p. 356, letter A, to p. 357, letter C, post. The facts in *British Transport Commission v. Worcestershire County Council* are set out in the report of the Divisional Court (see [1956] 1 All E.R. at pp. 323, 324).

B Sir Andrew Clark, Q.C., Sir Frank Soskice, Q.C., and J. P. Widgery for the appellants.

Michael Rowe, Q.C., Harold Williams, Q.C., and E. S. Temple for the respondents.

The House took time for consideration.

May 14. The following opinions were read.

C VISCOUNT SIMONDS: My Lords, these consolidated appeals, in which the British Transport Commission are appellants and the Westmorland County Council and the Worcestershire County Council respectively are respondents, raise a question of general importance. It will be sufficient to state the facts and contentions in regard to the appeal in which the Westmorland County Council are respondents. The same conclusion must be reached in both cases.

D The appeal in the *Westmorland* case is brought from an order of the Court of Appeal whereby that court unanimously dismissed an appeal from a decision of the Divisional Court of the Queen's Bench Division which had been given on a Case Stated by Quarter Sessions of the Peace for the County of Westmorland. The Case Stated was consequent on an order of sessions dismissing an application by the appellants for a declaration that no public right of way existed over a bridge spanning certain lines of railway owned and occupied by the appellants in the Borough of Kendal in the same county.

E The jurisdiction of quarter sessions arises in this way. By s. 27 of the National Parks and Access to the Countryside Act, 1949, the council of every county in England and Wales are required to carry out a survey of all lands in their area over which a public path is alleged to subsist and to prepare a draft map of their area showing such footpath whenever, in their opinion, such a right of way subsisted, or is reasonably alleged to have subsisted, at the relevant date as therein defined. The council are then required* to publish in the prescribed manner a notice of the preparation of the draft map and of the places where it may be seen and to hear objections as to anything contained in or omitted from it. Having made a determination on any such objection, the council are next required† to make a provisional map incorporating its determination and to advertise the preparation thereof and the places at which it may be inspected. At any time‡ within twenty-eight days of the publication of such notice the owner, lessee or occupier of any land on which the map shows a public path or a road used as a public path may apply to quarter sessions for a declaration that at the relevant date there was no public right of way over the land and, unless quarter sessions are satisfied that at that date such a right of way did exist, they must make a declaration accordingly. By s. 31 (7) of the Act, provision is made for an appeal to the High Court by way of Case Stated on a point of law.

H Pursuant to their obligations under this Act, the respondents, the Westmorland County Council, prepared a provisional map of the Borough of Kendal and showed on it a footpath numbered 29 which crossed certain lines of railway owned and occupied by the appellants by means of an overbridge, which I will presently describe. The relevant date for the purpose of the Act was Aug. 1, 1952. On Nov. 12, 1954, the appellants applied to the justices of the County of Westmorland

* By *ibid.*, s. 29.

† By *ibid.*, s. 30.

‡ See *ibid.*, s. 31 (1) (a), (3).

sitting as an Appeal Committee of Quarter Sessions for the county for a declaration that on Nov. 1 no public right of way existed over the overbridge. This application was heard on Apr. 5, 1955, and was refused, and in due course a Case was, pursuant to the Act, stated for the opinion of the High Court. A

It is necessary that I should recite the facts precisely as they are found in the Case Stated. After reference to the application, the Case proceeded as follows:

" 2 (A) The said lines of railway were constructed in or about the year 1847 by the appellants' predecessors in title under powers contained in the Kendal and Windermere Railway Act, 1845. B

" (B) At the date of the construction of the said railway no public right of way existed on or near to the line of the said way numbered 29.

" (C) The said bridge was constructed by the appellants' predecessors in title at or about the time of the construction of the said railway in order to facilitate access between the land on either side of the said railway which was severed by the construction of the same. C

" (D) The said bridge was constructed solely as a private accommodation crossing for the benefit of the owners and occupiers of lands so severed as aforesaid and no express dedication to the public of the way thereover has at any time been made. D

" (E) Since the construction of the said railway members of the public have used the said way numbered 29 and the said bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a highway if the owner of the soil were capable of such dedication. E

" (F) The owners from time to time of the soil of the said way, other than the appellants and their predecessors in title as owners of the said railway, have at no time been under such a disability as would render them incapable of dedicating the said way as a highway and have made no application to quarter sessions for such a declaration as was sought by the appellants in these proceedings nor has such an application been made by any lessee or occupier (other than the appellants) of the soil of the said way. F

" (G) If and when the appellants cease to be bound to maintain the said bridge for the benefit and convenience of the owners or occupiers of the lands severed by the said railway for whose benefit and convenience the same was originally constructed, by reason of the rights of the said owners and occupiers having been released by agreement or abandoned or having otherwise ceased to be exercisable, the appellants would demolish and discontinue the said bridge, it being their practice so to deal with accommodation works as opportunity arises. G

" (H) There is no likelihood of the appellants wishing to construct additional lines of rails under the said bridge or its approaches unless substantial new industrial development takes place in the area served by the said railway. There is no prospect of any such development. H

" (I) The continued existence of the bridge will not cause any danger to the running of the appellants' trains and the operation of the railway.

" (J) The bridge is a strong and durable edifice likely to last indefinitely with comparatively small repairs. The cost of demolishing it would be at the very least £700. It has not been repaired for at least eight years and if it is to remain it will require repairs within the next two or three years which we estimate will cost £250 and thereafter maintenance at a cost which we estimate at £150 in every period of ten years. Accordingly we find that the annual cost of maintenance capitalised would be appreciably less than the cost of demolition. In every case the costs referred to are calculated at present day prices. I

- A “(K) In so far as it is a matter of fact, the expenditure involved in the maintenance of the bridge is quite compatible with the present and future execution of the purposes for which the land is vested in the appellants.”

By way of amplification of the facts as stated it should be added that the Kendal and Windermere Railway Act, 1845, incorporated (inter alia) the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845.

B Section 68 of the latter Act required the railway company to make and at all times thereafter maintain for the accommodation of the owners and occupiers of lands adjoining the railway (inter alia) so many bridges over the railway as might be necessary for the purpose of making good any interruptions caused by the railway to the lands through which it was made. The bridge over which the footpath numbered 29 runs (which has been called “the overbridge”) was constructed pursuant to this section.

C Section 16 of the same Act was strongly relied on by the appellants. It provided that, subject as therein mentioned, it should be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, as hereinafter mentioned, to execute any of the works therein mentioned, that is to say, they might construct on, across, under, or over any lands described in the plans such embankments, bridges and fences as they should think proper, and (this is the relevant power) they might “from time to time alter, repair, or discontinue the beforementioned works or any of them, and substitute others in their stead” and further they might “do all other acts necessary for making, maintaining, altering, or repairing, and using the railway.”

E These being the facts the contentions of the parties may now be stated. It was contended by the appellants that the dedication of a public right of way over the said bridge would be incompatible with the purposes of their railway undertaking in that: (A) It would commit the appellants in perpetuity to all such expense in the maintenance of the said bridge as might from time to time be necessary which expense could be avoided if the same were demolished. (B) It would fetter the appellants’ powers to expand their said railway undertaking by the construction of additional lines of rails if and when they might require to do so. (C) It would deprive the appellants of their statutory powers to discontinue the said bridge and crossing pursuant to s. 16 of the Railways Clauses Consolidation Act, 1845.

G It was contended by the respondents that—(A) there having been user of the said way numbered 29 and the said bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a highway if the owner of the soil were capable of dedication, dedication ought to be presumed to have taken place; (B) the user of the bridge by the public as a public footpath was not inconsistent with the operation of the railway and the execution of the purposes for which the bridge and adjoining railway land is and was vested in the appellants and their predecessors; (C) the dedication of a public right of way over the bridge would only be incompatible with the execution of the functions of the appellants and their predecessors if it were to involve the appellants in a material increase in expenditure and, on the facts, the appellants would not be involved in any increase in expenditure whatever; (D) section 16 of the

I Railways Clauses Consolidation Act, 1845, did not have the effect contended for it by the appellants; otherwise its effect would be that railway undertakers as a matter of law could in no circumstances dedicate a right of way across any part of their railway; this proposition was not supported in any decided case.

On these facts and contentions the justices were of opinion that there had been dedication, and accordingly refused to make the declaration sought by the appellants. The question they submitted for the opinion of the High Court was “whether on the facts aforesaid a dedication of the alleged public right of way

was incompatible with the statutory objects of the appellants." As I have already said, the Divisional Court and Court of Appeal in turn dismissed the appellants' appeal. In effect, both courts answered the question submitted to them in the negative. A

I must for a moment recur to the appellants' contentions as they appear in the Case Stated. Contention (A) is no longer advanced as a separate contention. Contentions (B) and (C) may fairly be said to be directed to the general question submitted by the justices, but learned counsel for the appellants found it convenient to argue the case on the alternative pleas: (A) that the dedication of public rights of way in the circumstances of the case would amount to a repeal of the appellants' statutory power to discontinue the bridge in certain events and would thus be ultra vires; and (B) that such dedication would have been incompatible with the public or statutory purposes for which the appellants and their predecessors held their lands. It is, however, clear that the two pleas interlock: for one aspect of incompatibility might consist in such a surrender of power as to debar the performance of the statutory purpose. I propose, therefore, to examine the case on the footing that the real question is that which was submitted by the justices, not, however, closing my mind to the aspect of the question to which I have just referred. Before I refer to the authorities, which are numerous, it is, perhaps, desirable to state that, in my opinion, they are by no means irreconcilable, as has been suggested, but that the single difficulty is to ascertain from them what is the test of incompatibility which is to guide the court in determining whether an act proposed to be done by a railway or other statutory company is incompatible with the statutory purpose for which it was authorised to acquire and acquired its land. B C D E

Any examination of this question must begin with *R. v. Inhabitants of Leake* (1) ((1833), 5 B. & Ad. 469), which has been cited in many cases, some of them in this House, and never disapproved. The decision goes to the root of the matter, and, often as they have been cited, I think I should remind your Lordships of the words of PARKE, J., in that case (*ibid.*, at p. 478): F

"If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power." G

Here a principle is laid down which is supported not only by a great weight of succeeding authority but by its inherent reasonableness. For, though on the one hand it would be improper that commissioners or other persons having acquired land for a particular statutory purpose should preclude themselves from using it for that purpose, on the other hand, if consistently with its user for that purpose it can be used for some other purpose also, I see no impropriety in such secondary user. If the usefulness of a parcel of land is not exhausted by its user for its statutory purpose, why should it not be used for some other purpose not incompatible with that purpose? H

This, at least, is the view which has been consistently taken for over one hundred years, and I do not doubt that any departure from it would be fraught with most serious consequences to assumedly well-established public rights. Amongst the cases to which reference might be made, some have a particular value because they were later in date than *Ayr Harbour Trustees v. Oswald* (2) ((1883), 8 App. Cas. 623), on which the appellants strongly relied, and were decided in the light of that binding decision. I may mention such cases as *Grand Junction Canal Co. v. Petty* (3) ((1888), 21 Q.B.D. 273); *Foster v. London,* I

A *Chatham & Dover Ry. Co.* (4) ([1895] 1 Q.B. 711); *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439); *Taff Vale Ry. Co. v. Pontypridd Urban District Council* (6) ((1905), 93 L.T. 126); *South Eastern Ry. Co. v. Cooper* (7) ([1924] 1 Ch. 211); *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.* (8) ([1926] A.C. 355). If, in *Mulliner v. Midland Ry. Co.* (9) ((1879), 11 Ch.D. 611), there are to be found observations by SIR GEORGE JESSEL, B.M.R., which do not conform with this long line of authority, they cannot be given the weight which is usually accorded to the decisions of that very learned judge. They have, in fact, been the subject of judicial criticism and explanation: see, e.g., *Gonty's case* (5) and *Petty's case* (3).

C It was, however, on the *Ayr case* (2) that counsel for the appellants mainly relied, suggesting, if I understood the argument, that a proper understanding of that case must lead to a decision in his favour. I think, on the contrary, that this contention is based on a radical misunderstanding of it. For it appears to me that in the *Ayr case* (2) it was plain that the proposed agreement by the statutory body, which had acquired land for a particular purpose, that they would not use it so as to interfere with the access from other property of the vendor to the sea, was regarded as incompatible with the statutory purpose.

D It was, in fact, an example of incompatibility, not a decision to the effect that incompatibility does not supply a test. This was clearly the view of LORD SUMNER in the *Birkdale case* (8). Similar observations may be made on *Paterson v. St. Andrews Provost* (10) ((1881), 6 App. Cas. 833), which gives equally little support to the appellants.

E If I am right in saying that the principle of *Leake's case* (1) must be applied here, I must next consider what is the test of incompatibility, which, as I have already said, appears to me to be the real difficulty in the case. This is a question of fact. It can be nothing else and it has been so treated, and expressly so treated, in many of the cases to which I have referred. But to say this does not completely solve the problem. For the jury or tribunal of fact must still be properly directed what is the test, and it is to this point that counsel for the appellants directed his attack. He urged that there could only be compatibility if it could be proved that in no conceivable circumstances could the proposed user at any future time and in any way possibly interfere with the statutory purpose for which the land was acquired. If he is right, it is clear that the justices in the present case did not ask themselves the right question or ascertain the relevant facts.

G My Lords, I am satisfied that this argument is misconceived. In the first place in none of the relevant cases, neither in those that I have already mentioned nor in those, far more numerous, that I have examined, has anything of the kind been suggested. PARKE, J.'s use of the word "never" in *Leake's case* (1) was clearly not intended to have so dramatic an effect. But, in the second place, to H give to incompatibility such an extended meaning is, in effect, to reduce the principle to a nullity. For a jury, invited to say that in no conceivable circumstances and at no distance of time could an event possibly happen, could only fold their hands and reply that it was not for them to prophesy what an inscrutable providence might in all the years to come disclose. I do not disguise from myself that it is difficult to formulate with precision what direction should be given to a jury. But after all we live in a world in which our actions are constantly I guided by a consideration of reasonable probabilities of risks that can reasonably be foreseen and guarded against, and by a disregard of events of which, even if we think of them as possible, we can fairly say that they are not at all likely to happen. And it is, in my opinion, by such considerations as these, imprecise though they may be, that a tribunal of fact must be guided in determining whether a proposed user of land will interfere with the statutory purpose for which it was acquired. At an earlier stage of this opinion I set out at length

the facts found by the justices in order that it might be seen how far they had correctly directed themselves in reaching their conclusion that there had been a dedication of the way in question. In para. 2 (H), (I), (J) and (K) of the stated Case they find the facts as they are now and as they are in their view likely to be. I do not think that there is any sin of commission or omission to be found in them, or that it can be said that, on the basis that I have attempted to lay down, they were not well entitled to reach their conclusion. A B

I should, on this part of the case, add that there was some discussion whether a tribunal of fact must look at the facts as they are at the date when the matter arises for determination or, disregarding the present, try to look at them as they existed when the dedication was presumed to be made. It is possible, my Lords, that a case may arise in which it becomes relevant to decide this question, but, inasmuch as a presumption of dedication arises after user for a number of years but there is no presumption of the date of dedication and in the present case the justices adopted the course most favourable to the appellants by looking at the facts as they are today and can today reasonably be foreseen, I do not think it necessary to say any more on this question. C

My Lords, I come now to that part of the argument for the appellants, which, though it is comprehended in the broad question of incompatibility, was treated as an independent plea. It was to the effect that, in the circumstances of the present case, the dedication of a right of way over the overbridge in question would amount to a repeal of the appellants' statutory power to discontinue the bridge, and would thus be *ultra vires*. This plea looks back to s. 16 of the Railways Clauses Consolidation Act, 1845, to which I have already referred, and it is stated in a way which gives it a superficial attraction. But it is not accurate to say that, if a statutory body puts it out of its power to act in an authorised manner in a particular case, that amounts to a repeal *pro tanto* of the Act of Parliament. This appears to me to be involved in the larger conclusion that I have already reached that land acquired for a particular statutory purpose may yet be used for another purpose which is not incompatible with it. The argument here, too, could be that user for another purpose precludes user for the statutory purpose and, therefore, *pro tanto* amounts to a repeal of the Act. But such an argument is rejected because the statutory purpose is not defeated so long as the secondary user is compatible with it. A fortiori, where the question is not of the main purpose of the undertaking but of the exercise of a power under s. 16, the question is whether its non-exercise, or such an act as will preclude its exercise, is consistent with the statutory purpose for which the land was acquired. The answer must be precisely that which has already been given. It is consistent: it is not incompatible. The single new fact which might in some other case be of importance is that the continued existence of a bridge, which the appellants would in other circumstances demolish, might involve them in certain costs of maintenance. But in the present case it was disclaimed as a separate ground of incompatibility, and I have been unable to discern its relevance in any other way. Nor do I think it necessary to consider what may be the respective obligations of the appellants and the local authority in the event of the bridge being no longer required as an accommodation work but being still necessary to support the public way. This is a question which has not arisen and may never arise. D E F G H I

Reference was made in the course of the argument before the House to s. 1 of the Rights of Way Act, 1932, sub-s. (7) of which provides:

"Nothing in this section contained shall affect any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate any such way where such way would be incompatible with such public or statutory purposes."

A I agree with SINGLETON, L.J., and HODSON, L.J., that the sub-section does not help the appellants but, on the contrary, by preserving the existing law and recognising that incompatibility of a public way with statutory purposes is the test, confirms the view that the principle of *Leake's* case (1) prevails.

For these reasons, which shortly adopt the judgments of the Divisional Court and the Court of Appeal, I am of opinion that both appeals should be dismissed.

B I cannot conclude without saying how much I have owed in preparing this opinion to the careful and exhaustive judgment of the late SINGLETON, L.J.

LORD MORTON OF HENRYTON: My Lords, I shall deal only with the *Westmorland* case as that was the only case argued before your Lordships and it is agreed that the same question arises in each of the two consolidated appeals.

C The bridge over which the alleged public right of footway runs was constructed by the predecessor in title of the appellants solely as a private accommodation crossing for the benefit of the owners or occupiers of lands severed by the construction of the Kendal and Windermere railway. Since the construction of that railway members of the public have used the bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a public footpath if the owner of the bridge were capable of such dedication. See finding (E) in para. 2 of the Case Stated.

D Counsel for the appellants submitted that neither the appellants nor the railway company which was their predecessor in title, were capable of such dedication. His reasons were (i) that a dedication of a public right of way over the bridge would prevent the undertakers from exercising at any time a statutory power, namely, the power to discontinue the bridge, which is conferred by s. 16 of the Railways Clauses Consolidation Act, 1845. That Act is incorporated with the special Act, the Kendal and Windermere Railway Act, 1845; (ii) that such a dedication might, at some future time, hamper the undertakers in carrying out to the best advantage the purposes of the special Act.

E My Lords, in my opinion, the only rule applicable to the present case is that a statutory company has no power to grant a public right of way the enjoyment whereof by the public is incompatible with the statutory objects of the company. This rule was established as a rule of law by a long series of cases, starting with *R. v. Inhabitants of Leake* (1) ((1833), 5 B. & Ad. 469), and has been recognised by this House in *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.* (8) ([1926] A.C. 355).

G It is common ground between the parties that the question of incompatibility is a question of fact, but there is a vital difference in the views put forward on behalf of each party as to the proper question to be put to the tribunal of fact. Counsel for the appellants submitted that the question should be

H “whether the existence of the alleged right of way might, in any possible circumstances, at any future time, hamper the undertaker in carrying out to the best advantage the purposes of its special Act”;

counsel for the respondent council submitted that the question should be

I “whether at the date when the question is considered by the tribunal of fact, there is any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties.”

My Lords, I can find no decision, in the long line of authority cited in argument, which is clearly in favour of counsel for the appellants' version, and I find several cases in which the court appears to have acted on the view that counsel for the respondents' version is the right one. As examples, I would mention *Grand Junction Canal Co. v. Petty* (3) ((1888), 21 Q.B.D. 273), and *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439).

I do not find this result surprising, for, if counsel for the appellants' version is correct, it would, I think, be impossible ever to presume dedication of a public right of way by a statutory railway company over any part of the land which it had acquired for the purposes of its Act. A right of way is a burden on the land. I cannot think that it would be possible for a tribunal of fact honestly to find that the existence of such a right could never at any time, and in any possible circumstances, hamper the undertaker; yet there are many cases in which a dedication of a public right of way has been presumed against a statutory railway company.

I, therefore, accept counsel for the respondents' submission, and turn to consider whether, on the facts found in the Case Stated, there is any likelihood that the existence of a public right of way over the bridge would interfere with the adequate and efficient discharge of the appellants' statutory duties.

It is first to be borne in mind that the bridge is an accommodation crossing and there is no evidence that it has ceased to be required for the purpose for which it was erected. Indeed, it cannot be said with certainty that a time will ever come when it is no longer required for that purpose, for the land on each side of the line may remain indefinitely in one ownership and there may never be any agreement with the owner that the bridge may be discontinued.

Next, there is, of course, no obligation on the appellants to exercise the power to discontinue the bridge, even if the time comes when it is no longer required for accommodation purposes.

Finally, the findings of fact (H), (I), (J) and (K) in para. 2 of the Case Stated make it clear that it is extremely unlikely that the appellants will ever find it necessary to discontinue the bridge for the purposes of their undertaking. I use the word "necessary" because it has been held that each one of the powers conferred by s. 16 of the Railways Clauses Consolidation Act, 1845, can be exercised only when it is necessary for making, maintaining, altering or repairing and using the railway. See *R. v. Wycombe Ry. Co.* (11) ((1867), L.R. 2 Q.B. 310), approved in *Pugh v. Golden Valley Ry. Co.* (12) ((1880), 15 Ch.D. 330), *Emsley v. North Eastern Ry. Co.* (13) ([1896] 1 Ch. 418).

I add that I am by no means satisfied that it would be impossible to discontinue the bridge, either under the statutory power or at common law, if it were no longer required as an accommodation way and if a public right of way existed over it. I find it unnecessary, however, to deal with this question, in view of the findings of fact to which I have just referred.

For these reasons, my Lords, I am of opinion that the question which I have posed should be answered in the negative. It follows that I would dismiss the appeal.

LORD RADCLIFFE: My Lords, I agree that these appeals ought to be dismissed. I should not say more but for the fact that the principles of law which bear on their subject appear to me to stand so curiously related that I do not want to part with the appeals without saying something as to what I conceive to be involved in the decision now proposed. It means, I think, that we must cut down two very far-reaching general propositions of law, valuable in themselves, to proportions that are manageable in relation to the particular set of circumstances with which we are now confronted. Both these general propositions support the appellants' argument. One proposition is that laid down by SIR GEORGE JESSEL, M.R., in *Mulliner v. Midland Ry. Co.* (9) ((1879), 11 Ch.D. 611 at p. 623). It is to the effect that a railway company, which operates under statutory powers of managing its railway conferred on it for the furtherance of the public interest, is devoid of legal capacity to grant any easement or right of way over land acquired by it unless expressly authorised by statute so to do. It has not, generally speaking, the full capacity of disposition enjoyed by a private owner of land. The other proposition, which is distinct

A from the first, is that no body, corporate or unincorporate, which holds property or rights under powers conferred on it for the public benefit can make a disposition or agreement effective in law by which it abdicates its freedom to exercise those powers at any time in the future. The second proposition rests principally on two decisions of this House in Scottish cases, *Paterson v. St. Andrews Provost* (10) ((1881), 6 App. Cas. 833); *Ayr Harbour Trustees v. Oswald* (2) ((1883), 8 App. Cas. 623).

B *Mulliner's* case (9) was decided in 1879. It has been referred to again and again in other cases, both in argument and in judgments of the court. It has certainly never been overruled; on the contrary, SIR GEORGE JESSEL's statement of the law has twice been made the very foundation of unanimous decisions in the Court of Appeal—see *Great Western Ry. Co. v. Solihull Rural District Council* (14) ((1902), 86 L.T. 852) and *Great Western Ry. Co. v. Talbot* (15) ([1902] 2 Ch. 759). More than that, part of his reasoning (though not directly his reasoning on this point) was quoted with approval by LORD BLACKBURN when making the first speech in this House in the *Ayr Harbour* case (2) (8 App. Cas. at p. 635). In any ordinary combination of circumstances one would say that the legal principle laid down in *Mulliner's* case (9) was firmly established. On the other hand, it is equally certain that for many years there has been a tendency to treat *Mulliner's* case (9) as having stated the law in terms different from those actually employed. It has been subjected to a process of judicial explanation. Few authorities can have been explained so often with such little fidelity to the original source. In 1888, in *Grand Junction Canal Co. v. Petty* (3) ((1888), 21 Q.B.D. 273), the court treated *Mulliner's* case (9) as being a decision in which (21 Q.B.D. at p. 275) “the facts of the case . . . pointed to a different conclusion of fact from that on which the decision in *R. v. Inhabitants of Leake* (1) ((1833), 5 B. & Ad. 469) was founded.” In *South Eastern Ry. Co. v. Cooper* (7) ([1924] 1 Ch. 211) SIR ERNEST POLLOCK, M.R., referred to *Mulliner's* case (9) as (*ibid.*, at p. 223) “a case . . . of a very special character” and WARINGTON, L.J., in the same case, similarly discounts the significance of SIR GEORGE JESSEL's intended proposition of law by describing it as made (*ibid.*, at p. 232) “. . . in reference to the facts of that case . . .” That, I suppose, could be said with as much or as little force about all judgments. Yet two things at least are plain from a reading of *Mulliner's* case (9), first, that there was nothing special about the facts—they related to a purported grant of a right of way through arches forming the substructure of a station—and, secondly, that SIR GEORGE JESSEL rested his decision on what he himself called “the general law”. The question that he put and answered in the negative was (11 Ch.D. at p. 619): Has a railway company power by law to alienate, either for value or without value, any portion of the land actually used for the railway or works, except so far as express provision to that effect is made in its regulating Act? From that he deduced, as was pointed out and approved by RIGBY, L.J., in *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439 at p. 450), that the grant of any easement was similarly forbidden.

H *Gonty's* case (5) is yet another Court of Appeal case in which *Mulliner's* case (9) was commented on. The case itself amounted to a decision that, in considering whether part of a building could be severed from the rest “without material detriment thereto”, that being the only condition on which a railway company could effect the severance under a special statutory power, it was legitimate to treat the railway company as having legal power to grant a right of access over the portion proposed to be taken, and to assess compensation accordingly. I have not sufficient ingenuity at my command to be able to say how this decision can be good law in the face of *Ayr Harbour Trustees v. Oswald* (2), in which it was decided by this House that, in assessing compensation for injurious affection of land retained arising from compulsory acquisition

of other land previously part of the same holding, it was not legitimate to treat the undertakers as having legal power to grant a right of access over the land acquired. However that may be, in *Gonty's* case (5), LORD ESHER, M.R., appeared to regard *Mulliner's* case (9) as being inconsistent with the view that the undertaker could grant the right of access but as being an authority which he was not prepared to follow. A. L. SMITH, L.J., said ([1896] 2 Q.B. at p. 447) that he was not going to controvert *Mulliner's* case (9), but thought that, if it were to be "cited as a case which says that the railway company cannot give an easement through its own embankment from one side to the other", he could not agree with it. Unfortunately, the learned lord justice did not say what, in his view, *Mulliner's* case (9) could be cited for if not for that, and his illustration of the power or duty of a railway company to create an accommodation access through its embankment, when it severs land, does nothing to clear up the matter since, of course, in such a case there is a statutory obligation to provide just such accommodation. RIGBY, L.J., as I have said, thought (*ibid.*, at p. 450) that *Mulliner's* case (9) did decide that no perpetual right of way could lawfully be created by a railway company over land taken and required for its purposes. "That . . . is all that case was intended to decide, and the case has no bearing on that before us." For completeness, I ought to add that there have been further comments on or proffered explanations of *Mulliner's* case (9) in *Taff Vale Ry. Co. v. Pontypridd Urban District Council* (6) ([1905], 93 L.T. 126) and in *South Eastern Ry. Co. v. Warr* (16) ([1923], 21 L.G.R. 669). Neither, I think, enables one to say with any confidence just how far it stands as an authority today or for what proposition.

How flickering is the illumination which these authorities throw on the main principle of law can be seen if one compares the decision of JOYCE, J., in 1912 in *Great Central Ry. Co. v. Balby-with-Hexthorpe Urban Council* (17) ([1912] 2 Ch. 110) with the decision of SWINFEN EADY, J., in 1909 in *South Eastern Ry. Co. v. Associated Portland Cement Manufacturers (1900), Ltd.* (18) ([1910] 1 Ch. 12). In the former, the learned judge, after referring to *Mulliner's* case (9) and *Gonty's* case (5), held it to be clear law that a railway company could not grant or dedicate a right of way over its lines of rails. In the latter, the learned judge, after referring to the same two cases, thought ([1910] 1 Ch. at p. 25) that there was "nothing whatever in that point" that a railway company "could not grant to somebody else the easement of tunnelling under" its line.

In my opinion, the root of the trouble lies in the fact that the courts have not truly accepted the validity of SIR GEORGE JESSEL's proposition that a railway company lacks legal capacity to grant an easement over railway land "except with a view to the traffic of their railway." Side by side with this proposition and without explicitly rejecting it, they have, in fact, been accepting and working on a different rule for statutory undertakers, viz., that they can grant easements over their land so long as the exercise of such easements is not inconsistent or incompatible with the fulfilment of the statutory purpose. This rule is regarded as being derived from *R. v. Inhabitants of Leake* (1). I do not think it profitable to inquire at this date whether that case, fairly considered, did amount to a decision of the court embodying any such rule. If we were reviewing it for the first time today, I should feel much doubt about that. But I think that we are bound to recognise that for very many years and on many occasions courts have taken as their test the words of PARKE, J. (5 B. & Ad. at p. 478):

"if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power",

A and have treated this test as a pragmatic one, to be answered according to the facts ascertainable at the time when the question arises. Some of the cases which recognise this test as the governing rule have been referred to in the speech of the noble and learned Viscount on the Woolsack. As he says, there are others.

B Such a rule has many drawbacks. It means that the validity of any easement must depend on the state of facts ascertained or reasonably foreseeable at the time when it is challenged in legal proceedings; and no one can tell in advance on what occasion a challenge will arise. It is very hard to know what measure of foresight or what extremity of prudence to allow to the judge of fact. It leads to what may well be, I think, misleading comparisons between different statutory undertakers and their works—railway lines, reservoirs, canals, tow-
C paths, drains and bridges. It has led to much confusion between the voluntary grant or dedication of a right *de novo*, the provision of accommodation ways or works under statutory obligation, and the voluntary enlargement of rights of way existing before the creation of the works and, therefore, necessarily preserved. Each of these classes may involve different considerations. When the distinctions have all been allowed for, I think that it is accurate to say that,
D although the test derived from *R. v. Inhabitants of Leake* (1) has often been accepted and propounded, it has never yet resulted in a finding that the voluntary grant by a railway company of a right of way over its lines on the level of the lines is an effective grant. A possible exception is *South Eastern Ry. Co. v. Cooper* (7); but the judgments delivered by the Court of Appeal in that case
E are not so expressed as to enable me to say with any certainty what was the ratio decidendi that formed the ground of their decision.

Nevertheless, I think that the accepted rule, with all its defects, is better than no rule at all. The construction of railways, at any rate, drove steel barriers over many hundred miles of the English countryside. To hold that at no time, at no point, and in no circumstances could a railway company grant *de novo*
F even a footway over, across, or under its lines would be a grave impediment to public amenity. In my opinion, therefore, we ought to say that *Mulliner's* case (9) cannot stand today as a binding decision, in so far as it laid down the proposition that a railway company lacks legal capacity to grant a right of way over or under its railway lands, including the site of the permanent way.
G I think, myself, that the error in the reasoning of that case lay in treating any grant of an easement as equivalent to an alienation for this purpose. Technically, as a matter of conveyancing, such a grant is, no doubt, a form of alienation. But, in the context of the powers of a railway company over the whole extent of the railway lands, a grant of an easement and an outright sale may amount to very different things. It seems to me better to say baldly that, on this
H occasion, a great judge laid down a proposition of law in terms that are too comprehensive to be maintainable than to continue to explain his decision in language that he did not use to justify conclusions which contradict his expressed opinion.

Now the other proposition which fortifies the appellants' arguments is that laid down in the two cases, *Paterson v. St. Andrews Provost* (10) ((1881), 6 App. Cas. 833) and *Ayr Harbour Trustees v. Oswald* (2). *Paterson's* case (10) is the earlier in date, though *Oswald's* case (2) is, I think, the one more often referred to. Both cases related to the question whether bodies holding land for purposes beneficial to the public interest could abdicate the potential exercise of certain powers over part of the land by ceding rights in it to other persons or to the public. In *Paterson's* case (10), the land concerned was the links at St. Andrew's which were held by the magistrates of the burgh for behoof of the inhabitants, subject to the obligation of preserving them for the purposes of the game of

golf and for the recreation and amusement of the inhabitants. What the magistrates were proposing to do was to construct a macadamised road along the boundary of the links. The learned Lords who heard the appeal, assisted by a volume of evidence from those skilled at golf, were evidently satisfied that there was no reason to fear that the addition of this feature would "interfere with the due prosecution of the game". LORD SELBORNE, L.C., said (6 App. Cas. at p. 843):

" . . . such variation in the state of the ground as it would introduce, would, in the event of balls finding their way there, rather add to than detract from the interest of the game . . .";

while LORD WATSON, speaking with something like levity, observed (*ibid.*, at p. 853) that

" . . . really the speculation as to whether it is better to have a road with ruts in it, or a metalled road, or a piece of rough grass with hollows and heaps, is after all rather a matter of fancy than a question having any substance in it."

It followed that there was nothing in law to prevent the magistrates from making up their road and allowing people the use of it.

On the other hand, it was the clear view of all the members of the House who took part in that decision that it was not within the power of the magistrates to abdicate any part of their control of the site of the road or, consequently, to dedicate it as a public highway; and the judgment approved by the House was worded accordingly. The whole point of the decision was to establish the distinction between the competence of the magistrates to make a road and allow passage over it and their incompetence to grant to the public or to individuals, or to allow them to acquire, any title to a right of way over it. Their opinion on this point is, I think, contained in the following words of LORD WATSON (*ibid.*, at p. 853):

" . . . such a change may come over St. Andrews that it may become necessary in the due exercise of their administrative powers for the town council to take away this right of road. One cannot anticipate that such a thing will immediately occur, but it may, and those who have the right to take recreation, and to play golf upon the links, are quite entitled to have a judgment which will prevent the magistrates from making such an alienation at the present moment as may come at any future period into collision with their rights over this piece of land . . ."

That imposes a very stern test. It does not depend on evidence. It looks to possibility, not to any standard of reasonable probability.

The facts of *Oswald's* case (2) are so familiar that I do not need to set them out. The Harbour Board had acquired part of his land, and the question arose what amount of compensation they ought to pay him for injurious affection of the remainder. To reduce the damage, and so his compensation, they were ready to secure him a right of permanent access to that remainder over the part they had taken. There was no evident reason why they should not so lay out the projected wharves and roads as to leave space for access by this means. They did not have to fill up the land taken with buildings. Nevertheless this House decided that they had no power to grant Oswald any permanent right over that land, because to do so would amount to depriving the present trustees and their successors of the discretion which their Act had vested in them, the power of using that land as the site of buildings if at any time the needs of their undertaking should require it. That would be to renounce "a part of their statutory birthright", as LORD SUMNER said in *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.* (8)

A ([1926] A.C. 355 at p. 372). Striking as the phrase is, it does not seem to me to offer much help in deciding which are the cases in which the principle of *Paterson's* case (10) and *Oswald's* case (2) is to be applied, where as he says (*ibid.*), "the very nature of the grants or the contract itself" provides the answer, and which are those many other cases in which the test to be applied is the humbler one of incompatibility proved by evidence. The birthright of a statutory corporation
 B includes all those powers and rights with which it is thought proper to invest it at its creation; and I do not think it easy for a court of law to decide merely by the nature of the thing which of those powers are inalienably entailed and which can be disentailed and disposed of by ordinary grant.

In my opinion, we are bound to recognise that the principle of these two cases cannot be applied in all circumstances and on all occasions to all statutory corporations and public bodies. That, indeed, has already been recognised by the
 C decision of this House in the *Birkdale* case (8), in which the electric supply company had certainly made a contract which deprived themselves and their successors of power at any future time to raise the charges for their supply beyond a fixed limit, however much the needs of their undertaking might require it. It is of some importance to remember, when searching for a dividing
 D line, that the two cases which "spoke for themselves" were both concerned with defined areas of land of no great extent, and the possible consequence of renouncing powers over such areas could be stated as a matter of practical observation. But nothing like the same observation can be brought to bear when the factors of the problem are, on the one hand, all the general powers derived by a railway company from the Railways Clauses Consolidation Act, 1845, and, on the
 E other hand, many miles of railway line covering great varieties of setting. In such cases what I have called the pragmatic test is, I think, to be preferred.

That consideration derives some support from the fact that we are dealing here with under- and over-bridges constructed as accommodation ways provided on severance. Such structures are not imposed on the railway line ab extra by voluntary initiative of the railway undertakers themselves. On the contrary,
 F their creation and maintenance for an indefinite period are conditions subject to which the undertakers are required to operate their line. Moreover, s. 68, which imposes this condition, itself adds the proviso

" . . . the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using
 G of the railway . . . "

But, if so, I cannot feel that there is much substance in the argument that the company had no power to grant a public right of way over such works because their existence is a natural defect to the best working of the line which ought to be removed as soon as the accommodation purpose is itself exhausted.

H LORD COHEN: My Lords, I need not restate the facts. It is sufficient to say that it is common ground that (i) the facts found by quarter sessions in the *Westmorland* case would raise a presumption of dedication of the footpath in question as a public right of way provided that it was not ultra vires for the appellants or their predecessors in title so to dedicate it, and (ii) there is no
 I material distinction between the *Westmorland* case and the *Worcestershire* case.

Quarter sessions, the Divisional Court and the Court of Appeal have all held that dedication was not ultra vires. LORD GODDARD, C.J., delivering the judgment of the Divisional Court, adopted the test laid down by PARKE, J., in *R. v. Inhabitants of Leake* (1) ((1833), 5 B. & Ad. 469 at p. 478) as follows:

" If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such

trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power.” A

The Lord Chief Justice pointed out ([1956] 1 All E.R. at p. 325) that that case had been followed again and again and went on to say that the question of incompatibility must be a question of fact to be decided by jury or judge, whichever in the particular case be the tribunal of fact. After distinguishing *Ayr Harbour Trustees v. Oswald* (2) ((1883), 8 App. Cas. 623), he held that on their findings of fact quarter sessions came to a correct decision. In the Court of Appeal, each of their Lordships delivered a judgment. They adopted the same test as that which I have already cited from the judgment of the Lord Chief Justice and held that, on the facts found by quarter sessions, they were bound by authority to uphold the decision of the courts below. B C

Before your Lordships, counsel for the appellants did not dispute that *R. v. Inhabitants of Leake* (1) was rightly decided on its facts, but, after a careful and helpful review of the authorities, he submitted that — (i) it had no application to a case where, as here, dedication would involve the voluntary release or abandonment or modification of a power conferred on a statutory undertaker by a special Act, or by any Act incorporated therewith relating to the manner in which the statutory undertaker may deal with land acquired for the purposes of the Act; (ii) *R. v. Inhabitants of Leake* (1) did not lay down as the test of incompatibility whether there was any likelihood of the dedication of a right of way materially hindering the statutory undertaker from an adequate and efficient discharge of his duties. The test laid down, said counsel, was whether the grant of an easement over the land might in any possible circumstances at any future time hamper the undertaker in carrying out to the best advantage the purposes of its special Act. D E

The first of these submissions is founded on s. 16 of the Railways Clauses Consolidation Act, 1845, which Act was, by s. 1 of the Kendal and Windermere Railway Act, 1845, incorporated in the last-mentioned Act. Section 16 sets out the various works which a railway company may execute and the section applies both to works for the construction of the railway and to accommodation works. The provision relied on by counsel was a provision that the company might from time to time alter, repair or discontinue the works and substitute others. This provision is followed by a provision conferring power to do all other acts necessary for making, maintaining, altering or repairing and using the railway. I pause here to observe that it has been held that this last limb of s. 16 is in reality a proviso on the whole section, and that the works authorised by the section must be works necessary for making, altering, repairing or using the railway. See *Emsley v. North Eastern Ry. Co.* (13) ([1896] 1 Ch. 418, per A. L. SMITH, L.J., at p. 434). F G

Counsel argued that, since it has been held that the obligation on a railway company to provide an accommodation way when its line severs a landowner's property remains in force only so long as the property on the two sides of the railway is in common ownership (see *Midland Ry. Co. v. Gribble* (19), [1895] 2 Ch. 827), the effect of dedicating a right of way over the accommodation bridge might be to prevent the exercise of this power of discontinuing the bridge. This he said amounted to the abandonment or modification of the statutory power. Dealing with this argument, the Lord Chief Justice said ([1956] 1 All E.R. at p. 325): H I

“ If this contention be right, it is indeed strange that it has never before been the subject of a decision or even mentioned in any of the judgments on the subject. There does seem to be a trace of an argument on this point in *A.-G. v. London & South Western Ry. Co.* (20) ((1905), 69 J.P. 110), but it

- A can hardly have been pressed, as the judgment of FARWELL, J., does not refer to it. If the point had been taken in *Taff Vale Ry. Co. v. Pontypridd Urban District Council* (6) ((1905), 93 L.T. 126), it would have afforded a short and complete answer."

With these observations I respectfully agree.

- B Counsel for the respondents countered counsel for the appellants' argument based on s. 16 by two propositions. (i) First he said that s. 16 does not confer a bare power to discontinue but only a power to discontinue and substitute another work. He admits that the company could discontinue without substituting another bridge, but he says that it would do so not under the section but in exercise of the power which any landowner would have if by discontinuance he disturbs no existing right. Section 16, the argument ran, is directed to conferring on a railway company a power which merely qua landowner it would not have, i.e., a power against the will of the person entitled to the accommodation way to discontinue it and replace it by another accommodation way, paying, if necessary, compensation under the relevant provisions of the Act. Counsel submitted that, since counsel for the appellants' argument connoted discontinuance without substitution, s. 16 had no relevance. (ii) Counsel submitted that, since the power to discontinue conferred by s. 16 is ancillary to the power to make, alter, repair or use the railway (see *Emsley's case* (13)), it would be incredible that the existence of this ancillary power can prevent dedication in a case where, as here, on the facts it is held that the dedication of the right of way is not incompatible with the main purpose of the railway.

- E I agree with the second submission and do not, therefore, find it necessary to express a concluded opinion on the first. For the reasons I have given, I would reject the first of counsel for the appellants' reasons for distinguishing this case from *R. v. Inhabitants of Leake* (1). If his second reason were well founded, it is difficult to conceive of a case in which a tribunal of fact could arrive at the conclusion that the dedication of the right of way was compatible with the objects prescribed by the Act. I doubt whether it could ever be said that in no possible circumstances at any future time could a railway company desire, for example, to widen its track. Counsel for the appellants, however, says that his proposition is supported by the language of PARKE, J., in *R. v. Inhabitants of Leake* (1) (5 B. & Ad. at p. 481), where he says,

- G "But I think, that if it is quite clear that such works would never be required, the commissioners, whether special or general, might give the right to the public."

- H Counsel stresses the word "never". The sentence, divorced from its context, lends some support to his argument, but, reading the judgment as a whole and having regard in particular to the next following paragraph thereof, I think it is clear that PARKE, J., regards the question as one of fact, to be determined, no doubt, not merely in the light of the position on the date of trial but in the light also of the probable future requirements of the company in the fulfilment of its railway purposes.

- I Counsel also relied on the language of SIR GEORGE JESSEL, M.R., in *Mulliner v. Midland Ry. Co.* (9) ((1879), 11 Ch.D. 611), where he said (*ibid.*, at p. 623):

"It appears to me quite impossible that the railway company can have a right either to sell, grant, or dispose of this land, or of any easement or right of way over it, except for the purpose of their Act, that is to say, with a view to the traffic of their railway."

The dispute in that case was as to a right of way granted by the railway company under one of the arches on which one of the company's railway stations was built. The evidence clearly established that the existence of the right of way

would interfere with the company's railway undertaking and the grant was held to be ultra vires. The correctness of the decision has never been challenged, but the dictum to which I have referred, if divorced from the facts of the case, in my opinion goes too far. This view is supported by the observations of the members of the Court of Appeal in *Grand Junction Canal Co. v. Petty* (3) ((1888), 21 Q.B.D. 273), and in *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439). In the former case it was held that the dedication of land as a public footpath was not inconsistent with its use by the canal company as a tow-path, and in the latter it was held that the giving of a private right of way over certain lands of the railway company was not inconsistent with the purposes of the railway company. In the former case, LORD ESHER said (21 Q.B.D. at p. 275) that he did not think that in *Mulliner's* case (9) the late Master of the Rolls meant to decide anything in contravention of what was decided in *R. v. Inhabitants of Leake* (1).

Counsel for the appellants also relied on the decision of this House in *Ayr Harbour Trustees v. Oswald* (2). This case had been relied on by Sir Frank Soskice before the Divisional Court. LORD GODDARD, C.J., dealing with his argument said ([1956] 1 All E.R. at p. 326):

"In our opinion, that case has no application to the present case. The harbour trustees were empowered by statute to acquire compulsorily an area of land for the purpose of their undertaking on payment of compensation to the owner of the land acquired. They sought to reduce the amount of compensation by offering to enter into a covenant with the dispossessed owner restricting themselves from building on, or using, a considerable portion of the land which the Act permitted them to take. To this the owner objected, and claimed that he was entitled to be compensated for what he had lost, and that the company had no power to sterilise the land, to use a convenient expression, and to covenant not to use that which the statute authorised them to acquire. It was held, to use LORD SUMNER's expression in *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.* (8) ([1926] A.C. 355), that the company could not thus dispose of their statutory birth-right. Here the dedication does not prevent the use of the land by the railway though it burdens it, as must always be the case where there is dedication."

With these observations I respectfully agree, and would only add that the very fact that the land the user of which it was proposed to restrict was included in the schedule connoted that its acquisition was then in the eyes of the legislature required for the purpose of the undertaking.

It is also to be observed that LORD HERSCHELL did not regard the decision in *Ayr Harbour Trustees v. Oswald* (2) as inconsistent with the line of authorities following *R. v. Inhabitants of Leake* (1), for in *Caledonian Ry. Co. v. Turcan* (21) H (1898), 25 R. (Ct. of Sess.) 7, he said (*ibid.*, at p. 18):

"In my view, without expressing any opinion upon the decision in that case [*Gonty's* case (5)], it does not conflict, as has been supposed, with the case of *Ayr Harbour Trustees v. Oswald* (2)."

The last case to which I need refer is *Paterson v. St. Andrews Provost* (10) I ((1881), 6 App. Cas. 833). It was not cited in either of the courts below, but counsel for the appellants submitted that it was really conclusive in his favour. The question at issue was as to the powers of the corporation in relation to the links, the property in which was vested in the corporation, subject to the obligation admitted to have subsisted from time immemorial of preserving the links for the purposes of the game of golf and for the recreation and amusement of the inhabitants. The case is somewhat remote from the present case, but, properly

A understood, it seems to me to support the respondents' case. I would refer to a passage from the speech of LORD WATSON where he says (*ibid.*, at p. 851):

B "Now, my Lords, although they hold it subject to these rights on the part of the inhabitants, the magistrates and council remain undivested to any further extent of their proprietary rights, and are therefore entitled either to make or to sanction any other uses to which the property is convertible so long as those uses are not inconsistent with the due enjoyment by the C burgesses of the rights vested in them by law. What uses they may so sanction will depend to a very great extent upon the amount of population and the amount of the golf played or recreation taken. Uses which would be perfectly legitimate and proper in a thinly populated burgh may become very illegitimate and very improper, and may constitute invasions of the burgesses' rights, when practised where there is a large population.

D "My Lords, what the magistrates and town council were proposing to do at the time when this action was raised appears to me to have been this, they were acting upon the assumption that it was within their competency to confer upon the public at large a right of way over a portion of the ground which it was their duty to preserve for purposes consistent with the rights of the inhabitants; and they justified their position upon the ground that as matters stood at that date, no right of the inhabitants would be invaded thereby. I think that was a mistaken view of the law and of the extent of their power, because they would thereby have vested in others a right which might become inconsistent with the rights of the inhabitants at some future time.

E "The appellants brought this action no doubt with a view to stop the threatened proceedings, but they did not limit the conclusions of their summons to the actual proceedings which the council were threatening to take, but made them so wide that, if given effect to, they would establish this proposition, that wherever a right of golfing or of recreation exists the F magistrates cannot give a comfortable or convenient right of passage over the ground reserved for that purpose, although the so giving it may not interfere to the smallest extent with the rights of the burgesses."

I read that passage as laying down that it was a question of fact whether what the corporation proposed to do would interfere with the rights of the burgesses. LORD WATSON no doubt stressed that, in reaching a conclusion on that issue of G fact, the court must have regard not only to the position as it was at the moment of trial but also to what was likely to happen in the future, but I find nothing in *Paterson's case* (10) disapproving of the statement of the law by PARKE, J., in *R. v. Inhabitants of Leake* (1), or of the application of that statement of the law in the many cases to which reference was made in the course of the argument.

H *Paterson's case* (10) was referred to by LORD BIRKENHEAD in *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.* (8) ([1926] A.C. at p. 364), and he did not suggest that it conflicted with *R. v. Inhabitants of Leake* (1). In the same case, LORD SUMNER referred with approval to *R. v. Inhabitants of Leake* (1) and (*ibid.*, at p. 372), explained the *Ayr Harbour case* (2) as being a case where the *res ipsa loquitur maxim* applied and the question of competence did not depend on a proved incompatibility between statutory purposes and the proposed I user. It was in this case that LORD SUMNER used the picturesque phrase "statutory birthright" and explained the *Ayr Harbour case* (2) as being one in which the trustees were proposing to renounce a part of their statutory birthright. It is, however, plain from his speech that he considered that the question whether a company was renouncing or seeking to renounce its statutory birthright would normally be a question of fact to be decided on the evidence. Reading his judgment as a whole, I think he was approving the decision in *R. v. Inhabitants of Leake* (1), and stating in other language the principle there laid down by PARKE, J., that the question whether there is power to dedicate a right of way

depends on whether the user by the public of that right of way would be compatible with the object prescribed by the statute appointing commissioners or creating the statutory company as the case might be. The question remains as to the test of compatibility. On that I cannot usefully add anything to what has been said by my noble and learned friend on the Woolsack and by LORD MORTON OF HENRYTON. I agree with the test they propose. As I read the Case Stated, that was the test applied by quarter sessions in the present case.

For these reasons I agree that the appeal should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, I agree and, but for the fact that certain Scots authorities were referred to and stressed in the argument for the appellants, I would have had nothing to add. No differences that exist between the laws of the two countries in the matter of constitution of public rights of way affect, in my opinion, the principles on which these cases fall to be decided. The law of Scotland is certainly no less favourable to the constitution of a right of way in circumstances such as the present than the law of England.

The Scottish case nearest in its facts is *Edinburgh Magistrates v. N.B. Ry. Co.* (22) ((1904), 6 F. (Ct. of Sess.) 620). LORD KINNEAR in that case held that the necessary user to establish a public right of way over a railway within the confines of Edinburgh had not been established. He expressed, however, an alternative ground of judgment which is stated in the headnote to the case as:

“*Opinion that a public right of way cannot be acquired by user over lands held by a railway company for the purposes of the railway, and that it makes no difference that the lands have been acquired by private agreement, and not by the exercise of compulsory powers.*”

If LORD KINNEAR was intending to lay down as a matter of law that in no circumstances could the public acquire a right of way over railway property, I think, with all respect to the great authority of that eminent judge, that such an opinion is not consistent with the train of authority to which your Lordship on the Woolsack has referred. There are, however, in LORD KINNEAR's opinion passages that suggest he was perhaps influenced by the fact that, in the circumstances of that case, a public right of passage was incompatible with the conduct of the traffic on the railway, and if that was the ground of his opinion, it was entirely consistent with English authority.

Ayr Harbour Trustees v. Oswald (2) ((1883), 8 App. Cas. 623) creates no difficulty. That was a very plain case of ultra vires. It did not turn on any question of conflict of rights, but on whether harbour trustees had any power to sterilise land which they proposed to acquire compulsorily by binding themselves and their successors not to use it for the statutory purposes for which alone it could be acquired. LORD SUMNER in *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.* (8) ([1926] A.C. 355) covers such a case where he says (*ibid.*, at p. 370) “. . . in default of proof of incompatibility in the present case, some other consideration of a cogent kind must be found.” Another consideration of a cogent kind existed in the *Ayr Harbour Trustees* case (2), as LORD SUMNER himself recognised. I would only add that the observations of LORD WATSON and LORD HERSHELL in *Caledonian Ry. Co. v. Turcan* (21) ((1898), 25 R. (Ct. of Sess.) 7) do not suggest that they thought the creation of a right of way over land acquired under statutory powers was so obviously impossible that it could be condemned out of hand. They leave the decision in *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439) not, it is true, approved, but at least undisturbed.

Paterson v. St. Andrews Provost (10) ((1881), 6 App. Cas. 833) was much relied on by appellants' counsel, but I doubt whether it is apt as an authority in the territory with which the present appeal is concerned. The magistrates of St. Andrews held certain land for the enjoyment by the inhabitants of St. Andrews of

A golfing and recreation thereon. They were, in effect, trustees of the land for these purposes. The point at issue was focussed by LORD WATSON in the following passage (*ibid.*, at p. 851):

“ . . . they [the magistrates and town council] were acting upon the assumption that it was within their competency to confer upon the public at large a right of way over a portion of the ground which it was their duty to preserve for purposes consistent with the rights of the inhabitants; and they justified their position upon the ground that as matters stood at that date, no right of the inhabitants would be invaded thereby. I think that was a mistaken view of the law and of the extent of their power, because they would thereby have vested in others a right which might become inconsistent with the rights of the inhabitants at some future time.”

C That the magistrates could do no positive act that was in breach of their duty to the inhabitants is clear. But it does not follow that by tacit acquiescence, indifference, or neglect, they might not have allowed a public right of way to be established over the golf links. I know of no authority or principle which would have prevented the public, by appropriate use of a path over the golf links from one public place to another for an uninterrupted period of forty years, from establishing the existence of a public right of way. The principle of presumed dedication has no place in the law of Scotland and, accordingly, it is not possible, in my opinion, to build up on *Paterson's* case (10) any argument favourable to the appellants.

E On the facts proved here, the assumed inconsistency of the existence of a right of way with the subsidiary powers conferred on the appellants by s. 16 of the Railways Clauses Consolidation Act, 1845, seems to me unreal. Whether the appellants could at some future time remove the bridges does not at the moment call for consideration. Even if they could, and did, it does not follow that the right of way would disappear, nor has it been shown that the exercise of the right of way would then become incompatible with the running of the railway. Incompatibility is a question of fact, not a question of law, and where the facts are such as would be sufficient to presume dedication to the public of a right of way in all other respects it is, in my opinion, for the statutory undertaker to prove incompatibility, and not for those asserting the right to prove compatibility. The speech of LORD SUMNER in *Birkdale District Electric Supply Co., Ltd. v. Southport Corpn.* (8) ([1926] A.C. at p. 367), though given in a somewhat different kind of case, contains passages to the same effect and in this matter I think no distinction can be taken between the two cases.

G I would dismiss these appeals.

Appeals dismissed.

Solicitors: *M. H. B. Gilmour* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Clerks of the Worcestershire and Westmorland County Councils* (for the respondents).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

THE ST. ELEFTERIO.
 SCHWARZ & CO. (GRAIN), LTD. v. ST. ELEFTERIO
 ex ARION (OWNERS).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), April 16, 17, 1957.]

Admiralty—Jurisdiction—Action in rem—Claim in tort arising out of agreement relating to carriage of goods—Arrest of ship—Whether plaintiffs entitled to proceed in rem without first establishing a cause of action sustainable in law—Administration of Justice Act, 1956 (4 & 5 Eliz. 2 c. 46), s. 1 (1) (h), s. 3 (4).

The plaintiffs issued a writ claiming “damages arising out of bills of lading relating to the carriage of goods in the defendants’ steamship or vessel, St. Elefterio”, and caused a warrant to be issued under which the ship was arrested. The defendants moved to set aside the writ and warrant of arrest, contending that on the true construction of s. 1 (1) (h) and s. 3 (4) of the Administration of Justice Act, 1956*, the court had no jurisdiction in rem to entertain the action.

Held: the plaintiffs were entitled to have their action tried since

(i) although s. 1 (1) (h) of the Act of 1956 was by its terms narrower than the corresponding provision contained in the former s. 22 (1) (a) (xii) of the Supreme Court of Judicature (Consolidation) Act, 1925†, nevertheless the words of s. 1 (1) (h) were wide enough to cover claims whether in contract or in tort arising out of any agreement relating to the carriage of goods in a ship, and

(ii) the purpose of s. 3 (4) of the Act of 1956 was to confer a right to arrest the ship in respect of which the cause of action was alleged to have arisen or another ship in the same ownership, and the reference in s. 3 (4) to “the person who would be liable . . . in an action in personam” was intended merely to identify the person whose ship could be arrested; and therefore, the plaintiffs’ claim not being frivolous or vexatious, they were entitled to assert it by proceedings in rem without first establishing that they had a cause of action sustainable in law.

[As to the exercise of Admiralty jurisdiction and the action in rem, see 1 HALSBURY’S LAWS (3rd Edn.) 49, para. 89, and p. 63, para. 125; and as to the application for warrants of arrest, see *ibid.*, p. 74, para. 154.

As to rights in rem and powers of arrest in respect of damage to cargo, see also 30 HALSBURY’S LAWS (2nd Edn.) 954, para. 1321, note (d) and 868, para. 1153, note (l); and for cases on the subject, see 1 DIGEST 140-141, 481-483.]

Cases referred to:

- (1) *Grieve, Son & Co. v. Koneg & Co.*, (1880), 17 Sc. L.R. 825; 41 Digest 373, 2195ii.
- (2) *Amis, Swain & Co. v. Nippon Yusen Kabushki Kaisha*, (1919), 1 Lloyd’s Rep. 51.

Motion.

The defendants, the owners of the steamship St. Elefterio, moved to set aside a writ and warrant of arrest directed against their ship. The facts appear in the judgment.

T. G. Roche, Q.C., and *H. V. Brandon* for the plaintiffs.

Ashton Roskill, Q.C., and *M. R. E. Kerr* for the defendants.

* The relevant terms of s. 3 (4) are printed at p. 375, letter H, post; s. 1 (1) (h) provides as follows: “The Admiralty jurisdiction of the High Court shall be as follows. that is to say, jurisdiction to hear and determine any of the following questions or claims— . . . (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship . . .” Sections 1-8 of the Act of 1956 were brought into force on Jan. 1, 1957, by the Administration of Justice Act (Commencement) (No. 2) Order, 1956 (S.I. 1956 No. 1979).

† Section 22 of the Supreme Court of Judicature (Consolidation) Act, 1925, was repealed by s. 57 of and Sch. 2 to the Administration of Justice Act, 1956.

- A **WILLMER, J.:** The St. Elefterio was arrested by the plaintiffs in respect of a claim, stated in the indorsement of the writ to be a claim for

“damages arising out of bills of lading relating to the carriage of goods in the defendants’ steamship or vessel, St. Elefterio.”

- B The vessel in fact carried a cargo of cattle cake on a voyage from Montevideo to Liverpool early in this year. The plaintiffs’ claim, as I understand it, is a claim by them as one time holders of bills of lading, and is founded on an allegation that the bills of lading were wrongly dated on various dates in January of this year, whereas in fact none of the cargo was loaded before Feb. 6. The plaintiffs had in fact bought the cargo from the shippers thereof, who were also the charterers of the St. Elefterio, and the plaintiffs had, in their turn, resold the cargo to other purchasers. According to an affidavit sworn by the plaintiffs’ solicitor, it appears that the bills of lading were in fact indorsed in blank by the shippers and presented to the plaintiffs. The plaintiffs did not themselves indorse the bills of lading, but they in due course presented them to their purchasers. Those purchasers, on discovering that the goods were not in fact shipped on the date or dates specified in the bills of lading, claimed as against the plaintiffs the right to reject them. There seems to have been a dispute between the plaintiffs and their purchasers, which was submitted to arbitration. As I understand it, the arbitration has been concluded, though no award has yet been published; but clearly counsel for the plaintiffs here expect that the purchasers are likely to be held entitled to reject the goods. It is in such circumstances that the plaintiffs have brought this action against the ship, in an attempt to recover the loss which they expect to sustain.
- D
- E

- F The defendants contend that, on the true construction of the Administration of Justice Act, 1956, and in particular s. 1 (1) (h) and s. 3 (4) thereof, this court has no jurisdiction in rem to entertain the action. It is argued, first, that s. 1 (1) (h) is by its terms narrower than the corresponding provision contained in s. 22 (1) (a) (xii) of the Supreme Court of Judicature (Consolidation) Act, 1925*, because whereas the former Act made specific provision for jurisdiction in tort in respect of goods carried, the paragraph in the new Act makes no corresponding provision. So far as that point goes I do not feel able to accede to the defendants’ argument. In my judgment the words of s. 1 (1) (h) of the Act of 1956, which I agree are materially different from the corresponding clause in the Act of 1925, are nevertheless wide enough to cover claims whether in contract or in tort arising out of any agreement relating to the carriage of goods in a ship.
- G

- H However that may be, the main argument for the defendants turns on the construction of s. 3 (4), and I think that, before I proceed to state the argument, it would be desirable to set out the terms of that sub-section. They are as follows:

- H “In the case of any such claim as is mentioned in s. 1 (1) (d) to (r) of this Act, being a claim arising in connexion with a ship, where the person who would be liable on the claim in an action in personam was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, the Admiralty jurisdiction of the High Court . . . may (whether the claim gives rise to a maritime lien on the ship or not) be invoked by an action in rem against—(a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; or (b) any other ship which, at the time when the action is brought, is beneficially owned as aforesaid.”
- I

It is argued that, on the true construction of that sub-section, before the plaintiffs can proceed in rem in respect, for instance, of a claim under s. 1 (1) (h), they must show that the defendants, the owners of the ship proceeded against, are persons who would be liable on the claim in an action in personam. In pursuance

* See 5 HALSBURY’S STATUTES (2nd Edn.) 352.

of that contention various reasons have been advanced on behalf of the defendants for saying that, in the circumstances of the present case, the defendants could not in law be held liable in respect of the plaintiffs' claim. As I understood his argument, counsel for the defendants shrank from asserting that a defendant who claimed to have a good defence on the facts would be entitled to have the writ and arrest set aside, but he did claim that, if he could show a good defence in law, then, on the true construction of the section, there would be no jurisdiction to arrest the ship, and the action could therefore be halted in limine.

In the view which I take it is not necessary for me to consider the validity of the various reasons advanced on behalf of the defendants for asserting that they have a good defence in law, but I think that it would be appropriate, as the reasons have been advanced and have been the subject of some argument, if I were briefly to state what they were. First, it was contended that shipowners cannot in law be held liable for damage said to be occasioned by a bill of lading being wrongly ante-dated, even if the ante-dating has been done as a result of a fraud on the part of the master. In support of that proposition reference was made to a decision of the Court of Session in *Grieve, Son & Co. v. Koneg & Co.* (1) ((1880), 17 Sc. L.R. 825). Against that it was argued on behalf of the plaintiffs that that was a case where the claim was laid only in tort, and that it left untouched the question whether shipowners might not be liable in contract; and in connexion with that I was referred to a decision of ROCHE, J., in *Amis, Swain & Co. v. Nippon Yusen Kabushiki Kaisha* (2) ((1919), 1 Lloyd's Rep. 51). Next it was argued on behalf of the defendants that the bills of lading must be presumed to have been signed as presented by the shippers, and that in those circumstances the shippers could not themselves have had any cause of action against the shipowners. It would follow, it was contended, having regard to the terms of the Bills of Lading Act, 1855, that the plaintiffs, as holders, would be in no better position, and would have no better cause of action, than the shippers themselves. It was further argued that mere negligence in respect of the issue of a bill of lading would not give rise to any cause of action. Then it was said that the plaintiffs have not made out any title to sue; having sold the goods, and having passed on the bills of lading to their buyers, before the issue of the writ and the arrest of the ship, they could not themselves have had any cause of action at that date, which was said to be the material date.

Lastly, it was contended that, since the shippers were also the charterers of the ship, the bills of lading, having been issued to them in fulfilment of the charterparty, were in any event no more than receipts for the goods, so that the mere fact of insertion of a wrong date in the bills of lading would give rise to no cause of action. I need hardly say that none of these contentions advanced on behalf of the defendants was accepted as correct by the plaintiffs; but I do not propose to go into the merits of these various contentions now, or to decide whether the defendants are right or whether the plaintiffs are right. It seems to me, having regard to the view I take of the construction of s. 3 (4) of the Act of 1956, that this is not the moment to decide whether the defendants are right or whether they are wrong in their submissions on the points of law raised. If they are right on all or any of these various points advanced, it may well be that in the end they will show a good defence to the action. That, in my judgment, furnishes no good reason for setting these proceedings aside in limine, and thereby depriving the plaintiffs of the right to have these issues tried.

It has not been suggested that the proceedings are frivolous or vexatious, so as to call for the exercise of the court's inherent jurisdiction to halt such proceedings in limine. The defendants' argument is founded on the proposition that s. 3 (4) of the Act of 1956 introduces a new restriction on the right to proceed in rem, and that a plaintiff cannot arrest a ship under that sub-section unless he can prove at the outset that he has a cause of action sustainable in law. In my judgment that proposition rests on a misconception of the purpose and meaning

- A of s. 3 (4). As it appears to me, that sub-section, so far from being a restrictive provision, is a sub-section introduced for the purpose of enlarging the Admiralty jurisdiction of the court. As I view it, its purpose is to confer for the first time in England the right to arrest either the ship in respect of which the cause of action is alleged to have arisen or any other ship in the same ownership. That is an entirely new right so far as the law of England is concerned, although it
- B previously existed in other countries including Scotland. The reason for conferring that right now is for the purpose of bringing this country into line with other countries as a result of an international convention. In my judgment the purpose of the words relied on by counsel for the defendants, that is to say the words, "the person who would be liable on the claim in an action in personam", is to identify the person or persons whose ship or ships may be arrested in relation
- C to this new right (if I may so express it) of arresting a sister ship. The words used, it will be observed, are "the person who would be liable" not "the person who is liable", and it seems to me, bearing in mind the purpose of the Act, that the natural construction of those quite simple words is, "the person who would be liable on the assumption that the action succeeds". This action might or might not succeed if it were brought in personam. That would depend on the
- D view which the court ultimately took of the various contentions raised by counsel for the defendants. But clearly, if the action did succeed, the person or persons who would be liable would be the owner or owners of the steamship *St. Elefterio*. In such circumstances, in the absence of any suggestion that the action is frivolous or vexatious, I am satisfied that the plaintiffs are entitled to bring it and to have it tried, and that, whether or not their claim turns out to be a good one, they
- E are entitled to assert that claim by proceeding in rem.

- It is an odd circumstance, but it almost seems as if there must be some malignant fate which ordains that questions of this character always manage to arise on the last day of term, i.e., in circumstances in which, if the judge takes the wrong view, there is no practicable way of putting him right in the Court of Appeal without the possibility of inflicting irreparable damage on the party
- F against whom the decision goes. I make that observation because it adds point to what I want to say in conclusion, namely, that any construction of s. 3 (4) of the Act other than the construction which I have sought to put on it, would, it seems to me, lead to the most intolerable difficulties in practice. If counsel for the defendants is right in saying that a plaintiff has no right to arrest a ship at all, unless he can show in limine a cause of action sustainable in law, what is to
- G happen in a case (and, having regard to the argument I have listened to, this may be just such a case) where the questions of law raised are highly debatable, and questions on which it may be desired to take the opinion of the Court of Appeal or even of the House of Lords? Suppose, for instance, following the argument of counsel for the defendants, that this court comes to the conclusion, on the preliminary argument held at this stage of the action, that the action is not one that
- H is sustainable in law, it will presumably set aside the writ and the warrant of arrest. It is possible (these things have been known to happen) that a higher court might take a different view; but in the meantime the ship, which is a foreign ship, has been freed from arrest, has gone, and may never return to this country. It might be that in those circumstances the plaintiffs would have lost their right for ever to entertain proceedings in rem in this country.

- I The fact is, and this is the sanction against abuse, that the plaintiffs, if their alleged cause of action turns out not to be a good one, will be held liable for costs, and those costs will include the costs of furnishing bail in order to secure the release of the ship. The defendants can always secure the release of their ship by the simple expedient of furnishing bail. It is perfectly true that if, as they say it will, the action fails, they will probably not recover inter partes the whole of the costs of furnishing the bail; but in that respect I do not know that they are in any different position from other defendants in other types of action. That

observation applies especially in these days of legal aid. There is many a defendant, who has been unsuccessfully sued, but who at the end of it all finds himself in the position that he cannot recover the whole of his costs. That is one of the incidents of litigation which parties have to accept in modern conditions. The simple remedy for the defendants, if they want their ship released, is to put in bail. The action will then be tried, and at the appropriate time—when all the facts have been ascertained—due consideration will be given to the arguments on law which the defendants desire to advance. In my judgment, therefore, this motion is misconceived and I find myself unable to accede to it.

Motion refused.

Solicitors: *Richards, Butler & Co.* (for the plaintiffs); *Holman, Fenwick & Willan*, agents for *Weightman, Pedder & Co.*, Liverpool (for the defendants).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

PRACTICE NOTE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Devlin, JJ.), May 13, 1957.]

Criminal Law—Non-capital murder—Appeal—No appeal against sentence—Sentence one fixed by law—Criminal Appeal Act, 1907 (7 Edw. 7 c. 23), s. 3—Homicide Act, 1957 (5 & 6 Eliz. 2 c. 11), s. 9 (1).

[As to appeals against sentence, see 10 HALSBURY'S LAWS (3rd Edn.) 541, para. 994.

For the Criminal Appeal Act, 1907, s. 3, see 5 HALSBURY'S STATUTES (2nd Edn.) 928.]

LORD GODDARD, C.J., said: Applications for leave to appeal against sentence of life imprisonment imposed under s. 9* of the Homicide Act, 1957, for non-capital murder, cannot be received because s. 3 (c) of the Criminal Appeal Act, 1907, provides that a person may appeal against a sentence "unless the sentence is one fixed by law". The sentence for non-capital murder is now fixed by law, by the Homicide Act, 1957.

I also desire to say that in the past all applications for leave to appeal in capital cases were treated as final appeals and put in the list as such. The prosecution was represented so that, if the appeal were dismissed the capital sentence would not be postponed. Now, in all cases of non-capital murder applications for leave to appeal against conviction will be treated in the ordinary way. They will be listed simply as applications, and the prosecution need not be represented unless leave to appeal is given.

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

* Section 9 (1) of the Homicide Act, 1957, provides: "Where a court . . . is precluded by this Part of this Act [i.e., by s. 7 or s. 8 (1)] from passing sentence of death, the sentence shall be one of imprisonment for life."

A

R. v. GRIFFITHS AND OTHERS,
Ex parte ATTORNEY-GENERAL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, JJ.),
May 2, 10, 1957.]

B *Contempt of Court—Pending proceedings—Publication of matter calculated to prejudice a fair trial—Magazine produced out of the jurisdiction—Sale in England, by English distributors, in the way of their trade—Whether defence of innocent dissemination available—Whether English correspondent of foreign publication responsible for contempt.*

C While a trial for alleged murder was in progress at the Central Criminal Court, a magazine was put on sale in England containing an article and paragraph in which there was matter that was prejudicial to the accused and was not given in evidence at his trial. The publication of this matter amounted to a contempt of court. The magazine was owned by a company registered in the United States of America and was compiled and edited in New York. The article and paragraph were, apparently, written in America. The American company maintained an office in London, which was under the charge of G., who was described as the chief European correspondent of the magazine. G.'s duties were those of a reporter. He did not write the article or the paragraph and, on the evidence, it appeared that he had not supplied information for them. The European edition of the magazine was printed in Amsterdam, whence copies were flown to London. The whole-sale distribution of the magazine in England was carried out by the R. Co., and the S. Co. also distributed the magazine and sold it on their bookstalls. The distributing companies were English companies. They were ignorant of the contents of the magazine before they distributed it. As soon as the attention of these distributors was directed to the relevant matter, they took every step in their power to stop its circulation. On motion for writs of attachment against G., the R. Co., the circulation director of the R. Co., and the S. Co., for contempt of court,

F **Held:** (i) the defence of innocent dissemination was not available to those who in the way of their trade were responsible for putting the offending matter into circulation, and therefore fines would be imposed on the R. Co., and the S. Co., no separate order being made against the circulation director of the R. Co.

R. v. Odham's Press, Ltd., Ex p. A.-G. ([1956] 3 All E.R. 494) applied.

G (ii) the offence of contempt of court lay in the publication of the article and paragraph, not their preparation, and on the facts responsibility for them or their publication could not be imposed on G.

H Per CURIAM: it has never yet been held that a reporter who supplied to his editor or employer objectionable matter which the latter published was himself guilty of contempt. G. seemed to be the representative of the magazine in this country, but that was not enough. While this jurisdiction to punish for improper comment on pending proceedings was absolutely necessary for the proper and impartial administration of justice, it was one which must be used with caution, and ought not to be vicariously extended because the real offenders were outside the jurisdiction (see p. 382, letter E, post).

I [As to contempt of court by publication of newspaper articles while criminal proceedings are pending, see 8 HALSBURY'S LAWS (3rd Edn.) 9, 10, para. 12; and for cases on the subject, see 16 DIGEST 22, 169 et seq.]

Cases referred to:

- (1) *Emmens v. Pottle*, (1885), 16 Q.B.D. 354; 55 L.J.Q.B. 51; 53 L.T. 808; 50 J.P. 228; 32 Digest 81, 1120.
- (2) *McLeod v. St. Aubyn*, [1899] A.C. 549; 68 L.J.P.C. 137; 81 L.T. 158; 16 Digest 20, 152.
- (3) *R. v. Odham's Press, Ltd., Ex p. A.-G.*, [1956] 3 All E.R. 494; [1957] 1 Q.B. 73.

Motion.

This was a motion for leave to issue writs of attachment against Eldon Wylie Griffiths, the first respondent, Andrew Roy Rutherford, the second respondent, Rolls House Publishing Co., Ltd., the third respondents, and W. H. Smith & Son, Ltd., the fourth respondents, for their several contempts of court in distributing for publication by sale or causing to be sold and published the issue of a magazine called "Newsweek", dated Apr. 1, 1957, which contained certain written material (viz., an article and a paragraph) referring to the trial of Dr. John Bodkin Adams which was then in progress at the Central Criminal Court. The first respondent was the chief European correspondent in London of "Newsweek". The second respondent was the circulation director of the third respondents, who were the importers and trade distributors in the United Kingdom of "Newsweek". The fourth respondents were wholesale and retail distributors of "Newsweek". The facts of the case appear in the judgment.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.) and Rodger Winn for the applicant, the Attorney-General.

Neville Faulks for the first respondent, E. W. Griffiths.

W. P. Grieve for the second respondent, A. R. Rutherford, and the third respondents, Rolls House Publishing Co., Ltd.

Gerald Gardiner, Q.C., and *H. P. J. Milmo* for the fourth respondents, W. H. Smith & Son, Ltd.

Cur. adv. vult.

May 10. **LORD GODDARD, C.J.**, read the judgment of the court: On Mar. 18, 1957, the trial of Dr. John Bodkin Adams for murder began at the Central Criminal Court before DEVLIN, J., and the trial was continuing on Apr. 4. On this latter date there was on sale on bookstalls in London an issue dated Apr. 1 of a magazine called "Newsweek". In that part of it devoted to news from Great Britain there appeared two fairly long paragraphs, one headed "The Doctor on Trial" and the other "Bequests". These paragraphs both related to the trial and contained matter highly prejudicial to the accused man which had not been and never was given in evidence at the trial. It has not been contended by any of the respondents that this publication did not amount to a contempt, and in the opinion of this court it was one of the most serious description. Accordingly, the Attorney-General has moved for writs of attachment to issue against the respondents, the first of whom, Eldon Wylie Griffiths, is described as the chief European correspondent in London of the magazine. Mr. Rutherford [the second respondent] is the circulation director of Rolls House Publishing Co., Ltd. [the third respondents], who import the magazine and distribute it to the trade; and W. H. Smith & Son, Ltd. [the fourth respondents] are well known newspapers and bookstall proprietors who also supply the magazine to wholesale houses and have it on sale in their shops and bookstalls. It appears that Rolls House Publishing Co., Ltd. distribute some nine thousand copies weekly, and W. H. Smith & Son, Ltd. dispose of about one thousand eight hundred. It is only right to say at once that, as soon as the attention of these two companies was called to the objectionable paragraphs, they took every possible step which they could to call in the copies that had been distributed to the trade and to stop the sale, not only of this particular issue, but also of that of the next week in case it should contain other objectionable matter, as the trial had

A not finished. They at once expressed deep regret that they should have been parties to circulating matter which amounted to a contempt—for which they apologised. Before dealing with their responsibility in the matter we will consider the position of the first respondent, who, as we have said, is described in the magazine itself as its chief European correspondent.

“Newsweek” is owned by a company registered in Dayton, Ohio, in the United States of America. The company has an office in New York, and it appears that it is in that city that the magazine is compiled and edited. It publishes two international editions, one for Asia and another for Europe, and the circulation manager of the European edition is resident in Paris. The company maintains offices in several European cities and in this country they have one in Jermyn Street. The respondent Griffiths appears to be the head of that office, and, as we have said, is named in the paper as its chief European correspondent. The European edition is printed in Amsterdam, whence copies for sale in England and Scotland are despatched by air to and distributed by or under the direction of Rolls House Publishing Co., Ltd., without the intervention of “Newsweek’s” London office. The respondent Griffiths has sworn that he takes no part in the preparation of the magazine, his duties being merely those of a reporter. He collects items of news in this country and sends them by cable to New York, and there it is decided what, if any, use is to be made of them; the stories are written there and apparently the European edition is made up in New York and then sent for printing to Amsterdam. He said that he knows nothing of the contents until he sees the copy which arrives in this country. He does write stories based on information that he collects here and he sends them to America for publication, but he has sworn that he did not write the offending paragraphs or send the material on which they were based. When seen on Apr. 5 by Detective Superintendent Mannings with regard to the publication, he said:

“I am surprised you did not come to see me first, and I would like to know exactly what the judge objects to in our article; further, why Smiths and the Rolls Publishing Co. took it upon themselves to stop circulation of our magazine without notifying us. Did they do it because you told them to, or did they do it of their own volition?”

He also told the officer that there was no one senior to him in the organisation here, and that he was directly responsible to New York. In a statement which he then signed he said that it was his duty to offer guidance to the editors on stories pertaining to Britain. If he really did not know why those paragraphs relating to the trial were objectionable and offended against the law of this country, he would seem to be singularly ill-qualified to offer guidance to the editors on matters relating to this country; it is safe to say that there is not a newspaperman in Great Britain who would not have seen at a glance that these paragraphs were objectionable in the highest degree and would expose those responsible for them to the risk of severe punishment. But, strongly as we deprecate the attitude which he then adopted, and while we consider his evidence was far from frank, the question is whether we can hold that he is responsible for the publication of the offending matter. He has exhibited to his affidavit the cables which he sent to New York relating to this trial, the authenticity of which were not challenged by the Attorney-General. It seems that he told his head office, by cable on Mar. 15, that he was unable to send a reporter to the court and suggested that they should either write something in New York or find a freelance journalist to cover the trial. On Mar. 19 he suggested that the English and probably many American papers were flooded with accounts of the trial so that, as the London office was not attending the trial, they could add nothing to what his principals could obtain in New York by cuttings from their newspapers. On the same day he asked for any special instructions, and apparently

he received some requests from New York for photographs. On Mar. 26 he reported a declining interest in the trial as he thought that reports were being curtailed in the expectation that the interest would revive if and when the accused man gave evidence, and said that they would try to find a fresh angle during the hearing on Mar. 27. Whether he found one or not he did not tell us, but again on Mar. 27 his principals cabled that they were "skipping" Adams, and apparently, at least for the time being, they were taking no further interest in the case. These cables do appear to support his evidence that he neither wrote the paragraphs nor supplied the information for them. We have already said that we do not think that he was wholly frank in the evidence which he gave; his counsel called him at the hearing, but he added practically nothing to the contents of his affidavit. He apparently made no attempt to find out from New York from whom or by what means they obtained information as to matters which were not given in evidence at the trial and which, for all that is known, may be as untrue as they certainly were prejudicial. He had been in communication with his head office, as he told the superintendent that, after conferring with New York, he was authorised to state that the intention of the editors was accurately and impartially to tell the story of the trial. We can only say that their performance seems lamentably inconsistent with their intentions. In this state of the evidence it does not seem to the court that responsibility for this article or for its publication can be imposed on the respondent Griffiths. The offence is not the mere preparation of the article, but the publication of it during the proceedings. It seems that the article was written in America, printed in Amsterdam and distributed by commercial houses in this country. It has never yet been held that a reporter who supplied to his editor or employer objectionable matter which the latter published is himself guilty of contempt. The respondent Griffiths seems to be the representative of the magazine in this country, but that is not enough. While this jurisdiction to punish for improper comment on pending proceedings is absolutely necessary for the proper and impartial administration of justice, it is one which must be used with caution, and ought not to be vicariously extended because the real offenders are outside the jurisdiction.

We now turn to the case of the two other respondents, Rolls House Publishing Co., Ltd., and W. H. Smith & Son, Ltd., who were admittedly distributors of this publication. Their answer to the motion is that they did not, in fact, know that it contained offending paragraphs and had no reason to suppose that it would. Rolls House Publishing Co., Ltd. have been distributing this magazine in Great Britain since 1949, with one short interval, and no complaint has ever been received as to its contents during that time. The system adopted is that it is sent by air from Amsterdam where it is printed, some copies being flown direct to Scotland, and the rest to London Airport. Copies are put on sale at the airport directly they arrive and the rest are sent to the London office, and so the publication is on sale before Rolls House Publishing Co., Ltd. have any knowledge of its contents. The chairman of W. H. Smith & Son, Ltd. has informed the court that before that company began to sell "Newsweek" the directors examined three consecutive numbers and came to the conclusion that it was unlikely that objectionable matter would be contained in it. He says that they have distributed it for some twenty years and have never received any complaint as to the contents. Accordingly, both these respondents, neither of whom is "the first publisher", seek to take advantage of what in the law of defamation is called the defence of innocent dissemination, based on the decision of the Court of Appeal in *Emmens v. Pottle* (1) ((1885), 16 Q.B.D. 354). They rely also on *McLeod v. St. Aubyn* (2) ([1899] A.C. 549), which was a case relating to contempt. In our opinion the latter case has no real bearing on the present. The facts were that the appellant had received by post a copy of a weekly newspaper which was generally current and on sale in St. Vincent. Before he had read it a friend

A of his found that the paper had not arrived at the public library where he usually read it and borrowed the appellant's copy. The Judicial Committee declined to hold that there was any duty on the appellant to have read his copy before he lent it to his friend. They clearly regarded the contention that in such circumstances the appellant could be said to be guilty of publishing a contempt as extravagant, and we should take the same view if, for example, an English
B reader happened to lend his copy of "Newsweek" to another. In the present case these respondents were dealing with the magazine as a matter of business and distributing it as wholesalers to the trade; and also, in the case of W. H. Smith & Son, Ltd., selling it on their own bookstalls. It is true that in *Emmens v. Pottle* (1) the defendants were newsagents who sold the paper in the ordinary course of their business, but the decision turned entirely on the particular facts
C found by the jury, which the court held amounted to a finding that the defendants had not published a libel. We cannot agree that that case is conclusive of the present. Cases of contempt by the publication of matter tending to prejudice a fair trial stand in a class of their own and are not truly analogous to cases of defamation. This court lately reviewed the decisions on this subject in *R. v. Odham's Press, Ltd., Ex p. A.-G.* (3) ([1956] 3 All E.R. 494) and held that lack
D of knowledge of the contents of the offending article was no defence, nor was lack of intention. This had been distinctly held both by LORD HARDWICKE, L.C., and LORD ERSKINE, L.C., in the clearest terms in the cases* which we cited in our judgment and which we need not set out again, and it is observable that they were both dealing with persons who innocently printed the matter complained of in the ordinary course of their trade. As we are holding that to those who
E in the way of their trade are responsible for putting the offending matter into circulation the defence of innocent dissemination is not available in cases of contempt, it is unnecessary to consider whether either of these respondents were guilty of any negligence, although, having regard to what may be called the gossipy nature of this magazine and the wide interest that was evoked by the trial in question and the notorious fact that the restraint which English law
F imposes on comment on trials in progress is not imposed in America, it may well be that the concluding sentence of the judgment of BOWEN, L.J., in *Emmens v. Pottle* (1) (16 Q.B.D. at p. 358) would apply here. We accept unreservedly that neither of these respondents (we treat Mr. Rutherford and Rolls House Publishing Co., Ltd. as one) knew of these scandalous paragraphs and we recognise that they immediately took every step in their power to stop the circulation
G as soon as their attention was directed to the matter. It is regrettable that in holding them guilty of a contempt we cannot also deal with those who are far more responsible but are out of the jurisdiction. We shall impose a fine (albeit of a nominal amount) and we do so to emphasise the risk which is run by dealing in foreign publications imported here but which have no responsible editor or
H manager in this country. The distributors are the only persons who can in these circumstances be made amenable in the courts of this country. Now that the risk and responsibility have been exposed by this case, should offences occur in the future similar leniency may not be extended. It was argued that, if these two respondents are liable, so every small newsagent or street seller who sells the paper would equally be liable. Logically this may be so, but the court would
I not regard with favour applications against such persons to whom no real blame would attach. This jurisdiction is discretionary and the court can be trusted not to exercise it except against those who can fairly be said to bear some real responsibility for the publication.

The order of the court will be that the respondents, W. H. Smith & Son, Ltd., and Rolls House Publishing Co., Ltd. each pay to the Crown a fine of £50 within

* *Re Read & Huggonson* (*The St. James's Evening Post* case), (1742), 2 Atk. 469, and *Ex p. Jones*, (1806), 13 Ves. 237.

seven days or writs will issue, and they will each pay one half of the taxed costs. A
There is no need to make a separate order against Mr. Rutherford.

Order accordingly.

Solicitors: *Director of Public Prosecutions* (for the applicant); *Crane & Hawkins*
(for the first respondent); *Lawrence Jones & Co.* (for the second and third
respondents); *Bircham & Co.* (for the fourth respondents).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*] B

NOTE.

DAVIE *v.* NEW MERTON BOARD MILLS, LTD. AND OTHERS.

[QUEEN'S BENCH DIVISION (Ashworth, J.), March 14, 1957.]

After the conclusion of the judgment in this case, reported at p. 38, ante, and after further discussion on costs, counsel for the first defendants, the plaintiff's employers, applied that liability as between the employers and the second defendants, the manufacturers of the tool, should be apportioned under s. 6 (1) (c) of the Law Reform (Married Women and Tortfeasors) Act, 1935. The application was made pursuant to notice of intention to apply for apportionment given to the manufacturers on behalf of the employers in February, 1957. It was submitted on behalf of the employers that the plaintiff's case had been throughout on the basis that the liability of the plaintiff's employers was only a technical liability as they could not reasonably be expected to examine the tool for this particular defect. On behalf of the manufacturers it was submitted that the employers were to some extent to blame because they allowed the tool, which was specified for use for a certain purpose, to be used as a general purpose tool. F G

HIS LORDSHIP said that he took the view that the responsibility as between the defendants rested fairly and squarely on the second defendants, the manufacturers. Accordingly, as regards the £2,030 damages awarded to the plaintiff, there would be an order for contribution by the manufacturers to the extent of one hundred per cent.

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

A KHAN v. AHMED.

[QUEEN'S BENCH DIVISION (Lynskey, J.), May 6, 1957.]

Libel—Privilege—Qualified privilege—Report of meeting in newspaper—Meeting organised by Pakistani students to honour distinguished statesman—Meeting open to anyone—Whether public meeting—Letter requiring publication of full apology—Terms of apology not specified—Whether defendant requested to publish letter or statement of explanation or contradiction—Defamation Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 66), s. 7 (1), (2), Schedule, para. 9.

B In 1955 a Pakistani student organisation held in London a meeting in honour of the memory of the founder of Pakistan. The meeting was not confined to members of the organisation, but was apparently open to anyone who wished to attend it. Among those who attended the meeting was the plaintiff. The defendant wrote a report of the meeting which was published in a newspaper circulating in England and which contained matter that the plaintiff alleged was defamatory of him. His solicitors wrote to the defendant requiring the defendant to publish "a full apology . . . such apology to be framed in a manner satisfactory to our client", but no apology was published. In an action by the plaintiff for libel the defendant contended that the publication of the report was privileged under s. 7 (1) of the Defamation Act, 1952, and para. 9 of the Schedule to that Act*, as a fair and accurate report of the proceedings at a public meeting; the plaintiff denied the privilege on the grounds that the meeting was not a public meeting and that the privilege was excluded by s. 7 (2) of the Act of 1952 as the defendant had been requested to publish a letter or statement by way of explanation or contradiction and had neglected to do so. In the summing-up,

E **The jury were directed:** (i) the meeting was a public meeting as it was held for the purposes of the furtherance or discussion of a matter of public concern within para. 9 of the Schedule to the Act of 1952 and,

F (ii) the letter requesting a full apology to be published was not a request that satisfied s. 7 (2) because it did not set out the words of the letter or statement which the defendant was to publish.

[For the Defamation Act, 1952, s. 7 and Schedule, para. 9, see 32 HALSBURY'S STATUTES (2nd Edn.) 403, 409.]

G **Action.**

In this action Yusuf Ali Khan, the plaintiff, who was a national of Pakistan, temporarily resident in England, claimed damages for an alleged libel contained in an article written by Nasim Ahmed, the defendant, and published in the issue dated Jan. 10, 1955, of a Pakistani newspaper called "Dawn", of which the defendant was the London correspondent. "Dawn" had a circulation in H England of eighty to one hundred copies.

The article concerned was a report of a meeting of the Pakistan Students' Federation, which was held in London on Jan. 7, 1955, to honour the memory of Quaid - I - Azam Mohammad Ali Jinnah, the founder of Pakistan. The plaintiff was a member of the Federation and attended the meeting, but the meeting was open to anyone who wished to attend it. By a letter dated Jan. 19, I 1955, the plaintiff's solicitors wrote to the defendant a letter ending with the following request:

"In our opinion your article constitutes a most serious libel on our client and he therefore requires that you should arrange to be published forthwith a full apology for your unfounded report . . . such apology to be framed in a manner satisfactory to our client."

* The relevant terms of s. 7 of and of para. 9 of the Schedule to the Defamation Act, 1952, are printed at p. 386, letters D and E, post.

No apology was published. The defendant claimed, *inter alia*, that publication of the report of the meeting was privileged under s. 7 (1) of the Defamation Act, 1952, because it was a fair and accurate newspaper report of proceedings at a public meeting held in the United Kingdom, within the meaning of para. 9 of the Schedule to the Act of 1952. The plaintiff denied that the report was privileged on the ground set out in s. 7 (2) of the Act of 1952, viz., that the defendant had been requested by the plaintiff to publish in "Dawn" a reasonable letter or statement by way of explanation or contradiction and had refused to do so. The plaintiff also contended that the meeting was not a public meeting.

J. A. G. Stonehouse for the plaintiff.

R. W. Vick for the defendant.

LYNSKEY, J., having directed the jury that the words published were capable of bearing a defamatory meaning and that the questions whether they did so and whether an ordinary reader, knowing the circumstances, would conclude that the words referred to the plaintiff, were for the jury, reviewed the evidence and continued: The defendant has pleaded the statutory defence of privilege under the Defamation Act, 1952. By s. 7 (1) of the Act of 1952 it is provided that:

"Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless the publication is proved to be made with malice."

There is no evidence at all of any malice on the part of the defendant, so that if the matter is privileged by s. 7 (1), then that privilege holds.

What is privileged is, *inter alia*,

"A fair and accurate report of the proceedings at any public meeting held in the United Kingdom, that is to say, a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission to the meeting is general or restricted."*

It was argued before me in your absence that this was not a "public meeting" and it may not have been a "public meeting", as it was understood to be, before the passing of the Act of 1952. That Act, however, defines a public meeting as

"a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission to the meeting is general or restricted."*

Members of the jury, as a matter of law I rule and direct you that this was a public meeting. It was a meeting held for a lawful purpose and it was held for the purpose of the furtherance or discussion of a matter of public concern, and, in those circumstances privilege applies unless (as is provided in s. 7 (2) of the Act of 1952):

"... it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances."

The question whether s. 7 (2) applies is, again, a matter of law. One letter was written in this case which has already been read to you and which you shall take with you and read again. It was a letter demanding a full apology and withdrawal of the publication†. As a matter of law, I must direct you that that is not

* See para. 9 of the Schedule to the Defamation Act, 1952.

† The relevant terms of the letter are printed at p. 385, letter I, *ante*.

A a request within the meaning of s. 7 (2), because what is referred to in the subsection is a special request by the plaintiff that the defendant shall publish either an explanation or a contradiction in the terms put forward by the person allegedly libelled, and in this case that was not done. All that the plaintiff's solicitors did was to write a general letter asking for a full apology, and I rule that that was not a compliance with s. 7 (2).

B The result is that the publication is privileged if you think that it was "a fair and accurate report" of the proceedings at the meeting and this is one of the questions that you will have to decide if you think that a reasonable person would identify the plaintiff with the alleged libel.

[His LORDSHIP went on to consider the question whether the report was a fair and accurate report of the proceedings, and he then directed the jury on the question of damages. The jury retired, and having considered their verdict, found for the defendant.]

Judgment for the defendant.

Solicitors: *Cree, Godfrey & Wood* (for the plaintiff); *Murray, Napier & Co.* (for the defendant).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

D

TRIEFUS & CO., LTD. v. POST OFFICE.

[COURT OF APPEAL (Hodson, Parker and Ormerod, L.JJ.), May 9, 10, 1957.]

E *Post Office—Contract—Carriage of registered postal packets overseas—Whether contractual relationship between sender and Her Majesty's Postmaster-General—Post Office Act, 1908 (8 Edw. 7 c. 48), s. 13—British Commonwealth and Foreign Post Warrant, 1948 (S.I. 1948 No. 590), reg. 49 (as substituted by S.I. 1950 No. 771), reg. 61.*

F In April and June, 1953, the appellants posted and the Post Office accepted two registered postal packets, containing diamonds to the value of some £3,380 and £17,998, for conveyance to New Zealand. On the back of the certificate of posting it was stated that "registration in the international service is not a system of insurance. Compensation is not paid for loss or damage of contents as distinct from loss of the entire packet, and the payment may in no circumstances exceed £2 18s. Packets sent to many countries abroad can be insured against loss or damage of contents". The packets having been lost while in transit in the custody of the Post Office, the appellants claimed damages for breach of contract to use care and diligence in the carriage and transmission of the packets.

G **Held:** the acceptance of the packets for transmission through the post did not give rise to any contractual relationship between the appellants and Her Majesty's Postmaster-General.

H Appeal dismissed.

[**Editorial Note.** The Post Office Act, 1908, was repealed and superseded by the Post Office Act, 1953, and the British Commonwealth and Foreign Post Warrant, 1948, has been revoked and replaced by the British Commonwealth and Foreign Post Warrant, 1953 (S.I. 1953 No. 1732).]

I As to the liability of Her Majesty's Postmaster-General for wrongful acts done by his subordinates, see 25 HALSBURY'S LAWS (2nd Edn.) 453, para. 808; and for cases on the subject, see 37 DIGEST 369, 370, 2-6.

For the Post Office Act, 1908, s. 13, see 18 HALSBURY'S STATUTES (2nd Edn.) 270; and for the corresponding s. 8 (2) of the Post Office Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 486.

For the Crown Proceedings Act, 1947, s. 9, see 6 HALSBURY'S STATUTES (2nd Edn.) 53.]

Cases referred to:

- (1) *Bourne v. Keane*, [1919] A.C. 815; 89 L.J.Ch. 17; 121 L.T. 426; 30 Digest (Repl.) 216, 584.
- (2) *Lane v. Cotton*, (1701), 1 Ld. Raym. 646 (91 E.R. 1332); 11 Mod. Rep. 12; Carth. 487; 37 Digest 369, 3.
- (3) *Whitfield v. Le Despencer* (Lord), (1778), 2 Cowp. 754; 98 E.R. 1344; 37 Digest 369, 4.

Appeal.

This was an appeal by the plaintiffs from an order of GORMAN, J., made on Oct. 2, 1956, dismissing an action brought by the appellants against the Post Office for damages claimed in contract, for alleged breach of obligation to use care in the transmission of two registered post packets, and in tort for negligence. The facts appear in the judgment of HODSON, L.J.

Sir Frank Soskice, Q.C., and *Anthony Cripps* for the plaintiffs, the appellants.

Melford Stevenson, Q.C., and *P. M. O'Connor* for the Post Office, the respondents.

HODSON, L.J.: The appellants claimed in contract and in tort against the Post Office in respect of the loss of two registered postal packets. One packet was posted on Apr. 29, 1953, and contained diamonds worth £3,380 odd, and the other was posted on June 22, 1953, at the same post office in London, and contained diamonds worth £17,998 odd. The Post Office accepted the packets, and a certificate of posting in the ordinary form was given. The packets were to be sent to New Zealand. The form of the certificate of posting has on the back, under the heading "Overseas":

"Registration in the international service is not a system of insurance. Compensation is not paid for loss or damage of contents as distinct from loss of the entire packet, and the payment made in no circumstances exceeds £2 18s. Packets sent to many countries abroad can be insured against loss or damage of contents."

The claim, in so far as it is based in tort, was a claim arising from the negligence of the Post Office. I need not go into the particulars of the negligence which was alleged; trouble arose from a dishonest servant of the Post Office. The claim in tort is not proceeded with, because it is recognised that, having regard to the language of the Crown Proceedings Act, 1947*, the claim in tort will not lie; but the claim in contract was pressed and was dealt with very shortly by the learned judge, having regard to the way in which the matter went. The pleading was, in contract, to the effect that the Post Office, in accepting the packets, had agreed (and I quote the material particulars)—

"to use care and diligence in and about the carriage and transmission, to employ in connexion with the carriage and transmission only adequate post officers, and to carry and transmit the packets and each of them by an efficient and appropriate system."

The Post Office, by their defence, denied that there was any contract made between them and the appellants with regard to either of the postal packets, and in particular that there was any contractual intention in the transaction. Further, the Post Office relied on the provisions of the Post Office Act, 1908†, and the Warrant made thereunder, to which I shall have to refer.

When the matter came before the learned judge, counsel then appearing for the appellants took the course that on the agreed facts, which I think that I have sufficiently stated, he was prepared to accept that in law he could not succeed, on a submission of no case by the Post Office, having regard to some old

* See Crown Proceedings Act, 1947, s. 9.

† See footnote, p. 391, post.

A decisions of the Court of King's Bench which were binding on GORMAN, J. He thereupon allowed, without argument, the matter to be determined against him and the action to be dismissed. In this court those decisions are no doubt open to review; one is a decision of 1701 and the other is a decision of 1778, and they are decisions which have stood for a long time. In accordance with well-recognised practice, discussed by the House of Lords in *Bourne v. Keane* (1) B ([1919] A.C. 815), where the authorities on the non-disturbance of decisions of long standing were reviewed, it was said by LORD BIRKENHEAD, L.C. (*ibid.*, at p. 857):

C “If there were, in fact, an unbroken line of authorities dating back three hundred years, then it would have been a matter for grave discussion whether this House, in accordance with well recognized principles, would consent to break that chain.”

The two authorities, to which I shall refer, have stood for a very long time, and no one has hitherto made any attempt to allege that in circumstances such as these a contract could be said to exist between the Post Office and the person who entrusts to the care of the Post Office a letter or package. In this court D counsel for the appellants has taken a point, which I think was not taken below, that, although the authorities contain language which is adverse to this claim, they are not in any event valid, as the learned judges' views about the contractual aspect of this matter were merely obiter, since in each of the decisions the claim was framed in case and therefore the question of contract did not directly arise for decision. We have listened to the argument on that basis and, for my E part, I think that it is correct that the observations on contract were obiter and were not directed to the matters raised on the pleadings. Notwithstanding that, the law as laid down in those cases (in the second case very clearly by that great judge, LORD MANSFIELD) has been accepted from 1778 until now, and the statutes which he had to consider were in *pari materia* with the Post Office Act, 1953, which is in force today. The statute in force today is the Act of 1953; that which F was in force at the relevant date so far as these proceedings are concerned is the Post Office Act, 1908. In my judgment, what LORD MANSFIELD said in 1778 is appropriate today and is entitled to the highest possible respect.

The first case, *Lane v. Cotton* (2) ((1701), 1 Ld. Raym. 646), a decision of the Court of King's Bench, followed on the first Post Office Act, the statute 12 Car. 2 c. 35* (1660), which recited the existence of post offices, established the office of G Postmaster-General and fixed the rates for carrying letters. On that statute, the position was considered by SIR JOHN HOLT, C.J., and TURTON, POWYS and GOULD, JJ. The three judges other than SIR JOHN HOLT, C.J., were of opinion, although the matter was not raised on the pleadings, that there was no contract. SIR JOHN HOLT, C.J., was a dissenting judge. I will read only an extract from the judgment of GOULD, J. (1 Ld. Raym. at p. 648):

H “If anything can support this action, it must be a contract expressed or implied; but here is neither the one nor the other.”

The next matter to which I need refer is the subsequent statute which was passed in the reign of Queen Anne, 9 Ann. c. 11 (1710), which dealt with the larger duties of the Post Office which existed at that time and increased the rates I payable. It is clear from the language of those old statutes that the Postmaster-General had a monopoly in the carriage of letters and packages for the Crown. I think that it is also clear that he was in a position to enter into contracts and that he had a monopoly, for example, of providing horses, which would involve entering into contracts with persons who had horses for hire. In *Whitfield v. Lord Le Despencer* (3) ((1778), 2 Cowp. 754) there is the important judgment of LORD MANSFIELD. The matter was argued twice, and it is not plain from the

* Repealed by S.L.R. Act, 1863.

report who were the other judges who sat with LORD MANSFIELD, but they were clearly of the same opinion as LORD MANSFIELD. The headnote reads:

"Case does not lie against the Postmaster-General, for a banknote stolen by one of the sorters out of a letter delivered into the post-office."

In the course of his judgment, LORD MANSFIELD referred to the earlier case of *Lane v. Cotton* (2), and in particular to the dissenting judgment of SIR JOHN HOLT, C.J. LORD MANSFIELD said (2 Cowp. at p. 764):

"The ground of Lord Chief Justice HOLT's opinion in that case, is founded upon comparing the situation of the postmaster to that of a common carrier, or the master of a ship taking goods on board for freight. Now, with all deference to so great an opinion, the comparison between a postmaster and a carrier, or the master of a ship, seems to me to hold in no particular whatsoever. The postmaster has no hire, enters into no contract, carries on no merchandize or commerce. But the post-office is a branch of revenue, and a branch of police, created by an Act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund.—As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown. There is no analogy therefore between the case of the postmaster and a common carrier.—The branch of revenue and the branch of police are to be governed by different officers. The superior has the appointment of the inferior officers; but they give security to the Crown. One requisite is, that they shall take the oaths taken by all public officers: another strong guard is, that they are made subject to heavy penalties; and this is carried so far, that, what in the case of a common carrier, or any other person, would be only a breach of trust, is in them declared to be a capital felony."

At the end of his judgment, LORD MANSFIELD referred to the position as it had previously stood when what he referred to as "the solemn judgment" in *Lane v. Cotton* (2) was given (see 2 Cowp. at p. 766):

"In that year a solemn judgment was given, that an action on the case would not lie against the Postmaster-General, for a loss in the office by the negligence or fault of his servant. The nation understood it to be a judgment: and therefore it makes no difference, if what has been thrown out were true, and the writ of error was stopped in the way that has been mentioned. [That refers to the settlement of the action.] For the Bar have taken notice of it as a judgment; the Parliament and the people have taken notice of it, every man who has sent a letter since has taken notice of it; many Acts of Parliament for the regulation and improvement of the post-office, and other purposes relative to it, have passed since, which by their silence have recognized it. The mail has been robbed a hundred times since, and no action whatever has been brought. What have merchants done since and continue to do at this day, as a caution and security against a loss? They cut their bills and notes into two or three parts, and send them at different times: one, by this day's post, the other, by the next. This shows the sense of mankind as to their remedy. If there could have been any doubt therefore before the determination of *Lane v. Cotton* (2), the solemn judgment in that case having stood uncontroverted ever since, puts the matter beyond dispute. Therefore, we are all clearly of opinion the action will not lie."

In my judgment, what LORD MANSFIELD said in that case is, in all relevant respects, as true today as it was then. In particular, one of the important parts of the ratio of his decision was his observation that the Post Office was a branch of revenue. Counsel for the appellants has said that times have changed since

A LORD MANSFIELD gave his judgment, and that the position is altogether different. Counsel at one time appeared to me to suggest that the risk of highway robbery was less today than it was then. The number of letters carried today is very much greater than it was then, but I see no great force in that submission. The risk of wicked people interfering with the Post Office is certainly very great today. There seems to me to be no foundation for the argument

B that matters have so changed in that respect that we ought to arrive at a different conclusion today from that which LORD MANSFIELD reached in 1778. Moreover, it is said that, whereas in 1778 there would not have been so many cases in which the Post Office entered into contracts, the position today, produced by the modern developments of business, is that, as the modern statutes show, the Post Office or Her Majesty's Postmaster-General is continually entering into contracts

C of various kinds for various purposes. One answer to that is that the position was really the same in substance at the time when the early Post Office Acts were passed, because it is clear that contracts would have had to have been entered into by the Postmaster-General for the hire of post-chaises and horses and so forth for the purposes of the business. There is no difference in kind between the position today and the position then.

D That being the position historically, the Post Office relies in particular on the provisions of the Post Office Act, 1908. In my judgment, the Post Office Act, 1908*, to which I need not refer in very great detail, clearly proceeded on the footing that no contractual obligation arises between the Post Office and the sender of a letter in circumstances such as these. The Act of 1908 was a consolidating Act. By s. 1 it was made clear that postal packets subject to charge

E were the subject of a duty:

"Subject to the provisions of this Act, there shall be charged by the Postmaster-General for the use of His Majesty the King on all postal packets which are conveyed or delivered for conveyance by post under the authority of the Postmaster-General such postage and other sums as may be fixed in manner provided by this Act."

F By s. 2 of the Act of 1908 power to fix rates of postage was vested in the Treasury. I come to s. 12 of the Post Office Act, 1908, under which, in combination with the enabling power in s. 82 of the same Act, subordinate legislation has been made. Section 12 read:

G "All postal packets shall be posted, forwarded, conveyed, and delivered subject to such provisions, conditions, prohibitions, and restrictions respecting the time and mode of posting and delivery, and of the payment of postage and other sums in respect thereof chargeable under this Act or any warrant, or regulations made under this Act, and respecting the registration of, and giving receipts for, and giving and obtaining certificates of posting and delivery of, any postal packet, and the sums to be paid in addition to

H any other postage for that registration, receipt, or certificate, and respecting stamps, covers, form, dimensions . . . as may be directed by Post Office regulations."

I The relevant subordinate legislation was the British Commonwealth and Foreign Post Warrant, 1948 (S.I. 1948 No. 590, as amended)†, which contained a number of provisions to which we have been referred. I read first two regulations from the warrant:

"44. *Registration. Outgoing packets may be registered.* (1) Subject to the provisions of this Warrant any outgoing postal packet (except a magazine for Canada and Newfoundland) may be registered.

* The Act of 1908 was repealed and replaced by the Post Office Act, 1953; the Act of 1908 was the statute relevant to the claims litigated in these proceedings.

† This Warrant has been revoked and replaced subsequently by the British Commonwealth and Foreign Post Warrant, 1953 (S.I. 1953 No. 1732), which was amended by S.I. 1955 No. 1878.

" 49.* *Compensation for loss.* Subject to the provisions of this Warrant :
 —(a) if any article of pecuniary value, enclosed in or forming part of a registered postal packet other than an insured letter, be lost or damaged so as entirely to destroy its value whilst in the custody of the Postmaster-General, the Postmaster-General may pay to any person or persons who may in the opinion of the Postmaster-General establish a reasonable claim to compensation (having regard to the nature of the article, the care with which it was packed, and other circumstances) such sum not exceeding £2 18s. as he may think just."

That provides for a discretionary payment to be made by the Postmaster-General. Regulation 61 is the relevant regulation which was pleaded by the Post Office in this case:

" 61. *Compensation may be paid out of aids provided by Parliament.* The Postmaster-General may give effect to the provisions of this Warrant as to the loss or damage of registered postal packets, insured letters and insured boxes, and of articles enclosed in or forming part of a registered postal packet, insured letter or insured box, out of such aids or supplies as may be from time to time provided and appropriated by Parliament for that purpose, but nothing contained in or done under or in pursuance of this Warrant shall render him liable, either personally or in his official capacity, to any action or other legal proceeding in respect of or in consequence of any such loss or damage. The decision of the Postmaster-General on all questions arising between him and any person claiming payment in respect of the loss or damage of a registered postal packet, insured letter, or insured box or of any article enclosed in or forming part thereof shall be final and conclusive."

I emphasise the words from " but nothing contained " onwards to the end of reg. 61. Section 13 of the Post Office Act, 1908, read as follows:

" 13. *Liability for loss of postal packets.* The registration of or giving a receipt for a postal packet, or the giving or obtaining of a certificate of posting or delivery of a postal packet, shall not render the Postmaster-General or the Post Office revenue in any manner liable for the loss of the packet or the contents thereof."

Counsel for the appellants has argued that the effect of reg. 61 of the Warrant and of s. 13 of the Post Office Act, 1908, does not exclude the possibility (or, indeed, in his case, as he submits, the correctness of the decision) that there is a contract between the parties on the admitted facts in this case; but, in my opinion, that regulation and s. 13 clearly indicate that Parliament and those who made the Warrant under the authority of Parliament were proceeding on the footing that no loss of the contents of a postal packet arising out of contract could be recovered. That reading of the matter is, I think, the plain reading of s. 13, which envisages a set of circumstances in which a contract might reasonably be inferred. Nevertheless, the registration does not render Her Majesty's Postmaster-General or the Post Office revenue in any manner liable for the loss of a packet or the contents thereof. It would be strange if that language were to be treated as recognising the possibility of a contractual liability existing apart from the registration or the giving of a certificate in connexion with the registration.

The only other statutory enactment to which I wish to refer is the Crown Proceedings Act, 1947. I should first state that the action is brought against

* The text cites the new reg. 49 of the British Commonwealth and Foreign Post Warrant, 1948, which was substituted for the original reg. 49 by the British Commonwealth and Foreign Post Amendment (No. 3) Warrant, 1950 (S.I. 1950 No. 771).

A the Post Office, and not against the Postmaster-General, by virtue of the directions given under the Crown Proceedings Act, 1947*. The only section to which I should refer is s. 9, sub-s. (1) of which reads as follows:

B “Subject as hereinafter provided, no proceedings in tort shall lie against the Crown for anything done or omitted to be done in relation to a postal packet by any person while employed as a servant or agent of the Crown, or for anything done or omitted to be done in relation to a telephonic communication by any person while so employed; nor shall any officer of the Crown be subject, except at the suit of the Crown, to any civil liability for any of the matters aforesaid.”

C That deals with the claim in tort, which has not been proceeded with because that section, it is recognised, bars such proceedings. Section 9 (2) of the Crown Proceedings Act, 1947, provides:

D “Notwithstanding the provisions of s. 13 of the Post Office Act, 1908, proceedings shall lie against the Crown under this sub-section in respect of loss of or damage to a registered inland postal packet, not being a telegram, in so far as the loss or damage is due to any wrongful act done or any neglect or default committed by a person employed as a servant or agent of the Crown while performing or purporting to perform his functions as such in relation to the receipt, carriage, delivery or other dealing with the packet.”

E The effect of the Crown Proceedings Act, 1947, is that, in respect of any wrongful act done by a servant of the Post Office in connexion with the loss of or damage to an inland postal packet, a member of the public is in a stronger position than that in which he had previously been; but it is to be noted that s. 9 (2) excludes overseas postal packets.

F Those are all the legislative provisions to which I think it necessary to refer. They confirm the view which was expressed on the earlier statutes and to my mind by themselves, even apart from the earlier authorities, make it exceedingly difficult to entertain an argument such as that addressed to us on behalf of the appellants in this case.

G The only other matter to which I should refer (for it might be thought that members of the public might be misled into thinking that they had entered into a contract with the Post Office in circumstances such as these) is the Post Office Guide, a document which is accessible to the public and for sale to the public, which at p. 77 of the July, 1956, edition contains this language:

“Additional information. The Post Office does not enter into a contract of carriage either express or implied. It accepts postal packets for transmission by post under, and subject to, the provisions of the Post Office Acts and the regulations made thereunder.”

H For these reasons, in my opinion, the judgment of the learned judge was right. No contract was entered into between the appellants and the Post Office. I add only this, that I think it would have been difficult to answer favourably to the appellants the question which has arisen in this case, without endeavouring at any rate to ascertain what the terms of the contract were; but the way in which the case was left was this—aye or no, was there in law or in fact a contract at all? On the admitted facts, the appellants have not been able to show that there was any contractual relationship between them and the Post Office on which they could succeed. In my opinion, therefore, this appeal should be dismissed.

I **PARKER, L.J.:** I agree. It is, of course, clear that if A entrusts a letter to B to be carried to C, and B receives remuneration for his services, a contractual

* Under s. 17 of the Crown Proceedings Act, 1947, the Treasury must publish a list specifying the government departments which are authorised departments for the purposes of the Act. The Post Office is an authorised department for this purpose; see 11 *HALSBURY'S LAWS* (3rd Edn.) 14.

tie results between A and B. It is also clear that Her Majesty's Postmaster-General has power to contract; and the only question here is whether, when A entrusts to the Post Office a postal packet for transmission overseas, a contractual tie results. Clearly the Postmaster-General is in quite a different position from a private individual. He is responsible to the Crown for running a public service and, incidentally, a monopoly. The money that is paid by the public is revenue. So far as this case is concerned, I find it unnecessary to go further into those arguments, because, as it seems to me, there are three matters which, taken together at any rate, are conclusive against the appellants in this case: (1) in 1701, in *Lane v. Cotton* (2), and 1778 in *Whitfield v. Lord Le Despencer* (3), which, it is true, were both actions on the case, there were strong dicta, to which HODSON, L.J., has referred, to the effect that the Postmaster-General entered into no contract for the carriage of postal packets, and those dicta have never been questioned; (2) as far as is known, no one before those cases, in those cases or since those cases, has ever brought before the courts a claim alleging that there was any such contract; and (3) in subsequent legislation Parliament has acted, I think clearly, on the basis that that is the true legal position. Thus, it seems to me that s. 13 of the Post Office Act, 1908, proceeded on the basis that the mere acceptance of a postal packet did not create any contractual tie. That section must have been dealing with contract, because it could not have been suggested, I think, that registration or the giving of a receipt for a postal packet could add any liability in tort. Accordingly, it was dealing with contract.

Counsel for the appellants suggested that s. 13 only provided that the mere fact of registration, the mere fact of giving a receipt, did not create any added obligation. It seems to me that the answer to that is that the section did not say so. In the background in which it was passed, it seems to me clearly to have been anticipating an argument, which might be raised, that in the case of a registered postal packet the position was different and that a contract could be said to be created by the registration and the giving of a receipt. Again, as it seems to me, the regulations made by Warrant under the Post Office Act, 1908, proceeded on that basis. The relevant Warrant in this case was the British Commonwealth and Foreign Post Warrant, 1948*, and it is sufficient to mention reg. 49 and reg. 61, without reading them, as showing that the Warrant and the regulations proceeded on that basis. Finally, in more recent times, in 1947, s. 9 of the Crown Proceedings Act, 1947, seems to me to proceed on the basis that, so far as overseas post is concerned, the Postmaster-General is not liable. It is true that section is clearly dealing with tort; but, for myself, I find it inconceivable that if Parliament thought that there was any doubt as to the contractual position (or, rather, the absence of a contract) it would not clearly have been dealt with in the Act. In those circumstances, it seems to me that the forceful words of LORD MANSFIELD at the end of his judgment in *Whitfield v. Lord Le Despencer* (3) (2 Cowp. at p. 766), which HODSON, L.J., has read, apply today and in this case with added force.

I would only add that reference was made to the Post Office Guide which is mentioned on the certificate of posting, the receipt given for the registered packet. It seems to me perfectly clear that, if no contract otherwise exists, the terms of that Guide cannot possibly create a contract.

Accordingly, I agree that this appeal should be dismissed.

ORMEROD, L.J.: I agree, for the reasons which have been fully set out by my brethren, and there is nothing that I wish to add.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Chamberlain & Co.* (for the appellants); *Solicitor for the Post Office* (for the respondents).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

* S.I. 1948 No. 590; see footnote, p. 391, ante.

A ST. PANCRAS BOROUGH COUNCIL v. UNIVERSITY
OF LONDON.

[CHANCERY DIVISION (Wynn-Parry, J.), May 8, 16, 1957.]

B Rates—Limitation of rates chargeable—Hereditament occupied for the purposes of non-profit making organisation—Notice terminating the limitation of rates chargeable—When notice may be given—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (3).

C On the true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (2) and (3)* (which relates to rates payable by charitable organisations, organisations otherwise concerned with the advancement of religion, education or social welfare, and other organisations), no notice can be given under s. 8 (3) that the limitation as to rates imposed by s. 8 (2) (b) shall cease to apply or shall be modified until the expiration of "the first year of the new list" (as defined in s. 8 (2)).

D [For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Adjourned Summons.

E The plaintiffs, the Metropolitan Borough of St. Pancras, as rating authority for the district, applied to the court by originating summons for the determination of the question under R.S.C., Ord. 54A, whether, according to the true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (3), notices in respect of certain properties dated Mar. 20, 1956, and served on the defendants by post on Mar. 21, 1956, were valid and had the effect of withdrawing from the defendants as from the year ending Mar. 31, 1959, the limitation on the defendants' liability for rates conferred by s. 8 (2) of the said Act.

F C. F. Fletcher-Cooke for the plaintiffs, the rating authority.
W. B. Harris for the defendants.

Cur. adv. vult.

G May 16. WYNN-PARRY J., read the following judgment: The relevant facts can be stated shortly. The hereditaments in question are hereditaments within the meaning of that word as used in s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, to which I will refer as "the Act". The royal assent was given to the Act on July 27, 1955. By virtue of s. 1 (3) the valuation officer was required to transmit the new valuation list referred to in s. 1 (1) to the rating authority. This step was duly taken. On Mar. 21, 1956,

H * So far as relevant s. 8 (2) and (3) of the Act of 1955 are as follows: "(2) For the purposes of the making and levying of rates in a rating area, for the year beginning with the date of the coming into force of the first new valuation list for that area (in this section referred to as 'the first year of the new list'), and for any subsequent year, the amount of rates chargeable in respect of a hereditament to which this section applies shall, subject to the following provisions of this section, be limited as follows, that is to say—(a) for the first year of the new list, the amount so chargeable shall not exceed the total amount of rates (including any special rates) which were charged in respect of the hereditament for the last year before the new list came into force; (b) if, by virtue of the preceding paragraph, the amount of rates chargeable in respect of the hereditament is less than it would have been apart from that paragraph, the proportion by which it is thereby required to be reduced shall apply to any subsequent year during which the hereditament continues to be one to which this section applies, and accordingly the amount of rates chargeable in respect of the hereditament for any such year shall be reduced by that proportion . . .

I "(3) Where para. (b) of the last preceding sub-section has effect in the case of a hereditament, the rating authority may at any time give notice to the occupiers of the hereditament that, as from the end of a year specified in the notice . . . the limitation imposed by virtue of that paragraph shall either cease to apply to the hereditament or shall be modified as mentioned in the notice . . ."

notices as foreshadowed in s. 8 (3) were served in respect of the hereditaments involved. On Apr. 1, 1956, the first year of the new valuation list began. A

The question which arises is whether the notices are valid, or whether they were served prematurely and are therefore invalid. The answer depends wholly on the construction of s. 8 (2) and (3) of the Act, and in particular on the opening words of s. 8 (3). Sub-section (2) appears to me clear in its language, and its effect is that for the first year of the new list the total amount of rates chargeable in respect of a hereditament to which s. 8 applies is not to exceed that which was chargeable in respect of that hereditament for the last year before the new list came into force. After the expiration of the first year of the new list and provided the condition at the opening of para. (b) applies, there will be a proportionate reduction, subject to the provisions of sub-s. (3), whatever they mean, and to the effect of action properly taken thereunder. Then comes sub-s. (3), the opening words of which are critical: B C

"Where para. (b) of the last preceding sub-section has effect in the case of a hereditament, the rating authority may at any time give notice . . ."

As I construe sub-s. (2), it is possible in respect of any particular hereditament to which the Act applies to say, at least as late as during the currency of the first year of the new list, whether or not at the expiration of that year para. (b) will apply; but clearly the provisions of para. (b) cannot come into operation until the expiration of the first year. In sub-s. (3) the draftsman has used the present tense, "has effect", and prima facie the result must be that sub-s. (3) does not operate until after the expiration of the first year of the new list. The doubts which he has raised are caused first by the use of the adverb "where", and secondly by the use of the wide phrase "at any time". As regards the use of the word "where", it appears to me that this word in its context does no more than introduce a condition, namely, that the particular case must fulfil the conditions of para. (b) of sub-s. (2) before the notice contemplated by sub-s. (3) can be given, and it in no way affects the natural meaning of the words "has effect", which, in my view, refer to a point of time, viz., the moment of time, at the earliest, at which para. (b) of sub-s. (2) comes into operation, i.e., at the end of the first year of the new list. As regards the words "at any time", they follow the statement of the condition on the fulfilment of which the notice may be given, and in my view they cannot operate to allow a notice to be given at a time anterior to the condition being fulfilled. They must be read as if they were followed by the word "thereafter". This does not really involve adding to the sub-section. It only means that the period during which the notice contemplated by the sub-section can be given must necessarily start not earlier than the moment of time when the condition, on the fulfilment of which the notice can be given, has been fulfilled. D E F G

I am therefore of opinion that on the true construction of s. 8 (2) and (3) of the Act of 1955 no notice under sub-s. (3) can be given until after the expiration of the first year of the new list, and therefore the notices in question were prematurely given and are invalid. H

Declaration accordingly.

Solicitors: *Town clerk, St. Pancras Borough Council (for the plaintiffs); Slaughter & May (for the defendants).*

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

A

SMITH v. SMITH.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Wallington, J.), May 13, 1957.]

B

Justices—Evidence—Admission by probation officer of desertion on behalf of respondent husband unable to attend hearing—Appeal by husband on ground that admission was unauthorised—Probation officer authorised to ask for adjournment on husband's behalf but not to make admission of desertion—Re-trial ordered.

Probation Officer—Authority—Whether authorised to make admissions or apply for adjournment on behalf of party.

C

The wife caused a summons to be issued against the husband on her complaint that he had deserted her. The husband attended court on the date of the hearing; he saw a probation officer, admitted to him that he had left the wife and explained that he had an urgent job which required him to drive to a neighbouring town and could not wait for the case to be called on. The husband thereupon left the court building. The case was called on and the wife gave evidence. The probation officer then gave evidence to the effect that he had seen the husband, who had said that he could not appear that morning, and that the husband was prepared to pay £3 a week and admitted desertion. The justices found the complaint proved and made an order for maintenance in the wife's favour.

D

E

The husband appealed and in support of his appeal filed an affidavit in which he denied that he had admitted to the probation officer that he had deserted the wife and set out facts which showed that there might be an answer to the charge of desertion.

Held: the probation officer was authorised to ask for an adjournment, but had exceeded his authority in considering himself an agent to make vital admissions on the merits of the case; and accordingly the case would be remitted for a re-hearing.

F

Appeal allowed.

[As to reports by probation officers in matrimonial proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 497, para. 1096, note (a), and as to adjournment of domestic proceedings, see *ibid.*, 497, para. 1097, note (e); and for cases on the latter subject, see 27 DIGEST (Repl.) 718, 719, 6868-6872.]

Cases referred to:

G

(1) *Scutt v. Scutt*, (1950), 94 Sol. Jo. 422; 27 Digest (Repl.) 731, 6977.

(2) *Winter v. Winter*, [1942] 2 All E.R. 390; [1942] P. 151; 111 L.J.P. 95; 167 L.T. 258; 27 Digest (Repl.) 599, 5604.

Appeal.

H

The husband appealed against an order dated Oct. 30, 1956, of the Manchester justices sitting at Strangeways.

I

The wife caused a summons to be issued against the husband requiring him to attend at the magistrates' court on Oct. 30, 1956, at 11 a.m. to answer her complaint that he had deserted her. The husband arrived at the court at 10.30 a.m. on the day of the hearing and saw one of the court probation officers. He told the probation officer that he had his lorry outside and that he had a rush job which required him to drive the lorry straight away to Burnley. He also said that he had left the wife. The husband left the court buildings. The case was in due course called on and the wife gave evidence relating to the circumstances in which the husband had left her. The probation officer then gave evidence and stated:

"I saw the defendant this morning. He said he could not appear this morning. He has a small lorry with a gross profit of £10 per week. He pays £3 a week for his caravan [in which he was then living]. He said he was prepared to pay £3 a week, and admitted desertion."

The justices then found the wife's complaint proved, granted the custody of the two children of the marriage to her and ordered the husband to pay £2 a week as maintenance for the wife and £1 a week for each of the two children. In their reasons the justices stated:

"The defendant attended, but apparently could not wait for his case to be heard, and the bench accepted evidence of his statement admitting desertion and made an order accordingly."

The husband appealed.

H. Gore for the husband.

C. R. Beddington for the wife.

LORD MERRIMAN, P., stated the facts and continued: I find the evidence of the probation officer difficult to reconcile with what I understand to be the duty of a probation officer. It certainly is not his duty to obtain admissions, to bring a case before the court. I must not be taken to approve a probation officer interviewing a man without, apparently, any caution or anything of that sort, and then going into the witness-box to give evidence against him. It seems to me to be inconsistent with the known duties of probation officers. However, I do not want to use any hard words, and it seems to me that the simpler way to put this, on what we know of the facts, is to say that I have no doubt that something passed between the husband and the probation officer which justified the probation officer going into court and telling the court that the husband was not in default; he had been there, he could not stay, and he gave a reason why he could not stay. If it had gone no further than that it is plain that the justices would have had a discretion, after hearing what the solicitor for the wife said, whether or not to grant an adjournment. It would have been entirely a matter for their discretion, and I must not be taken, having regard to the course the case took, to be attributing any blame to the justices for going on with the case. They were put in some difficulty; but I do not think that it was the business of the probation officer to give this evidence against the husband that he had admitted desertion.

We have a very long affidavit from the husband, which unfortunately does not deal with this aspect of the case at all, except in this one sentence:

"I did not admit to . . . the probation officer, that I had deserted my wife. I told him I had left her. I believe he asked me if I had left her and I said 'Yes'."

It does not need any words from me to show that that admission does not necessarily mean that he had deserted her; and in the course of some nine paragraphs of affidavit he sets out his case. Let me be plainly understood not to be expressing any opinion whatever about the merits. [His LORDSHIP referred to the husband's affidavit and also to *Scutt v. Scutt* (1) ([1950], 94 Sol. Jo. 422) and *Winter v. Winter* (2) ([1942] 2 All E.R. 390) and continued:] The end of it all is that here is a man who says he has got a good defence. It is not for us to say whether or not it is a good defence. It is a defence that he wants to put forward, but which he was prevented from putting forward because the probation officer went further in his evidence than was warranted. I put that as a matter of principle, rather than on the facts of the case. I think that the very fullest extent to which the probation officer should have gone was to say what the husband had told him about why he could not wait, and to have left it to the justices to decide whether or not to grant an adjournment; and no further should he have gone. Putting it in contractual language, the probation officer was authorised to ask for an adjournment, but certainly exceeded his authority in considering himself an agent to make vital admissions on the merits of the case. And there I propose to leave it except as a matter of terms. In my opinion this application should succeed, the order be set aside, and the wife's complaint

A referred back to be re-heard by a fresh panel of justices for the petty sessional division.

WALLINGTON, J.: I agree. The justices' reasons in the case are in these terms:

B "The defendant attended, but apparently could not wait for his case to be heard, and the bench accepted evidence of his statement admitting desertion and made an order accordingly."

C I can well understand that the justices, having had evidence from their probation officer, quite naturally relied on it as an accurate account of what had passed between him and the husband. Unfortunately, however, the probation officer did, in fact, quite unintentionally and quite honestly misrepresent the effect of what the husband had said to him, in that he mistakenly treated the husband's admission that he had left his wife as an admission that he had thereby committed the matrimonial offence of desertion. I sympathise with the justices in these circumstances, because they were thus led into improperly assuming that they would be justified in acting on the probation officer's "statement" as proving the charge of the matrimonial offence of desertion without first satisfying D themselves that the words spoken by the husband to the officer were of such a character as to indicate that the husband intended them to be understood in the sense in which both the officer, and, in consequence of his testimony, also the justices, understood them. In my opinion they made a serious mistake in taking that course, with the result that the order which they made cannot stand.

E It is a very serious thing to accept an expression like "He admitted desertion" as conclusive of an admission of any offence. Between that expression and the words which are relied on by the narrator of it there is often a great divergence. Words are by some people understood to be an admission without any reasonable excuse for so doing. For example, a witness in the witness-box not infrequently says "Oh, yes, he admitted adultery", and then, pressed for the words which he or she has assumed to be an admission of adultery, the answer is "Well, I F told him that he had gone a bit wrong, and he did not deny it". Obviously it is not in any sense an admission of adultery. The present case, perhaps, will be a sufficient warning of the grave danger of accepting evidence of this kind without an investigation into the circumstances attending the supposed admission, the words used and the context in which they were used.

G Further, I am unable, for myself, to find anything in the materials before us which could properly be regarded as conferring on the probation officer an authority to make any such admission or give evidence about such an admission, though, as I have said, I can well understand the justices relying on him and treating what he gave evidence about as an actual admission that the husband had been guilty of desertion. In the circumstances it seems to me that there has not been a trial of the issues between these two spouses on desertion, and on H the face of things it does not look as if the interests of justice have been completely well served. It seems to me, therefore, that the order that ought to be made is the one that my Lord has just announced. I agree with it.

Order accordingly.

Solicitors: *Edward F. Iwi*, agent for *Julian S. Goldstone & Co.*, Manchester (for the husband); *Gregory, Rowcliffe & Co.*, agents for *Taylor & Buckley*, Oldham (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS *v.* BUCHANAN. A

[COURT OF APPEAL (Lord Goddard, C.J., Jenkins and Sellers, L.JJ.), March 13, 1957.]

Surtax—Settlement—Surrender of reversionary life interest—Surrenderer's children becoming entitled as if she were dead—Surrender a "disposition"—Subsequent surrender of prior life interest—Income of children applicable for their benefit in consequence of surrender of reversionary life interest—Finance Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 34), s. 21 (9)—Finance Act, 1943 (6 & 7 Geo. 6 c. 28), s. 20, Sch. 6, Part 2. B

A testator by his will settled his residuary estate on his children living at his death and their issue. Each child took a life interest in his share with remainder to his issue, but any such issue living at the date of the testator's death were also to take a life interest only with remainder to their issue. The testator died in 1927, and a son of his, G., and the son's daughter, D., who were then living, each became entitled to a life interest in one-third of the residuary estate. D.'s life interest, which was a protected life interest, was expectant on G.'s death and, subject to these two life interests, the capital of the one-third share belonged to her children. Under an express power in the testator's will D. executed in 1948 a surrender of her life interest, which was then still expectant on G.'s death. Under the terms of the will D.'s children then became entitled to the like estate or interest as if D. were dead. G. executed a surrender of his life interest on the following day. The income of the one-third share was thereafter applied for the benefit of D.'s children, who were infants. D.'s husband was assessed to surtax on the income so applied, on the ground that it was income that was to be treated as D.'s income under s. 21 (1) of the Finance Act, 1936, because it was applied for the benefit of her children "by virtue or in consequence of [a] settlement", viz., the surrender made by D. who was, it was also alleged, the "settlor" for the purposes of that section*. On appeal, C

Held: (i) D.'s husband was rightly assessed to surtax in respect of the income, since (a) D.'s surrender of her life interest was a "disposition" and therefore a settlement as defined in s. 21 (9) (b) of the Act of 1936, (b) D. was the settlor within s. 21 (9) (c) of the Act of 1936 and (c) it was by virtue or in consequence of the "settlement" within s. 21 (9) (b) that the income was paid to D.'s children. D

(ii) a will was not a settlement within the meaning of s. 20 of the Finance Act, 1943†, nor accordingly within s. 21 (9) (b) of the Finance Act, 1936; and, therefore, there were not two settlors, and the income was not attributable to the testator under the Finance Act, 1943, s. 20 and Sch. 6, Part 2. E

Appeal allowed. F

[For the Finance Act, 1936, s. 21 (9), see 12 HALSBURY'S STATUTES (2nd Edn.) 362; and for the Finance Act, 1943, s. 20 and Sch. 6, Part 2, see *ibid.*, 565, 574. G

For the replacing provisions of s. 397 (1), s. 403, s. 409 of the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 376, 380, 387.] H

Appeal.

The respondent taxpayer appealed against assessments to surtax made on him for 1949-50 and 1950-51 in respect to certain income paid to children of his wife by a former marriage on the footing that, under s. 21 of the Finance Act, I

* "Settlement" and "settlor" were defined by s. 21 (9) (b) (c) of the Finance Act, 1936; the terms of the definitions are set out at p. 402, letter E, p. 404, letter C, post.

† Section 20 of the Finance Act, 1943, declared, for the removal of doubts, that s. 21 of the Finance Act, 1936, and certain other provisions, had effect in accordance with the provisions of Sch. 6 to the Act of 1943 in the case of any settlement or disposition where there was more than one settlor or more than one person who made the disposition.

A 1936, such income was deemed to be the income of the mother and that the taxpayer was accordingly liable to include it in his total income for surtax purposes.

By his will the residuary estate of the first Earl of Iveagh, the testator, was settled on such of his children as were living at his death and their issue, each child taking a life interest in his share with remainder to his issue or, if any such issue was living at the testator's death, with a life interest to issue so living, and remainder to their issue. The testator died in 1927. He had three sons. One of them, the Honourable Arthur Guinness, and that son's daughter, Lady Dufferin and Ava, were alive at the testator's death, and Lady Dufferin therefore took only a life interest in her father's share of the residuary estate expectant on his death, with remainder to her children. She had three children by her first marriage to the Marquis of Dufferin and Ava, who was killed in action in 1945. In 1948 she married the taxpayer.

Lord Iveagh's will provided for the forfeiture of the life interest of any beneficiary who attempted to dispose of it, subject to the following exception in cl. 4 (3) (a):

D "Any such life tenant may at any time surrender such life interest or any part thereof to or in favour of the person or any one or more of the persons who would be entitled thereto or to some share thereof or of the trust premises in which it subsists . . . if the life tenant were then dead and any such surrender shall operate so that the person or persons in whose favour it is made shall thereby become entitled in like manner and for the like estate or interest under my will or under any such appointment as if the life tenant were dead."

E On Mar. 8, 1948, Lady Dufferin surrendered in favour of her children her life interest in the testator's residuary estate, which was then in remainder expectant on the death of her father. On Mar. 9, 1948, her father also surrendered his life interest. Lady Dufferin's children thereupon became entitled to possession of the father's share of the residuary estate. They were minors during the relevant years and the income was therefore expended for their benefit in accordance with the terms of the will.

F The taxpayer contended that any income paid to the children was paid in consequence of the provisions of the will and not by virtue or in consequence of the surrender by Lady Dufferin in 1948, and consequently s. 21 of the Finance Act, 1936, did not apply to such income; and, alternatively, if s. 21 did apply to such income, there were two "settlers" within the definition of that term in s. 21 (9) of the Act, the testator and Lady Dufferin, and the whole of the income fell to be attributed to the testator in accordance with s. 20 and Sch. 6, Part 2, of the Finance Act, 1943. The Crown contended that the income was paid to the children by virtue or in consequence of the surrender by Lady Dufferin, which was a settlement within the definition in s. 21 (9) of the Act of 1936, and the testator was not a settlor in relation to that settlement within the meaning of the Finance Acts, 1936 and 1943, and, alternatively, if both the testator and Lady Dufferin were settlers, as from the date of the death of the father, the income was "income originating" from Lady Dufferin within the meaning of Sch. 6 to the Finance Act, 1943.

H I The commissioners held that the income became payable to the children "by virtue or in consequence of" the settlement constituted by Lady Dufferin's surrender (which was a "disposition" within the meaning of s. 21 (9) (b) of the Finance Act, 1936, and thus was a settlement within s. 21 (9)); Lord Iveagh's will was also a settlement (as defined in s. 21 (9) (b) of the Finance Act, 1936), and s. 20 of and Sch. 6 to the Finance Act, 1943, must therefore be applied, notwithstanding that the will was made and probate granted before 1936; but the income was not "income originating" from Lady Dufferin, i.e., either "income from property originating from her" or "income provided

directly or indirectly" by her, of which alone account was to be taken under para. 1 of Part 2 of Sch. 6 to the Act of 1943, since she merely declined in advance to take the share left to her by the will. The income to be taken into account was therefore nil and the appeal succeeded. On appeal, VAISEY, J., on June 22, 1956, affirmed the decision of the commissioners in favour of the taxpayer, but on a different ground. He held that, although a surrender of a life interest was normally a "disposition" within the enactment, viz., within the definition of "settlement" in s. 21 (9) of the Finance Act, 1936, yet, having regard to the unusual terms of cl. 4 (3) (a) of the testator's will, the income benefit which the children received was attributable to Lord Iveagh's will and not to the surrender; and that therefore the case was not within s. 21, because the income in question was provided by Lord Iveagh, the children's grandfather, and not by Lady Dufferin.

John Pennycuik, Q.C., E. Blanshard Stamp and Sir Reginald Hills for the Crown.

Charles Russell, Q.C., and H. H. Monroe for the taxpayer.

LORD GODDARD, C.J., stated the facts and continued: Section 21 of the Finance Act, 1936, was passed because parents were entering into covenants with trustees to apply money for the benefit of their children and because that was a form of tax avoidance. The section provided:

"(1) Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person . . .

"(9) In this section— . . . (b) the expression 'settlement' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets . . ."

The Finance Act, 1943, s. 20, made special provision with regard to settlements where there was more than one settlor. The Special Commissioners decided the present case in favour of the taxpayer by having recourse to the Finance Act, 1943, and holding that the income in this case originated from the testator, Lord Iveagh. They regarded the testator and his grand-daughter, Lady Dufferin, as being both settlors. They thought, therefore, that the provisions of the Finance Act, 1943, applied and that as the income derived from the testator's will, he should be regarded as the settlor for this purpose and not Lady Dufferin. VAISEY, J., did not take that view and I cannot take that view because I do not think that a will of a testator comes within s. 20 of the Finance Act, 1943, at all; it is not a settlement to which the Act applies, and I think that that is a sufficient answer to any argument based on the Finance Act, 1943.

Section 21 (9) (b) of the Finance Act, 1936, provided that the expression "settlement" included any "disposition, trust, covenant, agreement, arrangement or transfer of assets", and counsel for the taxpayer has argued strenuously that a surrender is not a disposition. I should have great difficulty in holding that; I think that a surrender clearly is a disposition. A person can dispose of his interest in a fund or in a chattel or in anything else in a variety of ways, but, if, having an interest in a fund, although the interest may not then be in possession, he surrenders that interest, it seems to me that he disposes of it. Still more is it clear in my mind that, if he surrenders the interest, the persons next entitled to that interest or to the income under the interest become thereby advanced. When Lady Dufferin executed the surrender, in my opinion, she disposed of her interest under her grandfather's will, and she could only dispose of it to her children since otherwise she would have forfeited the interest altogether and it

A would then have become subject to various trusts under which the trustees might have applied it in favour of the children but would not have been obliged to do so. She exercised the power which the will had given her to surrender in favour of her children and, therefore, she disposed of the interest to her children. In those circumstances, looking at the clear words of s. 21, it is in consequence of that disposition that income is paid for the benefit of the children of Lady Dufferin. She is the settlor because, if a disposition is a settlement, the person who disposes is the settlor*. The income is being paid for the benefit of her children. It seems to me, therefore, that the section entirely covers the facts of this case.

The terms of the testator's will have been canvassed by learned counsel on both sides with great care, but we are concerned here not so much with the terms of the testator's will as with the terms of s. 21 of the Finance Act, 1936, which was passed long after the will was made but was designed to catch this particular class of transaction under which a parent, by means of some form of settlement, settled money on his children the income of which would otherwise have been his for the purpose of reducing his liability to surtax. It was for that very purpose that this transaction which we are now considering was carried out, and I think that it is obviously caught by the section.

For these reasons I am of opinion that we should allow this appeal.

JENKINS, L.J.: I agree. Counsel for the taxpayer has persuasively argued that Lady Dufferin had no disposable interest under her grandfather's will: she had no more than a protected life interest which might be brought to an end in a variety of ways; she might assign or charge it or attempt so to do or she might go bankrupt. In those cases, and no doubt in others, the ensuing forfeiture would give rise to a discretionary trust for a variety of persons including her children. Counsel submits that the testator, in dealing with the various cases of termination of life interests, dealt specially with one particular case, that of providing for the persons entitled in remainder by means of a surrender; and that he authorised a life tenant to make such a surrender provided that, in cases where this was done, the trusts should take effect as if the surrenderor was dead. Counsel submits that in those circumstances Lady Dufferin had no disposable interest; all that she could do was to get rid of her protected life interest under the will in one or other of the ways marked out by the testator; in which case the property would pass in accordance with the trusts of his will. So, says counsel, that which is here relied on as a settlement was not in truth a disposition made by Lady Dufferin at all, but it was a disposition made by the will of the testator, a prior provision in favour of Lady Dufferin having been eliminated.

Persuasive as that argument is, I find myself unable to accept it. It is true that Lady Dufferin's interest was a protected life interest, but she was left free as regards dealing with it in one particular way, i.e., by way of surrender in favour of persons entitled in remainder. She was entitled to the income under the protective trust, and it was for her to decide at her will and pleasure whether she should retain that income or surrender it for the benefit of those interested in remainder, viz., her three infant children. She chose to take the latter course, and the result was that the income which she would otherwise have been enjoying as life tenant from the moment when her life interest fell into possession went to her children and became payable to them or applicable for their benefit. Accordingly I am unable to accept that part of counsel's argument.

Then, counsel submits, there cannot be a settlement within the meaning of s. 21 of the Finance Act, 1936, of a life interest by means of a surrender. He says that a surrender of a life interest destroys the interest and that there is nothing left of which a settlement can be made; and that it is an abuse of language to describe as a settlor a life tenant surrendering his interest for the

* See the Finance Act, 1936, s. 21 (9) (c).

benefit of those entitled in remainder or reversion, or to describe the surrender, an extinction of his interest, as a settlement. If this matter depended on the ordinary use of language, I would attach great weight to that argument. I do not think that, in ordinary parlance, one would describe as a settlement a transaction consisting simply of a surrender of a limited interest. We are not concerned here, however, merely with the ordinary use of words; we have to find out whether the transaction carried out in this case was a settlement within the special and extremely wide meaning assigned to that expression by the Finance Act, 1936, s. 21. Looking at those provisions, one finds, in s. 21 (9) (b) that the expression "settlement" includes "any disposition, trust, covenant, agreement, arrangement or transfer of assets". Moreover, s. 21 (9) (c) provided:

"the expression 'settlor', in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly . . ."

In my view it is not open to doubt that a surrender is a disposition and therefore a settlement within that wide meaning.

With reference to the argument of counsel for the taxpayer that one cannot make a settlement of a life interest by surrendering and thereby destroying the interest, the section is not confined to cases where there is a settlement of a capital sum producing income or a settlement by way of covenant by the settlor to pay an annual or other periodical sum; the section applies in general terms to *any* income and not necessarily to income arising from a settled asset. Section 21 (1) of the Finance Act, 1936, provides:

"Where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person."

Applying this statutory provision to the present case, it appears to me that Lady Dufferin did make a settlement in that she made a disposition in the form of the surrender of her life interest. By virtue or in consequence of that disposition some income, i.e., the income to which she would have been entitled but for the surrender, was paid to or for the benefit of the children of the settlor, Lady Dufferin. Accordingly, in my opinion, the learned judge's decision in this case cannot stand. He came, in effect, to the conclusion that, on the language of this particular will, the only settlement in the case was the will itself, that this was the source from which the income was provided, and that Lady Dufferin's action in surrendering her life interest and bringing into effect the provisions of the will in remainder did not, in all circumstances of this particular case, amount to a disposition within the meaning of the Finance Act, 1936, s. 21 (9) (b). I find myself unable to agree with that view and I entirely concur with the judgment delivered by my Lord and the reasoning on which it is based.

In these circumstances I think that this appeal should be allowed.

SELLERS, L.J.: I agree that this appeal should be allowed for the reasons given by LORD GODDARD, C.J., and JENKINS, L.J. VAISEY, J., summarised his decision by saying that this case was not brought within s. 21 of the Finance Act, 1936, at all, since he thought that the income in question was provided by the testator, who was the children's grandfather, and not by the children's mother, Lady Dufferin. That is an acceptance of part of the submission which counsel for the taxpayer so persuasively put before this court, but, if the surrender was (as both my Lords have held and as I agree) a settlement within the definition in s. 21 (9) (b) of the Finance Act, 1936, then s. 21, in my judgment,

A does apply, because it is in consequence of the settlement that the income was paid to or for the benefit of the children of the settlor in the year of assessment.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Travers Smith, Braithwaite & Co.* (for the taxpayer).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

DERBYSHIRE MINERS' WELFARE COMMITTEE v. SKEGNESS URBAN DISTRICT COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Donovan, JJ.),
May 8, 9, 1957.]

C *Rates—Limitation of rates chargeable—Holiday camp for Derbyshire miners, their dependants and invitees—Camp established from compulsory contributions levied under statute—Accommodation and board at camp provided at cost—All Derbyshire miners employed by National Coal Board—Whether camp concerned with the advancement of "social welfare"—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1).*

D The appellants were the trustees of a holiday camp and ancillary premises which they occupied for the purpose of providing "a holiday centre and a recreation or pleasure ground for the benefit of workers in or about coal mines employed by collieries in the Derbyshire district" including the workers' dependants and invitees. The holiday camp was established by a fund raised from compulsory contributions levied under certain Acts dealing with the mining industry; the appellants were responsible for the expenses of maintaining and operating the camp, but received grants to cover capital expenditure from a statutory body. The appellants paid less than a rackrent for the premises. The camp was neither established nor conducted for profit, although the appellants did not run it at a loss. The workers benefit-
E ing under the trust were now all employed by the National Coal Board. The
F appellants appealed against a rate levied on them by the respondents on the ground that they were an organisation whose main objects were charitable or otherwise concerned with the advancement of social welfare within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and were therefore entitled to have the rate limited to the amount levied in the previous year under s. 8 (2) of the Act of 1955.

G **Held:** the appellants were an organisation concerned with the advancement of social welfare because, (i) the camp was not run as a matter of business and there was an element of benevolence about it, as the beneficiaries did not provide it themselves and enjoyed these holidays at no more than cost and the premises were occupied at a rent far below the rackrent
H (*Trustees of the National Deposit Friendly Society v. Skegness Urban District Council*, [1957] 1 All E.R. 407, applied); and (ii) the miners of Derbyshire were a sufficiently large and important section of the community to satisfy the requirement implicit in the word "social" that the advancement of social welfare must benefit the community at large or a substantial section of it.

I Observations of LORD SIMONDS in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* ([1951] 1 All E.R. at p. 35) considered.

Per CURIAM: a holiday camp where people can get holidays at cost would not of itself be a charity, not being in any way for the relief of poverty or for the advancement of education, religion or some other purpose beneficial to the community (see p. 409, letter B, post).

Appeal allowed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

- (1) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 28 Digest 10, 51.
- (2) *Inland Revenue Comrs. v. Roberts Marine Mansions Trustees*, (1926), 43 T.L.R. 270; 11 Tax Cas. 425; Digest Supp.
- (3) *National Deposit Friendly Society (Trustees) v. Skegness Urban District Council*, [1957] 1 All E.R. 407.
- (4) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31; [1951] A.C. 297; 2nd Digest Supp.

Case Stated.

This was a Case Stated by justices for the County of Lincoln, Parts of Lindsey, in respect of their adjudication as a court of quarter sessions sitting at Lincoln on Sept. 17, 18, 1956. By a notice dated June 27, 1956, and given under the Poor Relief Act, 1743, s. 4, the appellants, the Derbyshire Miners' Welfare Committee, appealed against a rate levied on them, for the year ending Mar. 31, 1957, by the respondents, the Skegness Urban District Council, in respect of a hereditament comprising a holiday camp and premises in the urban district of Skegness which the appellants occupied. The rate appealed against amounted to £3,040; the rate levied for the same hereditament for the year ending Mar. 31, 1956, amounted to £1,758 18s. The grounds of appeal were that the rate for the year ending Mar. 31, 1957, had not been made in conformity with the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8*, that the rate exceeded the amount permitted by s. 8, and that it should be limited to £1,758 18s. The following facts were found. The appellants were the trustees of a trust called the Derbyshire Miners' Welfare Convalescent Home and Holiday Centre, and were generally known as the Derbyshire Miners' Welfare Committee by which name they were described in the valuation list and rate book. The appeal related only to the trust concerning the holiday centre which is referred to hereinafter as the trust. The holiday camp and premises concerned, together with a convalescent home, were occupied by the appellants for the purpose of providing a home and camp for the use of workers in and about coal mines in Derbyshire (exclusive of South Derbyshire). The camp and premises comprised the following:—chalets, kitchen and dining hall, theatre and children's theatre, bars, lounges, tea bar and billiard room, bowling green, roller skating rink and garden, a special block for paraplegics, a dormitory for young children, shops selling holiday requisites, administrative offices and other ancillary buildings. The expenses of the paraplegic block were borne by a different fund from that bearing the expenses of the rest of the camp. The camp had been provided by a body set up under the Miners' Welfare Act, 1952, the Coal Industry Social Welfare Organisation, who, under s. 13 of that Act, could obtain from the National Coal Board sums necessary to meet the cost of any social welfare activities which it carried on within the meaning of the Act of 1952 and which included the provision of holiday camps. The Social Welfare Organisation made grants to the appellants for capital expenditure incurred in connexion with the holiday camp on condition that the appellants were responsible for maintenance and operational expenses. The appellants did not seek to make a profit or a loss on their operations. Separate accounts were kept for the convalescent home and the holiday camp. By an order dated Feb. 20, 1953, the Charity Commissioners established a scheme for the regulation

* Section 8 (2) of the Act of 1955 limits the amount of rates chargeable on certain hereditaments, in particular (cf. s. 8 (1 (a))): "any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of . . . social welfare".

A of the trust*. The origin of the holiday camp, originally known as the Derbyshire Miners' Holiday Centre was, substantially, a lease dated Dec. 6, 1940, referred to in the order of the Charity Commissioners. This lease, which was not produced to the justices, declared, by cl. 6, trusts of the property demised†. The justices found that all employees at collieries in North Derbyshire were now employed by the National Coal Board. The persons attending the holiday camp were workers in or about coal mines in North Derbyshire and their wives and children, but any vacancies not filled by those persons were filled by appellants from other coal fields, although generally there were no vacancies. The charge for a week's accommodation and full board at the camp, which included the return rail or omnibus fare from the visitor's home to Skegness, varied from £5 15s. for an adult, to £1 10s. for a small child. Drinks and other refreshments were sold at the camp, alcoholic drinks being sold to those who joined a club at the camp, which local residents also joined in the winter. A substantial profit resulted from the supply of drinks but the fixed charge for accommodation resulted in the trustees making neither a profit nor a loss.

It was contended for the appellants that the purposes of the trust were charitable, and that (i) the order of the Charity Commissioners was *prima facie* evidence of this, and (ii) those entitled to enjoy the facilities of the camp formed a sufficiently wide section of the community to make the purposes charitable. Alternatively, the appellants contended that the purposes of the trust were concerned with the advancement of social welfare as (a) they concerned the provision of holidays at cost for persons in need of a change of air; (b) social welfare within the meaning of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, did not connote a benefit to the community at large, but it was the intention and effect of the enactment to confer its benefits on organisations which were not charitable because their purposes did not benefit a sufficiently large section of the community; and (c) social welfare within the meaning of s. 8 of the Act of 1955 should be taken to include "social welfare activities" as defined in s. 16 (1) of the Miners' Welfare Act, 1952‡.

F The respondents contended that the purposes of the trust were not charitable because (i) the order of the Charity Commission was not conclusive whether a purpose was charitable or remained so; (ii) a trust for the benefit of the servants of one particular master, such as the National Coal Board, was not a charitable purpose in law; (iii) although the purposes of the trust might have been charitable when the trust was set up in 1927, at which date there were many employers, yet it would never have come under the control of the Charity Commission if there had been only one employer in that year so that the fact that the property had been vested in the Charity Commissioners in 1927 should not affect the issue; and (iv) the definition of "social welfare activities" in s. 16 (1) of the Miners' Welfare Act, 1952, was in a different statute and in a connexion which was not in *pari materia* with s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The respondents further contended that the purposes of the trust were not "otherwise concerned with the advancement of . . . social welfare" within s. 8 (1) (a) of the Act of 1955, because social welfare connoted a benefit to the community, but a benefit to employees of one employer to the exclusion of all other members of the community was not the advancement of social welfare.

I * For the objects of the trust as set out in the Charity Commissioners' order, see p. 408, letter H, post. The order of the Charity Commission dated Feb. 20, 1953, related to two charities of which one, the Derbyshire Miners' Convalescent Home, was established under a declaration of trust dated Sept. 26, 1927, and the other was that known as the Derbyshire Miners' Holiday Centre, which was regulated in conformity with trusts declared by a lease dated Dec. 6, 1940.

† The lease was held by the court to be the governing document and the relevant terms of clause 6 are set out at p. 409, letter E, post.

‡ The terms of the definition are printed at p. 410, letter G, post.

The justices upheld the respondents' contention and dismissed the appeal. A
The appellants now appealed against that decision. The questions of law for the
opinion of the High Court were whether the justices were right in holding (a) that
the purposes of the trust were not charitable and (b) that the purposes of the
trust were not otherwise concerned with the advancement of social welfare
within the meaning of the Rating and Valuation (Miscellaneous Provisions) Act,
1955. B

Geoffrey Cross, Q.C., and *J. Malcolm Milne* for the appellants.

Sir Arthur Comyns Carr, Q.C., *C. E. Scholefield* and *J. D. James* for the
respondents.

DONOVAN, J.: This is an appeal by way of Case Stated from the decision of
justices for the County of Lincoln, Parts of Lindsey, dismissing an appeal by the C
appellants against a rate levied on them for the year ending Mar. 31, 1957. The
hereditaments occupied by the appellants are a holiday camp and auxiliary pre-
mises at Skegness. The rate for the year ending Mar. 31, 1956, was £1,758.
The rate for the year ending Mar. 31, 1957, was £3,040, so that there has been a
substantial increase in the second year. Part of the hereditaments occupied by
the appellants at Skegness consist of a convalescent home, but with this the case D
is not concerned and no issue arises on it.

The ground of appeal before the justices was that the appellants were entitled
to the benefit of s. 8 of the Rating and Valuation (Miscellaneous Provisions)
Act, 1955. So far as is relevant, s. 8 (1) provides as follows:

"This section applies to the following hereditaments, that is to say—
(a) any hereditament occupied for the purposes of an organisation (whether E
corporate or unincorporate) which is not established or conducted for
profit and whose main objects are charitable or are otherwise concerned
with the advancement of religion, education or social welfare."

It being admitted that the appellants are not established or conducted for
profit, they claim that, within the meaning of s. 8, their main object was charit- F
able, and, alternatively, that they were otherwise concerned with the advance-
ment of social welfare. The justices decided that the appellants were not
entitled to the benefit of s. 8 of the Act of 1955. They took the view that the
main object of the appellants was not charitable and that they were not other-
wise concerned with the advancement of social welfare, and the ground of that
decision appears to have been that the benefits which were conferred by the G
appellants were to such a limited class of individuals that there was not sufficient
public benefit conferred by the holiday camp to warrant the appellants' claim.
The justices also took the view that a holiday camp, the purpose of which was to
provide holidays at cost, was not per se a charitable object.

In 1953 the Charity Commissioners established a scheme for the regulation
of the appellants' assets and funds employed in the furtherance of the convalescent H
home and the holiday camp, and the relevant provisions of that scheme are
contained in two paragraphs, first in para. 5, which provides that

"The charity and the endowments thereof shall be administered and
managed for the object following that is to say—The provision and
maintenance of a convalescent home for workers in and about coal mines in
the district of Derbyshire (exclusive of South Derbyshire) and subject I
thereto the provision and maintenance of a holiday centre for the benefit
of persons qualified as aforesaid and in need of a change of air."

Paragraph 18 provides:

"The land and buildings for the time being belonging to the charity and
heretofore used as a convalescent home shall be appropriated and used as a
convalescent home for workers in or about coal mines in the district of
Derbyshire (exclusive of South Derbyshire) and their wives and families.

- A Any land and buildings belonging to the charity at the date hereof not required to be retained or occupied for the last above-mentioned purpose may be appropriated and used for the purpose of a holiday centre for the benefit of persons qualified as aforesaid and in need of a change of air."

B The words "in need of a change of air" will be noted as appearing in both of those paragraphs, and the reason for their inclusion is almost certainly that, per se a holiday camp where people can get holidays at cost would not be a charity, not being in any way for the relief of poverty or for the advancement of education, religion or some other purpose beneficial to the community. Those were the four heads of charities enumerated by LORD MACNAGHTEN in *Income Tax Special Purposes Comrs. v. Pemsel* (1) ([1891] A.C. 531), and, as has been held frequently, in order to come within that fourth category, the object of the organisation or trust must not be merely for the public benefit, but must be analogous to those objects which were enumerated as charitable under the Statute of Charitable Uses, 1601 (43 Eliz. c. 4), and those, in my view, would not include something which is merely a seaside holiday camp run at cost. In a case decided many years ago, *Inland Revenue Comrs. v. Roberts Marine Mansions Trustees* (2) ((1926), 43 T.L.R. 270) the Court of Appeal held that the words "in need of a change of air" as descriptive of the beneficiaries in that case, who I think were employees in the drapery trade, imported an element of the relief of sickness or poor health and so qualified that particular trust as charitable, and it would seem that whoever drafted the Charity Commissioners' scheme in the present case treated that decision as a precedent.

- D Nevertheless, the governing document in this case is a lease dated Dec. 6, 1940, wherein the trust is expressed. That was not produced at the hearing before the justices. The object of the trust is there described in cl. 6 in these terms:

E "The trustees shall permit the demised premises to be used for the purpose of a holiday centre and a recreation or pleasure ground for the benefit of workers in or about coal mines employed by collieries in the Derbyshire district (including the dependants and invitees of the said workers)."

F There is no mention there of beneficiaries who are in need of a change of air, and, therefore, the trust itself, so far as the document before the court is concerned, is simply to give certain persons a seaside holiday at cost, and prima facie, as I say, that would not be a charitable object.

- G Counsel for the appellants says that there are intermediate deeds which may alter the position and may justify those additional words which now appear in the scheme. That may be so, and counsel for the appellants wishes to reserve the point that, when all the relevant documents are looked at, this is a charity; but for present purposes, and in view of the state of the evidence before us, he is content not to rely on that point, but simply to rely on the second head of claim, which was that here, even if it cannot be said that the main object of the organisation is charitable, nevertheless the appellants are an organisation otherwise concerned with the advancement of social welfare.

H The words "social welfare" are almost impossible to define. It would be difficult to conceive an expression which could be wider in its scope; but, for my part, to provide holidays in a seaside camp at cost, arrangements being made to provide varied and healthy recreation in the camp so that people do not walk aimlessly up and down the parade, and have nothing like the same temptation to spend a lot of time in drinking, and where, in addition, mothers can leave their children to be properly looked after during the day and thus get some much needed relaxation themselves, all this to my mind is clearly the advancement of social welfare; and I did not understand counsel for the respondents to contend the contrary.

- I Counsel for the respondents resists the claim on these grounds. He says, first of all, that "social welfare" in its context in s. 8 of the Act of 1955, connotes

something benevolent in the origin of the funds used for the purpose, or, as A
 LYNKEY, J., said in *Trustees of the National Deposit Friendly Society v. Skegness*
Urban District Council (3) ([1957] 1 All E.R. 407 at p. 410), recently decided in
 this court, some eleemosynary element, otherwise, counsel for the respondents
 says that every club throughout the country will qualify for relief under this
 section. The relief which s. 8 gives in fact is the limitation of rates in a way which
 I need not pause to describe, and such a wide extension of this relief, says counsel B
 for the respondents, cannot have been intended by Parliament. There should,
 he says, be something in the nature of voluntary contributions and there is
 none here, because the fund for the establishment of this camp came from com-
 pulsory contributions levied under certain Acts of Parliament* dealing with the
 mining industry. He agreed, I think, that his argument could be summarised
 thus: if the main object of the organisation is business and not the advancement of C
 social welfare, then the organisation is not within s. 8, albeit that social welfare
 might incidentally follow from the operations of business. For myself I do not
 know that I should quarrel with that assertion.

The question here, however, is whether it applies in the present case. The
 words "or are otherwise concerned" and so on in s. 8 are words which clearly
 enlarge the scope of the relief which would otherwise be given by the section, D
 that is, enlarge the scope of the section beyond "charities" in the legal sense of
 that term. Counsel for the respondents wishes the section to be construed as
 though it read thus, "or are otherwise benevolently concerned with the advance-
 ment of social welfare". Again, I do not know that I should disagree if
 "benevolently" is used in contrast to "as a matter of business", because that, E
 I think, is inherent in the decision of this court in *Trustees of the National Deposit*
Friendly Society v. Skegness Urban District Council (3).

In the present case, however, I do not think that this camp is provided as a
 matter of business. I think that there is certainly some benevolence about it,
 seeing that the beneficiaries did not provide the funds themselves which were
 necessary to establish the camp, that they enjoy a holiday at no more than cost
 and that the trustees who run the camp for them pay a rent for the premises F
 which apparently is far below the rackrent.

Moreover, some assistance is to be derived as to what is meant by "social
 welfare", in connexion with the mining industry at least, from s. 12 of the
 Miners' Welfare Act, 1952, and the definition of "social welfare" which is con-
 tained in that Act in s. 16. Section 16 (1) provides:

" 'social welfare activities' means activities concerned with the main- G
 tenance or improvement of the health, social well-being, recreation or
 conditions of living of—(a) persons employed in or about coal mines or other-
 wise employed under the board."

That definition, of course, is not conclusive of the present case, but, as I say, H
 I think that it is helpful, and it is perhaps noteworthy that there is no reference
 there to the necessity for voluntary contributions.

I do not think, therefore, that this case fails in limine, as counsel for the res-
 pondents suggests, merely because there is nothing benevolent about the origin
 and working of the holiday camp, assuming that element to be essential to the
 claim. I think, as I say, that there are elements of benevolence about it.

The second ground of objection put forward by the respondents, and the one I
 which was upheld by quarter sessions, is this, that the beneficiaries here are too
 limited a class, that, just as much as an organisation in order to be a charity
 in the legal sense of the term must benefit the public at large, or at any rate a
 substantial section of it, so also an organisation to be engaged in the advancement
 of social welfare within the meaning of this section must do this for the public

* These were the Mining Industry Act, 1920, s. 20, and the Mining Industry Act, 1926,
 s. 14 (1).

A at large, or at any rate for a substantial section of it. Counsel for the respondents says that this is implicit in the word "social" which connotes society, or some substantial part of it, as opposed to a few individuals.

B Accepting that this is so (and for my part I am prepared to do so), one notices here that the trust is for the coalminers of Derbyshire, their relatives or invitees. The Charity Commissioners' scheme* seems to me to have enlarged this by making everybody a potential beneficiary under the scheme, coal miner or not, with, however, a priority for certain of the Derbyshire miners. But in the present state of the evidence, as I say, it would be better to proceed on the basis that cl. 6 of the lease dated Dec. 6, 1940, expresses the true extent of the trust, and that I have already read.

C On that it is said by the respondents that the nexus between the beneficiaries is simply that of a common employer and that this is not enough and the decision of the House of Lords in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (4) ([1951] 1 All E.R. 31), is relied on as authority for that proposition. That was a case where the trust was expressly for the benefit of the employees of one private employer, albeit a corporation, and the House of Lords left open the question whether the members of a particular calling, as distinct from those employed by a particular employer, would likewise be too narrow a class, and the language used by LORD SIMONDS in his speech (*ibid.*, at p. 35) clearly leaves open the case of workers in a nationalised undertaking like the present.

E Again there is no point in discussing the numerous decisions on this topic, whether a particular section of the public is large enough to constitute a charity, which are to be found in the cases dealing with charities, many of which it is difficult to reconcile with the others. For my part, I think that the coal miners of Derbyshire, their dependants and their invitees, if they are the only beneficiaries of this scheme, do constitute a sufficiently large and important section of the community for the present purpose.

F Accordingly, I think that the appellants are an organisation concerned with the advancement of social welfare within the meaning of s. 8 of the Act of 1955, and I would allow the appeal.

HILBERY, J.: I agree, and do not want to add anything.

LORD GODDARD, C.J.: I so entirely agree with the judgment just delivered that I do not think that I can usefully add anything.

Appeal allowed.

Solicitors: *Lawrence C. Jenkins*, Nottingham (for the appellants); *Wrentmore & Son*, agents for the *Town clerk*, Skegness (for the respondents).

[*Reported by WENDY SHOCKETT, Barrister-at-Law.*]

* The proviso to para. 18 of the scheme provides that if accommodation in the convalescent home or holiday camp is not required for workers in or about the coal mines of Derbyshire and their families (excluding South Derbyshire), the trustees may admit to the home or camp "persons other than persons qualified [under the scheme] on payment by them of adequate charges."

R. v. CUNNINGHAM.

A

[COURT OF CRIMINAL APPEAL (Byrne, Slade and Barry, JJ.), May 20, 27, 1957.]

Criminal Law—Maliciously administering a noxious thing—Meaning of “maliciously” in statutory crime—Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 23.

B

The word “maliciously” in a statutory crime postulates foresight of consequence, and requires either an actual intention to do the particular kind of harm that in fact was done or recklessness whether such harm should occur or not; it is neither limited to, nor does it require, any ill-will towards the person injured (see p. 414, letters A to D, post).

A house had been converted into two dwelling-houses and the cellar was divided by a wall made of loosely cemented rubble. W., the appellant’s prospective mother-in-law, lived, as the appellant knew, in one of the converted houses. The other was unoccupied. One evening the appellant went to the cellar of the unoccupied house, tore the gas meter from the wall and from its pipes and stole money from it. He did not turn off the gas at a stop tap nearby and gas escaped, seeped through the dividing wall of the cellar and partially asphyxiated W., who was asleep in her bedroom. The appellant was charged under s. 23 of the Offences against the Person Act, 1861, with having unlawfully and maliciously caused W. to take a certain noxious thing, coal gas, so as thereby to endanger her life. At the trial the jury were directed that “malicious” for this purpose meant “wicked”. On appeal against conviction,

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D

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Held: the conviction should be quashed, because it was incorrect to say that the word “malicious” in a statutory offence meant “wicked” and it should have been left to the jury to decide whether, even if the appellant did not intend the injury to W., he foresaw that the removal of the gas meter might cause injury to someone but nevertheless removed it.

Appeal allowed.

F

[As to the crime of administering a noxious thing, see 10 HALSBURY’S LAWS (3rd Edn.) 737, para. 1415; and for cases on the subject, see 15 DIGEST (Repl.) 1002, 1003, 9866-9875.

As to the requirement of mens rea in statutory offences, see 10 HALSBURY’S LAWS (3rd Edn.) 274, para. 508; and as to malice in offences of malicious damage to property, see *ibid.*, 874, para. 1694; and for cases on the subject, see 15 DIGEST (Repl.) 1205, 12,240-12,243.

G

For the Offences against the Person Act, 1861, s. 23, see 5 HALSBURY’S STATUTES (2nd Edn.) 796.]

Cases referred to:

- (1) *R. v. Pembliton*, (1874), L.R. 2 C.C.R. 119; 43 L.J.M.C. 91; 30 L.T. 405; 38 J.P. 454; 15 Digest (Repl.) 1205, 12,247.
- (2) *R. v. Latimer*, (1886), 17 Q.B.D. 359; 55 L.J.M.C. 135; 54 L.T. 768; 51 J.P. 184; 15 Digest (Repl.) 999, 9842.
- (3) *R. v. Faulkner*, (1877), 13 Cox, C.C. 550; 15 Digest (Repl.) 1206, 7181.
- (4) *R. v. Martin*, (1881), 8 Q.B.D. 54; 51 L.J.M.C. 36; 45 L.T. 444; 46 J.P. 228; 15 Digest (Repl.) 999, 9841.

I

Appeal.

The appellant, Roy Cunningham, was convicted at Leeds Assizes on Mar. 25, 1957, before OLIVER, J., sitting with a jury, on an indictment charging that he unlawfully and maliciously caused to be taken by Sarah Wade a certain noxious thing, namely, coal gas, so as thereby to endanger the life of the said Sarah Wade, and was sentenced to five years’ imprisonment. He now appealed against this conviction. He also pleaded guilty to a second indictment charging

A him with the larceny of a gas meter and its contents and was sentenced to six months' imprisonment to run concurrently. He did not appeal in respect of this.

S. E. Brodie for the appellant.

J. S. Snowden for the Crown.

Cur. adv. vult.

B May 27. **BYRNE, J.**, read the judgment of the court: The court has already intimated that this appeal is allowed and the conviction quashed, and we now proceed to give our reasons.

The appellant was convicted at Leeds Assizes on an indictment framed under s. 23 of the Offences against the Person Act, 1861, which charged that he unlawfully and maliciously caused to be taken by Sarah Wade a certain noxious thing, namely, coal gas, so as thereby to endanger the life of the said Sarah Wade. The facts were that the appellant was engaged to be married, and Mrs. Wade, his prospective mother-in-law was the tenant of a house, No. 7a, Bakes Street, Bradford, which was unoccupied but which was to be occupied by the appellant after his marriage. Mrs. Wade and her husband, an elderly couple, lived in the house next door. At one time the two houses had been one, but when the building was converted into two houses a wall had been erected to divide the cellars of the two houses, and that wall was composed of rubble loosely cemented. On the evening of Jan. 17 last, the appellant went to the cellar of No. 7a, Bakes Street, wrenched the gas meter from the gas pipes and stole it, together with its contents. In a second indictment he was charged with the larceny of the gas meter and its contents; to that indictment he pleaded guilty, and was sentenced to six months' imprisonment. In respect of that matter he does not appeal. The facts were not really in dispute, and in a statement to a police officer the appellant said: "All right I will tell you, I was short of money, I had been off work for three days, I got 8s. from the gas meter. I tore it off the wall and threw it away". Although there was a stop tap within two feet of the meter, the appellant did not turn off the gas, with the result that a very considerable volume of gas escaped, some of which seeped through the wall of the cellar and partially asphyxiated Mrs. Wade, who was asleep in her bedroom next door, with the result that her life was endangered.

At the close of the case for the prosecution counsel who appeared for the appellant at the trial and who has appeared for him again in this court, submitted that there was no case to go to the jury, but the learned judge, quite rightly in our opinion, rejected this submission. The appellant did not give evidence.

G The act of the appellant was clearly unlawful and, therefore, the real question for the jury was whether it was also malicious within the meaning of s. 23 of the Offences against the Person Act, 1861.

Before this court, counsel for the appellant has taken three points, all dependent on the construction of that section. Section 23 provides as follows:

H "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony . . ."

I Counsel argued first that mens rea of some kind is necessary. Secondly, that the nature of the mens rea required is that the appellant must intend to do the particular kind of harm that was done, or alternatively that he must foresee that that harm may occur, yet nevertheless continue recklessly to do the act. Thirdly, that the learned judge misdirected the jury as to the meaning of the word "maliciously". He cited the following cases: *R. v. Pembliton* (1) ((1874), L.R. 2 C.C.R. 119); *R. v. Latimer* (2) ((1886), 17 Q.B.D. 359); and *R. v. Faulkner* (3) ((1877), 13 Cox, C.C. 550). In reply, counsel on behalf of the Crown cited *R. v. Martin* (4) ((1881), 8 Q.B.D. 54).

We have considered those cases, and we have also considered, in the light of those cases, the following principle which was propounded by the late Professor C. S. KENNY in the first edition of his *OUTLINES OF CRIMINAL LAW* published in 1902, and repeated in the sixteenth edition, edited by Mr. J. W. CECIL TURNER, and published in 1952 (*ibid.*, at p. 186):

"... in any statutory definition of a crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (i) an actual intention to do the particular *kind* of harm that in fact was done, or (ii) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured."

The same principle is repeated by Mr. TURNER in his tenth edition of *RUSSELL ON CRIME**. We think that this is an accurate statement of the law. It derives some support from the judgments of LORD COLERIDGE, C.J., and BLACKBURN, J., in *R. v. Pembrton* (1). In our opinion, the word "maliciously" in a statutory crime postulates foresight of consequence.

In his summing-up, the learned judge directed the jury as follows:

"You will observe that there is nothing there about 'with intention that that person should take it'. He has not got to intend that it should be taken; it is sufficient that by his unlawful and malicious act he causes it to be taken. What you have to decide here, then, is whether, when he loosed that frightful cloud of coal gas into the house which he shared with this old lady, he caused her to take it by his unlawful and malicious action."

"Unlawful" does not need any definition. It is something forbidden by law. What about 'malicious'? 'Malicious' for this purpose means wicked—something which he has no business to do and perfectly well knows it. 'Wicked' is as good a definition as any other which you would get.

"The facts which face you (and they are uncontradicted and undisputed; the prisoner has not gone into the box to seek to give any particular explanation) are these. Living in the house, which was now two houses but which had once been one and had been rather roughly divided, the prisoner quite deliberately, intending to steal the money that was in the meter—there it is (indicating Exhibit 1)—broke the gas meter away from the supply pipes and thus released the mains supply of gas at large into that house. When he did that he knew that this old lady and her husband were living next door to him. The gas meter was in a cellar. The wall which divided his cellar from the cellar next door was a kind of honeycomb wall through which gas could very well go, so that when he loosed that cloud of gas into that place he must have known perfectly well that gas would percolate all over the house. If it were part of this offence—which it is not—that he intended to poison the old lady, I should have left it to you to decide, and I should have told you that there was evidence on which you could find that he intended that, since he did an action which he must have known would result in that. As I have already told you, it is not necessary to prove that he intended to do it; it is quite enough that what he did was done unlawfully and maliciously."

With the utmost respect to the learned judge, we think it is incorrect to say that the word "malicious" in a statutory offence merely means wicked. We think the learned judge was, in effect, telling the jury that if they were satisfied that the appellant acted wickedly—and he had clearly acted wickedly in stealing the gas meter and its contents—they ought to find that he had acted maliciously

* See Vol. 2, p. 1592.

A in causing the gas to be taken by Mrs. Wade so as thereby to endanger her life. In our view, it should have been left to the jury to decide whether, even if the appellant did not intend the injury to Mrs. Wade, he foresaw that the removal of the gas meter might cause injury to someone but nevertheless removed it. We are unable to say that a reasonable jury, properly directed as to the meaning of the word "maliciously" in the context of s. 23, would, without doubt, have

B convicted.

In these circumstances, this court has no alternative but to allow the appeal and quash the conviction.

Appeal allowed.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Town clerk, Bradford.

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

NOTE.

MEANEY v. MEANEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Wallington, J.), May 7, 1957.]

Justices—Husband and wife—Maintenance order—Discharge—Application to discharge made to different magistrates' court—Form of complaint and of summons—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 122 (1) (g), (2)—Magistrates' Courts Rules, 1952 (S.I. 1952 No. 2190), r. 34.

[As to the application to domestic proceedings of the Magistrates' Courts Act, 1952, see 12 HALSBURY'S LAWS (3rd Edn.) 507, para. 1112, note (1).]

For the Summary Jurisdiction (Married Women) Act, 1895, s. 7, see 11 HALSBURY'S STATUTES (2nd Edn.) 852.

For the Magistrates' Courts Act, 1952, s. 122, see 32 HALSBURY'S STATUTES (2nd Edn.) 516.

For the Magistrates' Courts Rules, 1952, r. 34, see 13 HALSBURY'S STATUTORY INSTRUMENTS 54.]

Appeal.

The husband appealed against an order of the Slough justices dated Dec. 4, 1956.

The parties lived together in Rotherham, Yorkshire, where the husband was employed. At about Christmas, 1954, however, the husband became unemployed. In February, 1955, the husband went to Slough, where he had obtained a job; the wife remained in Rotherham.

On Apr. 24, 1956, the Rotherham justices made an order in favour of the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground that the husband had been guilty of wilful neglect to provide reasonable maintenance for her. The justices ordered the husband to pay to the wife £1 per week. On June 28, 1956, the Rotherham justices varied that order by increasing the amount of maintenance to £1 10s. per week.

The husband applied by way of complaint to the Slough justices to discharge the order of Apr. 24, 1956, and the justices issued a summons against the wife. The summons was in the normal form for civil proceedings (see Magistrates' Courts (Forms) Rules, 1952, Schedule, form 76) and not in the form for a summons to vary or discharge an order for periodical payments (see form 90 of the Schedule to the Rules of 1952). During the hearing of the appeal LORD MERRIMAN, P., raised the question of the jurisdiction of the Slough justices to discharge an order made by the Rotherham justices and of the form of the summons to discharge

that order. The case is reported solely for the observations of LORD MERRIMAN, P., A
on these points.

J. B. Gardner for the husband.

W. R. K. Merrylees for the wife.

LORD MERRIMAN, P.: I should like to add a few words on the matter of B
jurisdiction. This order was originally made by the Rotherham justices, and the
application to discharge the order, made and varied by the Rotherham justices,
has been raised before the Slough justices. As it is the first case of this kind
which, so far as I know, has come before the Divisional Court, I should like to
say a word about what the position was originally and the form which the
procedure has now taken. Under s. 7 of the Summary Jurisdiction (Married C
Women) Act, 1895, it is clear that applications to vary or to revoke orders have
to be made to the same court as that which made them. There were temporary
relaxations of that rule during the war, into which it is unnecessary for me to
go, but the whole thing was regularised by s. 122 of the Magistrates' Courts Act,
1952, which empowered the court to make rules. The rules, by s. 122 (1) (g),
might decide, among other matters, what magistrates' court should have juris-
diction to hear any complaint. Section 122 (2) provides: D

"Where any Act expressly confers jurisdiction on any magistrates' court
to hear a complaint, rules made under [s. 122 (1) (g)] shall not take away
that jurisdiction, but may extend it to any other magistrates' court."

Rule 34 (2) of the Magistrates' Courts Rules, 1952, gives effect to that, and covers
the present case.

I should like to point out that certain additional precautions are called for E
both in the making of the complaint* and in the form of the summons to the
respondent, if the complaint is made otherwise than at the original court.
So far as the summons is concerned the additional requirements which are pro-
vided for in the Magistrates' Courts (Forms) Rules, 1952, Schedule, form 90,
which will be found in *STONE'S JUSTICES' MANUAL* (1957 Edn.) at p. 2583, F
have not been complied with. We have not seen the complaint, but from the
recital of the complaint in that summons I doubt very much whether the com-
plaint was taken in the requisite form (form 89), and it is important, with this
marked relaxation of the old rigid rule that complainants had to go to the
original court to obtain a variation or revocation or discharge of a former order,
that the requirements of this statutory relaxation should be strictly complied with G
in all particulars.

Solicitors: *Charsley Leonard & Co.*, Slough (for the husband); *Jackson &
Jackson*, agents for *J. W. Fenoughty, Dunn & Co.*, Rotherham (for the wife).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

* See Magistrates' Courts Rules, 1952, r. 34 (7).

A CRITCHELL v. LAMBETH BOROUGH COUNCIL.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Pearce, L.J.J.), May 3, 6, 7, 1957.]

Housing—Closing order—Underground rooms—Fitness for human habitation—Standard to be applied—Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8 c. 51), s. 12 (2) (b)—Housing Repairs and Rents Act, 1954 (2 & 3 Eliz. 2 c. 53), s. 9 (1).

A local authority made a closing order, dated Oct. 8, 1956, in respect of a basement flat on the ground that the rooms of the flat, being underground rooms within the meaning of the Housing Act, 1936, s. 12, were to be deemed to be unfit for human habitation, under s. 12 (2) (b), since they did not comply with regulations made by the local authority pursuant to the sub-section.

Held: the closing order was bad, because s. 9 of the Housing Repairs and Rents Act, 1954, superseded s. 12 (2) (b) of the Act of 1936, and provided, in regard to underground rooms, the sole standard for fitness or unfitness for human habitation, thus rendering the provisions of s. 12 (2) (b) of the Act of 1936 and any regulations made thereunder no longer operative for this purpose.

Dicta of JENKINS, L.J., in *London Hospital (Board of Governors) v. Jacobs* ((Feb. 28, 1957), see footnote p. 418, post) applied.

Appeal dismissed.

[For the Housing Act, 1936, s. 9, s. 10, s. 11, s. 12, and s. 188 (3), (4), see 11 HALSBURY'S STATUTES (2nd Edn.) 457-463, 588.

For the Housing Act, 1949, s. 1 and Sch. 1, see 28 HALSBURY'S STATUTES (2nd Edn.) 607, 642.

For the Housing Repairs and Rents Act, 1954, s. 9, see 34 HALSBURY'S STATUTES (2nd Edn.) 269.]

Case referred to:

(1) *London Hospital (Board of Governors) v. Jacobs* (see footnote p. 418, post*).

F Appeal.

This was an appeal by Lambeth Borough Council from an order of His Honour JUDGE CLOTHIER, sitting at Lambeth County Court on Jan. 7, 1957, whereby he allowed an appeal by Mrs. Eileen Critchell against a closing order made by the council on Oct. 8, 1956, in respect of a basement flat owned by Mrs. Critchell, and ordered the closing order to be quashed.

Kenneth Jones for the council.

R. G. Freeman for the owner.

LORD EVERSHERD, M.R.: The difficult question, for difficult it seems to me to be, which has been debated on this appeal, arises out of the language of the Housing Act, 1936, and the Housing Repairs and Rents Act, 1954.

On Oct. 8, 1956, the Lambeth Borough Council (referred to hereinafter as "the council") made a closing order in respect of certain basement rooms which were together occupied as a dwelling-house in No. 88, Herne Hill. The house itself is owned by Mrs. Critchell (referred to hereinafter as "the owner"), and we understand that the basement rooms at all relevant dates were separately occupied by a family by the name of Collins. The closing order made by the council was justified by, and based on, s. 12 (2) of the Housing Act, 1936, and certain regulations† made by the council thereunder. Section 12 (2) reads:

"A room the surface of the floor of which is more than three feet below the surface of the part of the street adjoining or nearest to the room, or more

* The previous proceedings in that litigation were reported ([1956] 2 All E.R. 603).

† By virtue of s. 189 of the Housing Act, 1936, the regulations, which were made under s. 17 (7) of the Housing, Town Planning etc., Act, 1909, had effect as if made under s. 12 (2) of the Act of 1936.

than three feet below the surface of any ground within nine feet of the room, shall for the purposes of this section be deemed to be unfit for human habitation, if either—(a) the average height of the room from floor to ceiling is not at least seven feet; or (b) the room does not comply with such regulations as the local authority with the consent of the Minister may prescribe for securing the proper ventilation and lighting of such rooms, and the protection thereof against dampness, effluvia, or exhalation . . .”

In the present case nothing turns on para. (a) of the sub-section, because we understand that the height of the rooms, from floor to ceiling, on average is not less than seven feet. It is said, however, and it is not disputed for the purposes of this appeal, that in certain respects the rooms do not comply with the regulations which were promulgated by the council pursuant to the sub-section with the consent of the Minister. It, therefore, follows that, if the council are entitled now to rely on s. 12 (2) and these regulations, the closing order was validly made. If, on the other hand, the council are not able now to rely on the sub-section and the regulations, the closing order was not validly made. The owner took the matter, as she was entitled to do*, by way of appeal to the county court, alleging that, by reason of s. 9 of the Housing Repairs and Rents Act, 1954, the council were no longer able to rely on s. 12 (2) of the Act of 1936 and the regulations. This argument prevailed before the county court judge and the council have now appealed to this court.

I have already said that to my mind the case is one of considerable difficulty, but, in my judgment, in this court we are bound to answer the present question in the owner's favour by reason of the decision of this court in *London Hospital (Board of Governors) v. Jacobs* (1) (Feb. 28, 1957)†. Having regard, however, to the difficulties of the present case, and out of respect to the argument which has been put forward by counsel for the council, I shall make some references to the relevant sections of the Acts.

I begin with s. 9 of the Act of 1936. That section empowers a local authority to require insanitary houses to be properly repaired. The opening phrase of s. 9 (1), as it originally ran, read thus:

“Where a local authority, upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any house which is occupied, or is of a type suitable for occupation, by persons of the working classes is in any respect unfit for human habitation . . .”

By the Housing Act, 1949, s. 1 and Sch. 1, the reference to persons of the working class, perhaps in accordance with changed social views, was eliminated from the principal Act (the Act of 1936), and, as will later appear, certain other words

* Under s. 15 of the Housing Act, 1936.

† In *London Hospital (Board of Governors) v. Jacobs*, heard on Feb. 28, 1957, before JENKINS, MORRIS and SELLERS, L.JJ., the tenant, Mrs. Rose Jacobs, appealed from an order of His Honour JUDGE ELDER JONES, made at Shoreditch County Court on Dec. 12, 1956, whereby she was ordered to pay to the plaintiff landlords £23 14s. 3d. arrears of rent in respect of No. 33, Turner Street, London, of which she was tenant. The arrears represented an increase of rent under s. 23 of the Housing Repairs and Rents Act, 1954, pursuant to a notice of increase and declaration served on May 23, 1955. Subsequently the tenant procured a certificate of disrepair dated Dec. 6, 1955, specifying absence of drainage to the front area, which defect was rectified by the landlords, but the tenant made no application to the court under para. 4 of Sch. 2 to the Act of 1954. As there was no certificate of disrepair in force and no application had been made under para. 4, the county court judge, when the action came before him, refused to allow the tenant to adduce evidence or to submit that the conditions specified in s. 23 (1) of the Act of 1954 were not satisfied, and decided in favour of the landlords. On appeal by the tenant the case was remitted to the county court judge to re-hear and determine whether the conditions specified in s. 23 (1) of the Act of 1954 were satisfied. The case was re-heard by him on Dec. 12, 1956, when he made the order mentioned above from which the tenant appealed. The material passages from the leading judgment of the Court of Appeal are set out between p. 422, letter I, and p. 424, letter G, post. The appeal was dismissed.

A were inserted in other sections. From what I have so far read it will be observed, first, that s. 9 of the Act of 1936 is dealing in terms with a house and, secondly, that it is dealing with the case where such a house is unfit for human habitation. Going ahead somewhat, I further note that there is nowhere in this Part [Part 2] of the Act of 1936 any statement of the standards of fitness or unfitness for human habitation. But in s. 188 (4)* of the same Act it is stated:

B "In determining for the purposes of this Act whether a house is fit for human habitation, regard shall be had to the extent, if any, to which by reason of disrepair or sanitary defects the house falls short of the provisions of any bye-laws in operation in the district or of any enactment in any local Act in operation in the district dealing with the construction and drainage of new buildings . . ."

C Without, therefore, saying that the test is exclusively one by reference to local bye-laws, it is, at least, true to say that the scheme of the Act of 1936 contemplated that local authorities would promulgate, for their respective districts, bye-laws to which regard should be had on the question: Aye or No, was a house in any district fit for human habitation.

D I go back now to s. 10 of the Act of 1936, which is a section directed to enforcement of a notice requiring the execution of works, where the council has come to the conclusion that such works are requisite to render the house properly fit for human habitation. Then in s. 11 is found the power of the local authority, in certain circumstances, to order demolition of unfit houses. Thus s. 11 (1), as amended by the Act of 1949, reads:

E "Where a local authority . . . are satisfied that any house is unfit for human habitation and is not capable at a reasonable expense of being rendered so fit . . ."

certain proceedings may be taken. The authority first serve on the owner and certain other persons, if they can be discovered, what has been referred to as a "time and place notice", that is, a notice that the person served should attend

F at a certain time and place, if he wishes it, and make such representations to the authority about the premises as he desires; and on that the authority may accept an offer by the owner to do work which would make the house, in their view, properly fit for habitation. If no such undertaking is given or if the work is not carried out, then the authority, by s. 11 (4), are given power to demolish the unfit house.

G I have stated that these sections relate in terms to what is called "a house". There is, in the Act of 1936, only this definition of "house". Section 188 (3) reads:

H "For the purposes of any provisions of this Act relating to the provision of housing accommodation, the expression 'house' includes, unless the context otherwise requires, any part of a building which is occupied or intended to be occupied as a separate dwelling."

I It is one of the obscurities which Parliament has presented to the courts in this Act that it is not clear whether that definition is intended to cover the sections which I have read, or not. The Part of the Act which is directly concerned with the provisions of housing accommodation is Part 5, not Part 2, in which s. 9, s. 10 and s. 11 occur. As was pointed out, however, by counsel for the owner, s. 188 (3) does not say "for the purposes of Part 5 of the Act". On the other hand, there are, undoubtedly, other sections (for example, as counsel for the council observed, s. 34 and s. 35 in Part 3 of the Act) which might be said to relate to the provisions of housing accommodation, and counsel for the council urged with some force that the provisions for demolition of unfit houses could, at best, only somewhat obliquely be referred to as provisions for providing housing accommodation.

* Section 188, the interpretation section, is in Part 8 of the Act.

In any case, in my judgment, s. 9, s. 10 and s. 11 of the Act of 1936 use the word "house", in their context, as meaning what is commonly called a house—that is, a separate structure. So much, I think, appears plainly enough from s. 11; for clearly one could only sensibly demolish a house which is itself a distinct and separate entity. That view of the matter is made still more clear, to my mind, by the terms of s. 12, to sub-s. (2) of which I have already referred. Section 12 (1), as amended by s. 1 of and Sch. 1 to the Act of 1949, reads:

"A local authority may under this Part of this Act take the like proceedings in relation to any part of a building which is used, or is suitable for use, as a dwelling, or in relation to any underground room which is for the purposes of this section to be deemed to be unfit for human habitation, as they are empowered to take in relation to a house, subject, however, to this qualification that, in circumstances in which, in the case of a house, they would have made a demolition order, they shall make a closing order prohibiting the use of the part of the building or of the room, as the case may be, for any purpose other than a purpose approved by the local authority . . ."

The effect of s. 12 (1), on the face of it, seems to be this. It is saying that as regards part of a building, provided that that part is unfit for human habitation, the local authority may take the same steps or proceedings in regard to it as they can in regard to a house: videlicet, they can serve a "time and place" notice. They can hear any proposals of the owner; they can accept them, or, if none are made or if they are not acceptable or not carried out, they can make—here comes the one variation—not a demolition order, but a closing order.

Underground rooms or basements, as in the present case, may be clearly part of a building used or suitable for use as a dwelling, and, *prima facie*, the same provisions would, therefore, apply to them. The difficulty for present purposes is created by the circumstance that s. 12 (2) adds, not a variation to the procedure, but a different test as to fitness in regard to underground rooms whether or not, as I follow the language, the underground rooms themselves are a separate dwelling. It will be remembered that the vital formula is that an underground room "shall for the purposes of this section be deemed to be unfit for human habitation"; and that picks up the formula in s. 12 (1), "or in relation to any underground room which is for the purposes of this section to be deemed to be unfit for human habitation." It seems to me, therefore, that, as matters stood before the passing of the Housing Repairs and Rents Act, 1954, in the case of an underground room (whether other tests could be resorted to or not), if it was shown that the room failed to comply (to take my example from s. 12 (2) (b)) with regulations made in accordance with the sub-section by the local authority, then that room was deemed to be unfit, and the procedure which, by reference, the local authority could take with regard to a house, they could then proceed to take with regard to the underground room, with the same variation as with part of the building, namely, that, in lieu of the demolition order, they could make a closing order.

That was how matters stood. I have referred to the circumstance that by the Act of 1949 the reference to persons of the working class was eliminated, and, as I have mentioned that Act, it is perhaps pertinent to observe that further difficulties have been created for those whose function it is to understand and administer these Acts, by s. 50 (1) of the Act of 1949, which says that

" 'house' includes any part of a building, being a part which is occupied or intended to be occupied as a separate dwelling, and, in particular, includes a flat."

By s. 51 (1) of the Act of 1949, it was provided that that Act might be cited together with the Act of 1936 as the Housing Acts, 1936 to 1949. I make that reference because counsel for the owner somewhat relied on the definition as

A showing that "house" in these Acts generally is, or may be, used by Parliament so as to comprehend part of a house used as a separate dwelling.

It is with that in mind that I now turn to s. 9 of the Housing Repairs and Rents Act, 1954. Section 9 (1) reads:

B "In determining for any of the purposes of the principal Act [the Act of 1936] whether a house is unfit for human habitation, regard shall be had to its condition in respect of the following matters, that is to say . . ."

Then there are set out eight matters, which include ventilation, repairs, drainage, etc., and the sub-section continues:

C ". . . and the house shall be deemed to be unfit as aforesaid if and only if it is so far defective in one or more of the said matters that it is not reasonably suitable for occupation in that condition."

Section 9 (2) relates to back-to-back houses and preserves the pre-existing law as laid down in the principal Act as regards back-to-back houses. Section 9 (3) reads:

D "The following enactments shall cease to have effect . . . (a) section 188 (4) of the principal Act (which requires account to be taken of local bye-laws in determining whether a house is fit for human habitation); and (b) so much of any local enactment as specifies defects by reason of which a house is to be deemed for the purposes of s. 9 of that Act not to be in all respects fit for human habitation, or regulates the matters to be taken into consideration on an appeal . . ."

E So anxious was Parliament to make it clear that s. 188 (4) of the Act of 1936 was to cease to have effect that it was also expressly repealed in Sch. 5 to the Act of 1954; but it will be observed that nowhere is any reference whatever made to underground rooms or to s. 12 (2) of the principal Act. It is also to be observed that the existing provisions in regard to back-to-back houses were expressly reserved. It was, therefore, said that, if the pre-existing provisions as to underground rooms were to be preserved, Parliament might well have said so, as indeed it might. Per contra, and with certainly no less force, it was said that if Parliament desired to amend or repeal s. 12 (2), it might have said so, as it said with so much emphasis as regards s. 188 (4). The Act of 1954 is quite silent as to what Parliament meant by the word "house".

G It is in those circumstances that the considerable difficulties of the present case have been presented to us. If the matter were *res integra*, I should, for my part, feel that there was, to say the least, very great force in the argument which was put forward by counsel for the council. Putting it briefly, what he says is this. Section 9 of the Act of 1954 enjoins a new test for unfitness which takes the place of the test by reference to bye-laws or otherwise which is found in the Act of 1936 as applicable to a house, and, it may be, by reference to a part of a house; but there is nothing which disables or supersedes the special provisions which, in the case of underground rooms, provide tests of unfitness for human habitation. In support of that contention a number of points were taken. In the first place, it may well be said that special considerations are naturally and properly applicable to underground rooms. The test of human habitation by reference to such things as ventilation, dampness, drainage and so forth, when dealing with rooms which are to a substantial extent below ground, may reasonably require the convenience and simplicity of what one might call "rule of thumb" regulations. That they are somewhat special is, I think, also recognised by Parliament; for in another Act, the Public Health (London) Act, 1936, in s. 132, one finds a considerable code dealing with restrictions on the use of underground rooms as dwellings.

I Secondly, says counsel for the council, if one takes s. 9 of the Act of 1954 as replacing, so far as requisite, the provisions of s. 9, s. 10 and s. 11 of the Act of 1936 (that is to say, in so far as those sections indicate the test of unfitness for

human habitation, by substituting the new statutory test laid down by s. 9 of the Act of 1954), there is nothing which prevents s. 12 of the Act of 1936 still fitting in with the legislation so amended. It would, in other words, have been quite possible to re-write s. 9, s. 10 and s. 11 of the Act of 1936 so as to anticipate and to give effect to s. 9 of the Act of 1954 and still to leave s. 12 of the Act of 1936 exactly as it stands; s. 12 would still fit, and s. 12 (2) would only apply a different, and, perhaps, a more artificial, test, for underground rooms as a condition precedent to taking the various steps which, by reference, can be taken in the case of a part of a house used as a dwelling. Counsel then pointed out that the courts did not lightly construe one Act of Parliament as impliedly repealing another, unless reasonably clear language was used, particularly where the later Act contained a Schedule indicating what exactly had been repealed in the earlier legislation. I have already stated that particular care was taken to say that s. 188 (4) of the Act of 1936 should cease to be applicable, and, if Parliament intended that s. 9 of the Act of 1954 should supersede the old provisions as to underground rooms, it is perhaps strange that Parliament should not have said so. I bear in mind that s. 9 (3) of the Act of 1954 states that bye-laws shall cease to have effect, and I quite agree with counsel for the owner that there is no mystical distinction between a bye-law, on the one hand, and a regulation, on the other; but, to put it no higher, it seems to me that there is very great force in the submission of counsel for the council that, in the context of s. 9 (3) of the Act of 1954, the bye-laws referred to are the bye-laws contemplated by s. 188 (4) of the Act of 1936 and having nothing to do with the regulations which are contemplated by s. 12 (2).

If, therefore, the matter had been *res integra*, I should have felt, to say the least, a strong inclination towards the view put forward by counsel for the council. I think, however, that it would be wrong for us to arrive at a conclusion in conflict with what this court said in *London Hospital (Board of Governors) v. Jacobs* (1)*, which I mentioned at the beginning of my judgment. That was a case which arose out of s. 23 of the Housing Repairs and Rents Act, 1954. Section 23 empowers the landlord of a dwelling-house let under a controlled tenancy to increase the rent to the extent and in the manner there provided, subject to certain conditions. Those conditions are found in s. 23 (1) (a) and are:

“(i) that the dwelling-house is in good repair; and (ii) that it is reasonably suitable for occupation having regard to the matters specified in paras. (b) to (h) of s. 9 (1) of [the] Act.”

In that case, the point was taken by the tenant, Mrs. Jacobs, that the landlords, the Board of Governors of the London Hospital, were unable to satisfy condition (ii)—she did, in fact, challenge both conditions but for present purposes condition (ii) is the important one—in that one of the rooms in the house, being a basement or underground room, was less than seven feet high, being only six feet eleven inches, and, secondly, because, as regards the angle of one of its windows, it did not comply with the regulations made by the borough of Stepney under s. 12 (2) of the Act of 1936. Therefore, she said, however much in other respects the landlords were able to show that the provisions of s. 9 of the Act of 1954 were satisfied, they were bound to concede, by the express terms of s. 12 (2) of the Act of 1936 and the regulations, that part of the house, namely, this room, was unfit for human habitation and that, therefore, their claim for increased rent must fail.

The leading judgment was delivered by JENKINS, L.J., and MORRIS, L.J., was also a member of the court. He tells me that, in fact, the court only heard the argument of counsel for the tenant. The court was, therefore, perhaps less fortunate than this court, which has had close argument presented by counsel for both parties. In the course of his judgment JENKINS, L.J., made reference to many of the sections. I am reading from the transcript of the judgment which

* See footnote, p. 418, ante, where the case is summarised.

A is preserved in the Bar library and I trust that I shall be forgiven for making some extended quotations from it in order to make clear why I think, although the point was a different one, that we ought not to depart from what the court there laid down. JENKINS, L.J., said:

B “At the hearing the learned judge heard evidence given by witnesses on the part of the plaintiffs, Mr. Keniry and Mr. Roberts, both qualified surveyors, Mr. Keniry being in fact the public health inspector for the borough of Stepney. Both these witnesses on the plaintiffs’ side gave detailed evidence as to the condition and state of repair of the premises. To put it shortly, they both expressed their conclusion that the dwelling-house in question was in good repair and that it was reasonably suitable for occupation having regard to the matters specified in paras. (b) to (h) of s. 9 (1) [of the Act of 1954].”

C It will be appreciated that those last words which I have quoted are a paraphrase of the relevant terms of s. 23 (1) (a) of the Act of 1954.

JENKINS, L.J., went on to say:

D “On the defendant’s side a Mr. Milburn gave evidence; but the learned judge, having seen him and the plaintiffs’ two witnesses and having heard their evidence, came to the conclusion that he could not believe the evidence of Mr. Milburn and he, therefore, rejected it wherever it conflicted with the evidence of the plaintiffs’ witnesses. I can therefore disregard Mr. Milburn’s evidence. Now it is not in dispute that the plaintiffs’ two witnesses, in surveying the premises and in reaching their conclusion as to its being in good repair and reasonably suitable for occupation, considered that they should be guided by the provisions of s. 23 (1), and the incorporated provisions of s. 9, and also the definition of ‘good repair’ in s. 49 (1) [of the Act of 1954]. Using the requirements of those provisions as a yardstick, they reached the conclusion favourable to the plaintiff landlords which I have already stated; but they did not take into account the provisions of s. 12 (2) of the Housing Act, 1936, and they likewise did not take into account the provisions of para. 9 of certain Housing Act regulations issued by the Metropolitan Borough of Stepney. I should next refer to s. 12 of the Act of 1936.”

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G The lord justice then quoted passages from that section and other sections of the Act of 1936, and referred to the regulations issued by the Metropolitan Borough of Stepney*. He went on to say:

H “As to the facts of the present case which bear on the application of s. 12 of the Act of 1936 and the Metropolitan Borough of Stepney’s regulation which I have read, it is common ground that these premises include a basement room which is of the height of only six feet eleven inches instead of seven feet as required by s. 12 (2) of the Act of 1936. As to the window, the learned judge found (and it is, I think, not in dispute) that, in point of area, the window satisfied the Metropolitan Borough of Stepney’s regulation, but it fell short of the requirements of the regulation so far as the angle measured to ground level was concerned. On those facts and the terms of s. 12 (2) of the Act of 1936 and the terms of the Metropolitan Borough of Stepney’s regulation, [counsel for the defendant tenant] has raised the following ingenious argument. He says that the rent cannot be increased under the provisions of s. 23 (1) unless the dwelling-house, besides being in good repair, is reasonably fit for occupation. He says, on the facts as to the height of the basement room and the facts as to the window, one finds

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* JENKINS, L.J., read s. 12 (1), (2) of the Housing Act, 1936, and part of reg. 9 of the regulations under that Act for the Metropolitan Borough of Stepney, which was a passage relating to ventilation and lighting of rooms; and he continued his judgment in the terms quoted above.

that this room is to be deemed to be unfit for human habitation by the express provisions of s. 12 (2) of the Act of 1936. He says that it is impossible to hold that a house or a room is reasonably suitable for occupation if it is by statute to be deemed to be unfit for human habitation, and that, this being so, the learned judge, in holding that the premises were reasonably suitable for occupation under s. 23 of the Act of 1954, committed an error in law. The learned judge obviously gave careful consideration to that matter, and he found himself prepared to hold that s. 12 (2) of the Act of 1936 was amended by s. 9 of the Act of 1954; and, in my view, he would have been right in so holding."

JENKINS, L.J., then read s. 9 of the Act of 1954* and said: "Judged by that test, I think that on the evidence this house could not be deemed to be unfit for human habitation". That is the test of s. 9, be it observed. JENKINS, L.J., continued:

"It is to be remembered that the very words 'shall be deemed to be unfit for human habitation' in s. 12 (2) of the Act of 1936 are repeated in s. 9 (1) [of the Act of 1954], and there is, of course, a direct reference to the principal Act, the Housing Act, 1936. Therefore, in my view, the learned judge would have been right in holding that s. 9 of the Act of 1954 amended s. 12 (2) of the Act of 1936; but he found it unnecessary to decide that point, since, in his view, the relevant provisions for the present purpose were those contained in s. 9 and s. 49 of the Act of 1954, and he held on the evidence that those requirements were satisfied, and, if they were satisfied, then the claim to the increase in rent was made good. I am in complete agreement with the learned judge in that part of his reasoning also. Therefore, it does not so far appear that the learned judge committed any error in law."

After dealing with another point, JENKINS, L.J., said that he thought that the appeal failed. MORRIS, L.J., said:

"I entirely agree with the judgment which my Lord has just delivered, and I do not think that there is anything at all that I could usefully add."

SELLERS, L.J., said the same:

"I agree. I also would not wish to detract from the force and clarity of my Lord's judgment by adding any words of my own."

It is quite true that that case turned on s. 23 of the Act of 1954 and, in so far as s. 9 was introduced by reference, it could be said that, if, looking at s. 23 and s. 9, one could say that all the conditions there set out were satisfied, one need not trouble oneself about the regulations which the borough of Stepney had made under s. 12 (2) of the Act of 1936. That is strictly so. None the less JENKINS, L.J., with whom the other members of the court agreed, stated quite clearly and more than once that s. 9 of the Act of 1954 had superseded s. 12 (2) of the Act of 1936, so as to provide, in regard to underground rooms, the sole standard for fitness or unfitness for human habitation and so as to render no longer operative for that purpose the provisions of s. 12 (2) of the Act of 1936 or any regulations made thereunder. I think that it would be wrong for this court to introduce into a matter already complicated enough, and made complicated by what I cannot help feeling to be the imperfections of the drafting of these Acts, refinements and narrow distinctions between cases which might fall under one section rather than another of the same legislation. Having regard to the clear view expressed by JENKINS, L.J., with the concurrence of his brethren, that the rigours of s. 12 of the Act of 1936 had been mitigated by s. 9 of the Act of 1954 and that the former section had been amended by the latter, it would be wrong for

* The passage in s. 9 (1), which JENKINS, L.J., stressed, was the passage printed at p. 421, letter C, ante, beginning "... and the house shall be deemed to be unfit ..."

A us now to say that the test of fitness for habitation of underground rooms might be different under different sections of the same legislation and that, although s. 12 (2) of the Act of 1936 must be treated as superseded for some purposes, for other purposes, for the purposes of this closing order, it was not so and s. 12 (2) and the regulations and orders made thereunder remained in full force and effect. For those reasons, therefore, I come to the conclusion that this appeal should be dismissed.

C MORRIS, L.J.: I am also of the opinion that the appeal should be dismissed. Mrs. Critchell is the owner of a building, to use a neutral term, known as 88, Herne Hill. The lower part of that building has been let off to a family named Collins. It is in respect of that part of the building that a closing order was made. The order now under appeal is headed as follows:

"In the matter of the Housing Act, 1936, and in the matter of the basement front and back rooms, front off-room and scullery, being part of the building situate at 88 Herne Hill, S.E. 24."

The effective part of the order of the court reads:

D "It is adjudged that this appeal be allowed and that the closing order dated Oct. 8, 1956, in respect of the above mentioned part of a building be quashed."

E There has been no consideration of the question whether, if the tests laid down by s. 9 of the Housing Repairs and Rents Act, 1954, are applied, that part of 88, Herne Hill would or would not satisfy the standards imposed by that section. But the rooms which are in the basement at 88, Herne Hill are rooms which are all what may be called underground rooms as defined in s. 12 of the Housing Act, 1936. It is said, therefore, that, as these are underground rooms, the closing order was properly made without there being any necessity to apply the tests of s. 9 of the Housing Repairs and Rents Act, 1954. That is the point which is involved in this appeal.

F It might seem rather strange that, if this basement were called a "part of a building", then the closing order would have been incorrectly made, but, if the basement was referred to as being a number of underground rooms which were deemed to be unfit for human habitation under s. 12 (2) of the Act of 1936, then the closing order would have been correctly made. Questions of constructions of great difficulty arise in this case and these have been stated by my Lord, if I may respectfully say so, with great force and clarity. My Lord has referred to the relevant sections: accordingly, I need not recite any of those sections, but merely refer to them for the purpose of expressing a view in regard to some of the questions which arise.

H Under s. 12 (1) of the Housing Act, 1936, a local authority may take the like proceedings in relation to, first, any part of a building which is used or is suitable for use as a dwelling, and, secondly, in relation to any underground room which is, for the purposes of s. 12, to be deemed to be unfit for human habitation, as may be taken in relation to a house. There is, however, one qualification, which is that, in circumstances in which, in the case of a house, a local authority would have made a demolition order, in the case of part of a building or an underground room they are to make a closing order which will prohibit use other than for an approved purpose. The operative words are:

"... subject, however, to this qualification that, in circumstances in which, in the case of a house, they would have made a demolition order . . ."

These words make it necessary to refer back to s. 11 of the Act of 1936 and to pose the question: What are the circumstances in which a demolition order would have been made?

Section 11 (1) of the Act of 1936 begins by referring to the consideration of an official representation, or a report from officers or other information. "Official

representation" is defined in s. 188 (1) of the Act. The start of the matter is that the local authority should have official representation or a report from officers or other information. The sub-section (as amended by s. 1 of and Sch. 1 to the Housing Act, 1949) reads: "Where a local authority, upon consideration" of those matters, "are satisfied that any house is unfit for human habitation . . ."—"satisfied" there, it seems to me, must mean "prima facie satisfied" or "satisfied" in the first place, because the sub-section goes on to provide that there is to be a meeting at which the question is to be considered and at which meeting the owner of the property may be heard: so the local authority must be satisfied that the house is unfit for human habitation and that it is not capable, at a reasonable expense, of being rendered so fit. If the stage of satisfaction on those matters is reached, then a notice to attend at a certain time and place is served and, among other matters which may be considered, if an appointment is kept, are the condition of the house and any offer with respect to the carrying out of works or any propositions in regard to the future user of the house which the owner may put forward. The owner, who is served with the notice, is entitled to be heard. Afterwards the authority may, under s. 11 (3), accept some undertaking or, in the various circumstances which are set out, they may exercise the powers given by s. 11 (4) and make a demolition order.

Before the passing of the Act of 1954, it seems to me that no real difficulty arose in fitting in s. 11 and s. 12 of the Act of 1936. If a house was being considered, then s. 11 provided what was to be done. If a part of a building was being considered, then with reference to such part of the building the local authority would have to be satisfied that it was unfit for human habitation. If an underground room was being considered, then s. 12 (2) set out the circumstances in which such room was deemed to be unfit for human habitation for the purposes of that section. Therefore, when proceeding (in the case of an underground room) to comply with the provisions of s. 11, the local authority would have no difficulty in regard to the first matter, namely, whether the room was unfit for human habitation. In considering questions under s. 11 in regard to a house, whether the house was unfit for human habitation, the local authority was enjoined to have regard to any byelaws or to any enactments in a local Act*.

Then came the provisions of s. 9 of the Housing Repairs and Rents Act, 1954, which laid down the standard of fitness for human habitation to be adopted. By s. 9 (3) certain enactments are to cease to have effect. It is forcefully said, on the one hand, that there is no repeal of s. 12 (2) of the Act of 1936. On the other hand, it is said, with equal force, that although it is stated in s. 9 (2) of the Act of 1954 that the provisions of s. 9 (1) of that Act are to be without prejudice to s. 22 of the principal Act (which provides that certain back-to-back houses are to be deemed for the purposes of that Act to be unfit for human habitation), there is no express saving in regard to underground rooms. Either view of this matter presents difficulty. It seems to me, however, that, reading s. 11 of the Act of 1936 with s. 12 of that Act, the result is that, where a local authority, on consideration of the various matters which they must consider, are satisfied in regard to (a) any house, or (b) any part of a building which is used or suitable for use as a dwelling, or (c) any underground room which is for the purposes of s. 12 to be deemed unfit for human habitation, that it is unfit for human habitation and not capable at reasonable expense of being rendered so fit, then the various steps that s. 11 enjoins must be taken in reference either to the house, or to the part of a building which is used or suitable for use as a dwelling, or to the underground room. The procedure which s. 11 laid down in relation to a house is, as it seems to me, by s. 12 applied, subject to one modification, to (a) any part of a building which is used or suitable for use as a dwelling, and

* See s. 188 (4) of the Housing Act, 1936.

- A (b) an underground room which for the purposes of s. 12 is deemed to be unfit for human habitation.

The effect of s. 9 (1) of the Act of 1954 is to impose standards of fitness which, although indeed comprehensive, will permit of the occupancy of premises whose condition makes them reasonably suitable for occupation. In determining for any of the purposes of the Act of 1936 whether a house is unfit for human habitation, regard is to be had to the condition of premises in respect of repair, stability, freedom from damp, natural lighting, ventilation, water supply, drainage and sanitary conveniences, and facilities for storage, preparation and cooking of food and for the disposal of waste water. But, when all those are considered, the conclusion which is to be arrived at is one of reasonable suitability for occupation. Even if in the respects denoted there are some defects, then a house is to be deemed to be unfit for human habitation only if it is not reasonably suitable for occupation. Although it is provided that s. 9 (1) of the Act of 1954 is to be without prejudice to s. 22 of the principal Act, there is, as I have indicated, no special provision or special saving or exclusion relating to underground rooms.

- C Although I am most conscious of the difficulties of construction, it seems to me that s. 9 of the Act of 1954 imposes the standard of reasonable suitability for occupation, which standards will displace the rigidity of other standards or of particular provisions in bye-laws or enactments, and that, because by the operation of s. 11 and s. 12 of the Act of 1936 closing orders in reference to a part of a building or an underground room may be made in circumstances in which a demolition order could be made in the case of a house, the new standard under s. 9 of the Act of 1954 is to be applied in three cases: (a) when a house is being considered, (b) when part of a building used as a separate dwelling is being considered, or (c) when an underground room, which for the purposes of s. 12 of the Act of 1936 is deemed to be unfit for human habitation, is being considered. It may be that the standards of s. 12 of the Act of 1936 were left as standards subject to the overriding provisions of s. 9 of the Act of 1954 which are now introduced into s. 11 of the Act of 1936. For those reasons I, therefore, consider that the judgment of the learned county court judge should be upheld, and those are additional to the reason which my Lord has stated in his judgment, namely, that this court, in *London Hospital (Board of Governors) v. Jacobs* (1) ((Feb. 28, 1957), see footnote p. 418, ante), came to a decision which is binding on us.

- G PEARCE, L.J.: I agree. I feel the difficulties so clearly expressed by my Lords and I share their conclusion that we ought not to depart from the clear view taken by this court in *London Hospital (Board of Governors) v. Jacobs* (1) (Feb. 28, 1957).

Appeal dismissed.

Solicitors: *Town clerk, Lambeth* (for the council); *Seifert, Sedley & Co.* (for the owner).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NORWICH UNION LIFE INSURANCE SOCIETY *v.* PRESTON.

[CHANCERY DIVISION (Wynn-Parry, J.), April 30, 1957.]

Execution—Possession—Writ of possession—Furniture left on premises—Order for removal of furniture—Whether order for possession was for vacant possession—R.S.C., Appendix H, Form No. 8.

On July 10, 1956, a mortgagor was ordered within twenty-eight days after service on him of the order to deliver to the mortgagees possession of the mortgaged premises. On Sept. 14, 1956, the order was served on the mortgagor, and on Dec. 19, 1956, possession not having been given, a writ of possession was issued. On Jan. 9, 1957, the sheriff's officer evicted the mortgagor. The mortgagor left his furniture in the mortgaged premises and refused to remove it, contending that the order for possession was spent. The mortgagees applied for an order that the mortgagor should within four days remove his furniture.

Held: the mortgagees were entitled to the order which they claimed because the mortgagor had not given possession in compliance with the order since, by leaving his furniture on the premises, he was claiming a right to use them for his own purposes.

Cumberland Consolidated Holdings, Ltd. v. Ireland ([1946] 1 All E.R. 284) applied.

[For the form of a writ of possession, see 9 ENCY. COURT FORMS 203.]

As to mortgagee's right to possession, see 23 HALSBURY'S LAWS (2nd Edn.) 358, para. 535; and for cases on the subject, see 35 DIGEST 397, 398, 1394-1404.]

Case referred to:

(1) *Cumberland Consolidated Holdings, Ltd. v. Ireland*, [1946] 1 All E.R. 284; [1946] K.B. 264; 115 L.J.K.B. 301; 174 L.T. 257; 2nd Digest Supp.

Procedure Summons.

This was an application by mortgagees, the Norwich Union Life Insurance Society, for an order that the mortgagor should within four days remove his furniture, motor car and effects from the property described in the order for possession made in the action on July 10, 1956, namely, 71, Shelley Crescent, Heston, in the County of Middlesex. In support of the application there was evidence that the sheriff's officer had declined to take steps to remove the mortgagor's furniture and effects, alleging that the writ of possession, executed by him on Jan. 9, 1957, by evicting the mortgagor's wife and daughter from the premises, was completely executed when all life was put off the premises.

S. W. Templeman for the plaintiffs.

The defendant appeared in person.

WYNN-PARRY, J.: This is a procedure summons brought by the Norwich Union Life Insurance Society against the defendant, who is their mortgagor. They obtained an order for possession of the mortgaged premises on July 10, 1956, the defendant being directed to give up possession within twenty-eight days after service on him of the order. He was unwilling to comply with that order, which was served on him on Sept. 14, 1956, and on Dec. 19, 1956, a writ of possession was issued. On Jan. 9, 1957, the defendant was evicted by the sheriff's officer. He left, however, all his furniture on the premises and he refused to remove it, his contention being that as he was evicted from the premises the

- A order for possession has no further operation. It is true the language of the order directs the defendant to deliver up to plaintiffs "possession"* of the property, but not vacant possession. It is in my view essential to have regard to the common sense of the matter. The object of the application was obviously to enable the plaintiffs, as mortgagees, to deal with the premises. It is clear as a
- B matter of common sense that they could not hope favourably to deal with the premises with a view to recouping themselves for what the defendant owes them if the premises are left full of furniture. Theoretically they might have taken the furniture out of the house but that is, I agree, not a practicable policy in these days. In these circumstances the plaintiffs seek the help of the court. In *Cumberland Consolidated Holdings, Ltd. v. Ireland* (1) ([1946] 1 All E.R. 284)
- C LORD GREENE, M.R., held (*ibid.*, at p. 287) that subject to the rule de minimis a vendor who left property of his own on the premises on completion could not be said to give vacant possession since by doing so he was claiming a right to use the premises for his own purposes, viz., as a place of deposit for his own goods, inconsistent with the right which the purchaser had on completion to undisturbed enjoyment. It appears to me that the principle of that case is applicable
- D to a case such as this although the order does not deal with a case of vacant possession. In my judgment, therefore, this application succeeds and I must make an order for the removal of the furniture.

Order accordingly.

Solicitors: *Collissons & Dawes*, agents for *T. F. Barton*, Norwich (for the plaintiffs).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

* The writ of possession, prescribed in App. H to the Rules of the Supreme Court as Form No. 8, directs the sheriff to "cause . . . to have possession of the said land and premises". It does not mention vacant possession.

Re EDEN (*deceased*). ELLIS v. CRAMPTON.

[CHANCERY DIVISION (Wynn-Parry, J.), May 16, 17, 21, 1957.]

Will—Trust—Discretionary trust—Uncertainty—Gift of residue on trust for a class of persons difficult to ascertain—Beneficiaries, and amount of their shares, in discretion of trustees—Whether trust valid.

By his will, dated Aug. 22, 1908, the testator directed his trustees to divide his residuary estate, in such shares or sums as the trustees should in their absolute discretion decide, among the persons who should at the date of the death of the testator's wife be employed, or who should have been previously in the employment of, a certain company or in the service of the testator or of his wife. The testator further directed that the trustees, in determining the proportions to be paid to such employees or to the wives or children of such employees, should have due regard to the length and nature of the service. The company was a private limited company which had been incorporated in 1901 for the purpose of acquiring a business previously carried on by the testator and his father. The testator died in 1909, and his widow died in 1936. The testator's estate consisted exclusively of shares in the company, and, in exercise of a discretionary power given to the trustees by the will, the shares were retained until 1947, and, in consequence, the distribution of the residue was postponed. Although a provisional list of persons who were or had been in the company's employment or in the service of the testator or of his wife, was compiled after the widow's death, there was no record of all the persons who were possible beneficiaries under the terms of the will. On the question whether the trust of the testator's residuary estate was void for uncertainty,

Held: the trust was valid since it was only when on the evidence the difficulty of ascertaining the class to benefit was so great as to be virtually incapable of resolution that such a trust was void for uncertainty, and the evidence, when approached with a view to seeing whether it demonstrated certainly that it was impossible to ascertain the range of beneficiaries at the material date (the death of the testator's widow), did not demonstrate that their ascertainment was impossible.

Test stated in *Inland Revenue Comrs. v. Broadway Cottages Trust* ([1954] 3 All E.R. at p. 128), and *Re Hooper's 1949 Settlement* ((1955), 34 A.T.C. 3) applied.

Cases referred to:

- (1) *Inland Revenue Comrs. v. Broadway Cottages Trust, Inland Revenue Comrs. v. Sunninglands Trust*, [1954] 3 All E.R. 120; [1955] Ch. 20; 35 Tax Cas. 577, 585; 3rd Digest Supp.
- (2) *Re Ogden, Brydon v. Samuel*, [1933] Ch. 678; 102 L.J.Ch. 226; 149 L.T. 162; Digest Supp.
- (3) *Re Villar, Public Trustee v. Villar*, [1929] 1 Ch. 243; 98 L.J.Ch. 223; 140 L.T. 90; Digest Supp.
- (4) *Re Taylor, Midland Bank Executor & Trustee Co., Ltd. v. Smith*, [1940] 2 All E.R. 637; [1940] Ch. 481; 109 L.J.Ch. 188; 163 L.T. 51; 8 Digest (Repl.) 321, 57.
- (5) *Re Hooper's 1949 Settlement*, (1955), 34 A.T.C. 3.

Adjourned Summons.

The plaintiff, as the sole surviving trustee of the will, dated Aug. 22, 1908, of Samuel William Eden, deceased, issued an originating summons, dated July 30, 1956, for the determination of the question, among others, whether, on the true construction of the will and in the events which had happened, the direction therein contained for the division by the testator's trustees of the "remainder of the residue" of the testator's estate in such shares or sums as the trustees should in their absolute discretion decide among the persons who should at the

- A date of the death of the testator's wife be employed by, or who should previously have been in the employment of, Samuel Eden & Son, Ltd. (referred to hereinafter as "the company"), or in the service of the testator or of his wife, the trustees in determining the proportions to be paid to such employees or to the wives or children of such employees to have due regard to the length and nature of the service, (a) failed for uncertainty or otherwise, or (b) constituted a valid and effective trust.

- The company was a private limited company, incorporated in 1901 for the purpose of acquiring the business of hosiery manufacturers previously carried on by the testator and his father. The testator died on Oct. 2, 1909. His residuary trust estate, of which his widow was tenant for life, consisted exclusively of shares in the company, and the shares were retained by the executors in exercise of a discretionary power given to them by the will. The widow died on Oct. 22, 1936. After her death inquiries were made in regard to the persons who were at the time of her death or had previously been in the company's service and also in regard to those who had been in the testator's service or in domestic service with the widow, and a provisional list was compiled; but, owing to the difficult industrial conditions prevailing at the time, the plaintiff, as the sole surviving trustee of the testator's will decided, in the exercise of a discretionary power in that behalf given to him by the will, to postpone the sale of the trust holdings and the distribution of residue. During the Second World War, the company's factory having been requisitioned by the government and its business having been diverted to another firm, the plaintiff, in the interests of the estate, further postponed conversion and distribution. In January, 1947, the company's business was sold as a going concern and the plaintiff received the sum of £11,613 in respect of the testator's holding. Out of that sum £4,500 had been set aside in accordance with an earlier direction in the will in regard to the provision of almshouses, and the "remainder of the residue" was, accordingly, £7,113. In December, 1948, and January, 1949, in the belief that no question arose as to the validity of the direction in the will, certain interim distributions, amounting in the aggregate to £2,085, were made among persons who appeared to qualify as recipients under the will. On Jan. 14, 1949, a statement of the relevant terms of the will and of the interim distribution which had been made was published in a local newspaper, and, as a result, additional claims were received from persons who considered themselves eligible for the benefit. The plaintiff was then advised by his legal advisers that, having regard to the terms of the will, the directions of the court should be taken before any further distribution was made.

- In his affidavit, the plaintiff said that there was no record of all the persons living at the time of the widow's death who had at any previous time been in the employment of the company or of the testator prior to the incorporation of the company, and, with a view to obtaining a complete list of such persons, a notice was inserted, in January, 1954, in the LONDON GAZETTE and in seven local newspapers. These notices produced 188 additional claimants. The notices referred to wives and children of employees who had died after the date of the widow's death, but no claims were received from any such wives or children, and the plaintiff had made no attempt to trace any such persons. Nor had he attempted to trace the widows or children of all the employees in the company who had died during the widow's lifetime. He had no information in regard to persons who had been in the employment of the testator or of the widow, and had made no attempt to ascertain the existence of any such employees. The testator left no issue or parent surviving him.

The first defendant, Samuel Crampton, and the third defendant, Mary Alice Kirby, were in the employment of the company at the time of the death of the testator's widow. The second defendant, Reginald William Eggleston, and the fourth defendant, Doris Ellen Day, had been in the company's employment

before the death of the testator's widow but were not in that employment at her death. The fifth defendant was the widow of Arthur Bosworth who died in the lifetime of the testator's widow and was at the time of his death in the employment of the company. A

Milner Holland, Q.C., and H. A. Rose for the plaintiff.

J. A. Plowman, Q.C., and W. J. C. Tonge for the first and third defendants.

G. D. Johnston for the second and fourth defendants. B

J. H. Hames for the fifth defendant.

C. A. Settle for the sixth defendant, the personal representative of the testator's widow.

Denys B. Buckley for the Attorney-General.

May 16. **WYNN-PARRY, J.:** The first point with which I have to deal is whether or not a gift in the testator's will in the following terms is a valid gift or is void for uncertainty: C

"And as to the remainder of the residue of my estate I direct my trustees to divide the same in such shares or sums as my trustees shall in their absolute discretion decide among the persons who shall at the date of the death of my wife be employed or who shall have previously been in the employment of Samuel Eden & Son, Ltd. or in the service of myself or of my wife and my trustees in determining the proportions to be paid to such employees or to the wives or children of such employees shall have due regard to the length and nature of the service." D

The test to be applied can be conveniently taken from a passage in the judgment of JENKINS, L.J., who delivered the judgment of the Court of Appeal, in *Inland Revenue Comrs. v. Broadway Cottages Trust, Inland Revenue Comrs. v. Sunnyslads Trust* (1) ([1954] 3 All E.R. 120. He said (*ibid.*, at p. 128): E

"In our view, the construction placed on behalf of the Crown on the above-quoted observations of LORD TOMLIN in *Re Ogden, Brydon v. Samuel* (2) ([1933] Ch. 678) is the right one, and we see no reason for questioning the correctness of those observations of that eminent judge. On the contrary, LORD TOMLIN's view, which we take to be that a trust for such members of a given class of objects as the trustees shall select is void for uncertainty, unless the whole range of objects eligible for selection is ascertained or capable of ascertainment, seems to us to be based on sound reasoning, and we accept it accordingly." F

In that case there was an admission that it was impracticable to ascertain the whole range of objects eligible for selection. In the present case no such admission is made. It is, therefore, primarily a question of fact whether or not on the evidence it is possible to say that it would be impossible for any inquiry to ascertain the whole range of objects eligible for selection. G

Undoubtedly, in view of the terms of the gift, considerable difficulty is likely to be encountered in ascertaining the whole of the objects; but, as the authorities show, mere difficulty is not to be treated as a ground for regarding the gift as invalid. That can be illustrated by reference, first, to *Re Villar, Public Trustee v. Villar* (3) ([1929] 1 Ch. 243). In that case a testator gave his property to his trustees on certain trusts as to income and capital for his "participating issue", as defined in the will, using a well-known common form so as to tie it up in such a way that the capital was not to vest until the expiration of H

"the period ending at the expiration of twenty years from the day of the death of the last survivor of all the lineal descendants of Her Late Majesty Queen Victoria who shall be living at the time of my death." I

In his judgment, LAWRENCE, L.J., said (*ibid.*, at p. 251):

"In the present case there is in my opinion no infringement of the rule against perpetuities. All that is said is that there will or may be great

A difficulty in ascertaining the lives upon the death of the survivor of which the ultimate vesting depends. If it could now be established definitely that it is impossible to ascertain who were the descendants of Queen Victoria living at the death of the testator, and that any inquiry for the ascertainment of such descendants which might be directed by the court would necessarily prove abortive, there would be solid ground for holding that the gift was void for uncertainty. That however cannot be said in this case. The evidence shows at most that it is difficult at the present time to ascertain who are the lineal descendants in question, and that it may probably be more difficult in the future to ascertain who is the survivor of such descendants. But it cannot properly be said now that it is impossible to ascertain which of the lives mentioned by the testator were in existence at his death, and it is mere speculation whether it would be difficult or easy to ascertain the date of the death of the survivor of such lives. In my judgment the evidence falls far short of proving that the number of lives exceeds that to which testimony can be applied to determine when the survivor of them drops. The mere fact that difficulties may hereafter arise in ascertaining which is the survivor of the lives mentioned by the testator is not in my judgment a ground for holding that the gift in question is void for uncertainty."

In *Re Taylor, Midland Bank Executor & Trustee Co., Ltd. v. Smith* (4) ([1940] 2 All E.R. 637), the court had to consider a provision by which a testator directed his trustee to stand possessed of his residuary estate in trust for the Midland Bank Staff Association, Liverpool and District Centre, "Edgerley Taylor Fund", which he had himself constituted and which was governed by a constitution and rules setting out its objects. It was held that, as, on the facts, the members of the association were entitled to deal with the fund as they wished and to direct the trustee to divide it among them, putting an end to the provisions of the constitution and rules, the gift was valid, and that the fact that the trustee might have difficulty in determining what persons were members of the association did not invalidate the gift. FARWELL, J., in his judgment, having pointed out that the gift, as a gift, was a gift to the association, went on to say (*ibid.*, at p. 640):

"However, if . . . the members of the body are entitled to put an end to the provisions of the constitution, and to direct the trustees to hand over or divide the whole of the funds in their hands among all the then members . . . there is nothing which can render this gift invalid. It may be difficult to ascertain, for instance, the persons included in the class called 'the past and present members of the staff of the Midland Bank', but that is a matter to be determined primarily by the person in whose hands the money is, and it does not seem to me that the fact that there may be a question with regard to that renders this gift in itself invalid. It is in truth a gift of a fund which may be dealt with in accordance with the wishes of the members of the body which constitutes the fund in question, and there is nothing in the rules which regulate the fund, so far as I can see, which prevents the whole matter from being wound up and the fund distributed among the persons who are entitled thereto."

I That is another illustration of the rule that mere difficulty of ascertainment is not of itself fatal to the validity of the gift. As has been pointed out, it is a matter of degree, and it is only when one reaches, on the evidence, a conclusion that it is so vague, or that the difficulty is so great that it must be treated as virtually incapable of resolution, that one is entitled, to my mind, to say that a gift of that nature is void for uncertainty.

There is a recent decision of DANCKWERTS, J., to which I ought to refer, namely, *Re Hooper's 1949 Settlement* (5) ([1955], 34 A.T.C. 3). In that case, the settlement was created by a deed dated May 4, 1949, and was made in pursuance

of the settlor's desire to make provision for persons employed in, or connected with, a named company and for the relatives and dependants of such persons, and for other benevolent purposes. I need not trouble with the further details of the trust. The interesting part of the case is the approach which is made to the problem by DANCKWERTS, J., which, if I may say so, with respect, accords with the approach made by the court in the two cases to which I have already referred. DANCKWERTS, J., referred to and dealt with *Inland Revenue Comrs. v. Broadway Cottages Trust* (1). Then he said (34 A.T.C. at p. 6):

"The point, as I understand it, is that in [*Inland Revenue Comrs. v. Broadway Cottages Trust* (1)] it was admitted that the specified class was unascertainable at any given time, and it seems to me, as contended for by Mr. Plowman, that that is a very important feature of the case. It was accepted that the class could not be ascertained; and that as it was a trust with power of selection among that class, the whole of the trusts were void for uncertainty. Accordingly the trusts in question failed."

With respect, I accept every word of that view of what was decided in *Inland Revenue Comrs. v. Broadway Cottages Trust* (1). DANCKWERTS, J., then referred to *Re Ogden* (2), which was referred to by the Court of Appeal in *Inland Revenue Comrs. v. Broadway Cottages Trust* (1), and proceeded to deal with the evidence before him. Having referred to that passage from the decision in *Re Ogden* (2) ([1933] Ch. at p. 682), where it was said that the question was one of degree in each case whether, having regard to the language of the will and the circumstances of the case, there was such uncertainty as to justify the court in coming to the conclusion that the gift was bad, DANCKWERTS, J., quoted (34 A.T.C. at p. 7) the affidavit in the case before him, where it was stated:

"The company has very substantial records of past employees of the company. As a general rule an employee who retired after a long period of service received a pension. It is, however, possible that the company would not have a record of an employee who had been dismissed or had retired after a short period of service."

DANCKWERTS, J., then said: "He only says it is possible; he does not say definitely it is so", and I think those words are very important. He went on to say (*ibid.*):

"The affidavit sworn on behalf of the trustees by Mr. Edward Basil Green says this in para. 9: 'I and my co-trustees are and have for many years past been directors of the company, and have access to all the records thereof. The existence of the said settlement is known to a number of the employees past and present of the company, and we have had applications for grants or other benefits. We are quite satisfied that when we are exercising the discretionary powers given to us by cl. 3 and 4 respectively of this said settlement, we can and do take into account all the past and present employees of the company and their wives and dependants of those whom we should consider as being suitable objects of such discretionary powers'."

I may observe in passing that, on the reasoning of the Court of Appeal in *Inland Revenue Comrs. v. Broadway Cottages Trust* (1), that would be insufficient as affirmative evidence to show positively that the range of objects could be completely ascertained. DANCKWERTS, J., went on (*ibid.*):

"The first question is whether it would be possible to ascertain all the possible objects of the trusts in question. It does not seem to me to be impossible to ascertain that as a matter of inquiry by the trustees and by such advertisements as they might think fit to put up in the company's works or in the appropriate newspapers. It seems to me that they could ascertain in that way all the names of any employees who have been

A employed at any time by the company so far as is necessary to supplement the records which they already have and which seem to me to be exceedingly complete. But Mr. Stamp says that that leaves out of account this much more dangerous word or this uncertain description, 'dependants'. He says 'dependants' is a very uncertain word, and one which would give great difficulty in regard to the ascertainment of every possible beneficiary in the present case. No doubt that increases the class or widens the class which has to be considered, but it does not seem to me that it is more than a question of fact, once you have ascertained the names of the employees and of the dependants they have or may have had. That seems to me perfectly possible of ascertainment."

C The result of that case, so far as it concerns the present case, seems to me to be this. In considering what answer I should give to this question, I have to review the evidence, not so much with a view to saying that it demonstrates that at the material date the whole range of objects eligible for selection was ascertained, but rather with a view to seeing whether it demonstrates beyond the peradventure that it is impossible to ascertain the range of objects at that date. The evidence is contained in the plaintiff's affidavit, and, in particular, in a number of paragraphs towards the end of that affidavit. It says that the executors have made certain inquiries and that they have in certain cases been able to draw up provisional lists; but it also clearly shows that the inquiries have been far from exhaustive and have not proceeded to anything like the extent that would be required in an inquiry directed by the court.

E I entirely agree with the observations made by counsel for the personal representative of the testator's widow in his submission that any inquiry, whether by the trustees or by the court, would have to be, in view of the language of this gift, of a very wide nature, and it may well be that a large part, even the whole of the funds available, would be consumed in the inquiry. To say the least of it, that would be very unfortunate, but that cannot of itself constitute any reason why such an inquiry, whether by the trustees or by the court, should not be undertaken. Looking at the relevant paragraphs of the plaintiff's affidavit, I am not convinced that it will be impossible to ascertain the complete range of objects, and I am not prepared, therefore, to say that this gift is invalid on the ground of uncertainty. On the evidence before me I propose, therefore, to answer question 1 of the summons by saying that the gift constitutes a valid and effective trust.

G [HIS LORDSHIP then proceeded to hear argument on the further questions raised by the summons.]

Declaration accordingly.

Solicitors: *Steadman, Van Praagh & Gaylor*, agents for *Robert Barber & Sons*, Nottingham (for the plaintiff and the second, fourth, fifth and sixth defendants); *Taylor, Jelf & Co.*, agents for *Shacklock, Bosworth & Hooton*, Sutton-in-Ashfield (for the first and third defendants); *Treasury Solicitor* (for the Attorney-General).

[*Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.*]

HUGHES v. ARCHITECTS' REGISTRATION COUNCIL OF THE UNITED KINGDOM.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), May 15, 16, 24, 1957.]

Architect—Registration—Removal of name from register for disgraceful conduct—Appeal—Jurisdiction of appellate court—Architect acting as house agent both before and after registration—Whether conduct disgraceful to him as an architect—Architects (Registration) Act, 1931 (21 & 22 Geo. 5 c. 33), s. 7 (1), s. 9.

The appellant had been in practice as an architect and house agent since 1922. In 1934 he was registered as an architect under s. 6 (1) (b) of the Architects (Registration) Act, 1931, by virtue of which a person who had been practising as an architect could be registered under that Act without question of his qualifications by examination or otherwise. By s. 7 (1) of the Act of 1931 the Architects' Registration Council on the report of the Discipline Committee could remove from the register the name of a person found guilty of "conduct disgraceful to him in his capacity as an architect". In 1936 the council issued a code of professional conduct for registered architects and, among other things, therein laid down that a registered architect must not permit the business of house agency to form part of his practice. The code had no statutory force. At that time the council conceded that no action should be taken in relation to architects who were carrying on a house agency business before they were registered as architects. The council withdrew this concession at the end of 1955. In December, 1956, the council, on the report of the committee that the appellant was guilty of conduct disgraceful to him in his capacity as an architect, determined that his name be removed from the register. The disgraceful conduct consisted in the appellant's practising both as an architect and as a house agent. The appellant appealed under s. 9 of the Act of 1931 against the determination of the council.

Held: (i) the court had power to decide whether the conduct of the appellant was disgraceful conduct, because the right of appeal given by s. 9 of the Act of 1931 would be illusory unless the court were able to consider whether the appellant had been guilty of conduct which justified the removal of his name from the register.

Allinson v. General Council of Medical Education & Registration ([1894] 1 Q.B. 750) and *R. v. General Medical Council* ([1930] 1 K.B. 562) distinguished.

(ii) the appellant's conduct in combining the activities of an architect and of a house agent was not disgraceful conduct within s. 7 (1) of the Act of 1931 because (a) the appellant had been entitled to registration, at the time when the Act came into operation, by virtue of practising as an architect although he also practised as a house agent, and (b) the fact that the majority of the architects' profession viewed with disapproval the combining of the activities of architect and house agent did not render the appellant's conduct disgraceful conduct within s. 7 (1).

Appeal allowed.

[**Editorial Note.** The decision turned on the long period, extending to a time before the Act of 1931 was passed, during which the appellant had carried on his business. The case of any person first practising as an architect after 1931 would not be governed by this decision so far as the question of conduct was concerned (see p. 438, letter F, and p. 439, letter D, post).]

As to the removal of names from the register of architects, see 3 HALSBURY'S LAWS (3rd Edn.) 403, 404, para. 758.

For the Architects (Registration) Act, 1931, s. 7 (1) and s. 9, see 2 HALSBURY'S STATUTES (2nd Edn.) 604, 606.]

A Cases referred to:

- (1) *Allender v. Royal College of Veterinary Surgeons Council*, [1951] 2 All E.R. 859; 2nd Digest Supp.
- (2) *Allinson v. General Council of Medical Education & Registration*, [1894] 1 Q.B. 750; 32 Digest 184, 2267.
- (3) *R. v. General Medical Council*, [1930] 1 K.B. 562; 99 L.J.K.B. 217; sub nom. *R. v. General Medical Council, Ex p. Kynaston*, 142 L.T. 390; 94 J.P. 94; Digest Supp.

B

Appeal.

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This was an appeal under the Architects (Registration) Act, 1931, s. 9, against the determination of the Architects' Registration Council of the United Kingdom that the appellant's name should be removed from the register of architects. The appellant, who was a Fellow of the Royal Institution of Chartered Surveyors, was admitted to the register of architects in 1934. He had been in business in partnership from 1924 to 1933, and thereafter continued on his own account. Throughout he practised as an architect, chartered surveyor, and land and estate agent. At the time of his applying for registration as a registered architect the fact that he practised in these capacities was disclosed by him. In 1936 the council published for the guidance of the architects' profession the first Code of Professional Conduct. Clause (2) (f) of this code stated that a registered architect must not "permit the business . . . of house agency to form part of his practice". In June, 1936, the council passed a resolution that where the business of house agent was being carried on at the time of registration as an architect no action should be taken in the matter. Subsequently the code was revised in 1946, 1950 and 1955, but the prohibition on combining the activities of an architect and house agent remained substantially unaltered. In January, 1949, the council notified all architects on the register that no architect would be permitted after Jan. 1, 1956, to act as a house agent and that the concession made by the resolution of June, 1936, would be withdrawn on that date. There was also subsequent notification of this. The appellant continued after 1955 to practise in the same way as theretofore. A complaint of the appellant's conduct in this respect was preferred to the council. The complaint was heard by the Discipline Committee on July 17, 1956. The committee found that the appellant had been guilty of conduct disgraceful in his capacity as an architect in that, although he knew that the architects' profession as a whole was opposed to the practice of an architect carrying on business as a house agent and that the code, in conformity with the views and wishes of the profession, recommended that all architects, whatever their former practice had been, should from Jan. 1, 1956, cease to contravene the standards set by the profession in this respect, yet nevertheless the appellant had refused to comply with this standard. The committee expressed their wish to make it clear that they did not mean "disgraceful" in the popular sense of the word but disgraceful to the appellant in his capacity as an architect. On Oct. 5, 1956, the council, having before them the report of the committee, resolved that the council intended to remove the name of the appellant from the register, subject to the service of written notice of that intention and to considering any representations that the appellant might make. On Dec. 14, 1956, the council, having before them the appellant's representations, resolved to direct the registrar to remove the appellant's name from the register and that the appellant should be disqualified for registration for a period of two years from that date. The council further determined that the appellant should not be entitled to admission to the register thereafter unless in the meantime he had passed one of the recognised examinations. The appellant appealed for an order that these determinations should be set aside and that the council should register or cause to be registered the appellant's name as an architect.

Gerald Gardiner, Q.C., and Neville Faulks for the appellant.

B. J. M. MacKenna, Q.C., and J. C. Leonard for the respondents.

Cur. adv. vult.

May 24. The following judgments were read.

LORD GODDARD, C.J.: On Dec. 14, 1956, the respondents to this appeal, the Architects' Registration Council of the United Kingdom (to whom I refer as "the council"), determined that the name of the appellant should be removed from the register of architects kept under the provisions of the Architects (Registration) Acts, 1931 to 1938, and that he be disqualified from registration for a period of two years from Dec. 14, 1956, and was not to be entitled to admission to the register thereafter unless in the meantime he had passed one of the recognised examinations for registration. This determination followed an inquiry held by the Discipline Committee of the council established under the Act of 1931 which reported that the appellant had been guilty of conduct disgraceful to him in his capacity as an architect. Considering that the appellant is a man over sixty years of age and has been in practice without any sort of complaint as to his professional competence for something like thirty-five years, it is indeed remarkable that the council should determine that the suspension imposed should only be determined if he sat for and passed an examination, especially as the reason for his suspension had nothing to do with his professional competency. I can only suppose that the reason for imposing such a condition was that the council in fact meant to suspend him for life, for it is inconceivable that at his age the appellant would be willing to submit himself for examination. His right to be registered originally did not, as will be seen, depend on his qualifying by examination and, though it is not necessary to determine it in this case, I have the greatest doubt whether such a condition for reinstatement could be lawfully imposed.

The question raised by this appeal is one of importance, though for reasons which will appear from this judgment, it will not affect more than a dwindling number of the profession. As our decision is not open to appeal, I propose to deal with the matter as fully as possible and to start by examining the relevant statutes.

By the Act of 1931 a register of architects and an Architects' Registration Council were established. By s. 6 (1) the qualifications for registration are laid down, one of which was that the application for registration was made within two years of the Act coming into force and that the applicant then was or had been practising as an architect in the United Kingdom. It was under this provision that the appellant was registered in 1934. He had entered into articles in 1919 and had been in practice either in partnership or alone since 1922. He practised and described himself as an architect, chartered surveyor, land and estate agent and valuer and in fact was a Fellow of the Royal Institution of Chartered Surveyors. The Act of 1931 did not forbid a person to describe himself as an architect or to practise as such although he might not be registered. What the Act did was to prohibit the use of the term "registered architect" by any person who was not on the register. Section 7 of the Act gives power to the council to remove the name of a person convicted of a criminal offence and anyone found guilty of conduct disgraceful to him in his capacity as an architect by the statutory Discipline Committee after inquiry held by them. The section contains provisions as to the appointment and constitution of the committee and as to its procedure. In 1938 a short Act was passed, the Architects Registration Act, 1938, the main object of which was to prohibit under heavy penalties anyone from describing himself as an architect unless he was registered, and from that Act coming into force the title or description "registered architect" disappeared. It was the use of the word "architect" that was prohibited. Before this Act was passed, which no doubt added considerably to the dignity of the profession, the council had issued a code of professional conduct for

- A registered architects and among other things laid down was that the business of auctioneering or house agency must not form part of the registered architect's practice. There was of course no objection to the council laying down rules for the guidance of their members' professional conduct, but the code had no statutory force of itself. The position in 1936 was that persons who had been in practice before 1931 had a right to be registered whether or not they were also carrying on business as house agents. No doubt the council before registering persons, whose only qualification was actual practice, would be entitled to be satisfied that the applicant had been genuinely engaged in architectural practice and that he was not in reality merely a surveyor or house agent who called himself an architect. But if he had genuinely practised, he was entitled to registration and Parliament did not limit his right or make it a condition that he had not or would not engage in any other business. The legislature has conferred powers on several professional bodies to control admission to the profession and given them disciplinary authority over their members, but at the same time has preserved the right of persons who have been practising before this privilege was conferred to carry on as before, though they might not possess the particular qualifications by examination or otherwise that would be required from new entrants. Gradually these practitioners would disappear by retirement or death but I cannot agree that the council or governing body of a particular profession can necessarily impose on those persons all that they could on new entrants. In 1932 the appellant was carrying on these other activities and there was nothing in the Act to disentitle him to registration on that account and once he was on the register he could describe himself as a registered architect. Now it is clear that in 1936 the council were hoping to get additional powers and were promoting a Bill, which became the Act of 1938, with this object. They were anxious to prevent if they could the carrying on of a business of surveyor or estate agent with that of an architect. Naturally this was a matter of concern to surveyors, some of whom, like the appellant, did practise both as surveyors and architects. In January, 1937, we find that the President of the Architects' Registration Council of the United Kingdom wrote to the Royal Institution of Chartered Surveyors with reference to the proposed legislation saying:

"There is nothing in the Bill to interfere in any way with the activities of any person save that he may not call himself 'architect' unless he is qualified to do so by registration."

- G The conduct which the council have found disgraceful is that the appellant has refused to comply with the standard, which the profession as a whole approve, that the business of a house agent ought not to be carried on by an architect and so flouts the standard which the profession as a whole has set for itself and which has been set out in the code of conduct. So disgraceful conduct in his capacity as an architect is attributed to the appellant because he is doing and asserting his right to do the very thing which the president of the council informed this other professional body of which the appellant is a Fellow the proposed Act would not interfere with. He was writing to the body which obviously was interested in seeing that their members' business or practice would not in the future be restricted or impeded. It seems to me that the appellant is entitled to say "You tell the professional institute of which I am a Fellow in 1937 when you are seeking further powers that I and others like me can continue as before and then allege that it is disgraceful if we do". Moreover the council seem to have recognised that, in spite of the provisions of the code, they ought to allow the members who had previously carried on their other avocations to continue to do so at least for a time, but they fixed a date beyond which it was said that it would be regarded as misconduct if they continued to do so, and it is because the appellant continued after that date and asserted his right to do so that he has been adjudged guilty of disgraceful conduct.

The first and to my mind perhaps the most important question in the case is to determine the powers of this court on an appeal. Section 9 of the Act of 1931 gives the right of appeal and is in these terms: A

"Any person aggrieved by the removal of his name from the register, or by a determination of the council that he be disqualified for registration during any period, may, within three months from the date on which notice of the removal or determination was served on him, appeal to the High Court or Court of Session against the removal or determination, and on any such appeal the court may give such directions in the matter as they think proper, and the order of the court shall be final." B

It has been held by this court that a section in these terms confers a right of appeal as wide as one from a judge to the Court of Appeal: *Allender v. Royal College of Veterinary Surgeons Council* (1) ([1951] 2 All E.R. 859). While an appellate court will always attach great importance to the finding of a lower court, especially on findings of fact, if in their opinion the decision below is wrong they must give effect to their opinion and reverse it. It is contended that this court cannot on the authorities reverse the finding that the conduct of the appellant was disgraceful as an architect, though not in the popular sense of that word, because what is or is not proper professional conduct is entirely a matter for the council. On this point reliance is placed on *Allinson v. General Council of Medical Education & Registration* (2) ([1894] 1 Q.B. 750), and on *R. v. General Medical Council* (3) ([1930] 1 K.B. 562). The essential and vital difference between those cases and the present in my opinion is that no appeal was given* from a decision of the General Medical Council and an appeal is given from a decision of the Architects' Registration Council. This is not a matter of certiorari, it is an appeal. It is not a case in which the court has to see only if the council had jurisdiction to make the order they did and whether they had evidence on which they could act; in this case, as in the case of appeals from the decision of several other professional domestic tribunals, all of which are set out in R.S.C., Ord. 59, r. 38, this court must decide whether the decision of the tribunal was right and can be upheld. The only ground on which a person can be removed from the register is that he has been guilty of conduct disgraceful in his capacity as an architect. He is given a right of appeal against his removal. If therefore the court cannot consider whether he has been guilty of conduct which justified his removal the right of appeal would be purely illusory. The right of appeal given by s. 9 is a right of appeal against the finding, not against the degree of punishment, for the only sentence that can be imposed is removal from the register. D E F G

Now here we have the case of a man who was given by the statute a right to be registered and it is not contended that in 1932 the council could have refused him registration because he was then practising also as a house agent. In my opinion counsel for the appellant was right in his submission that if the action of the council can be upheld it means that they could have registered him one day notwithstanding that he practised also as a house agent and on the next removed him on that ground, which would be plainly absurd. Then it is surely material that the appellant openly practised as before for more than twenty years after registration. How can it reasonably be said that it was disgraceful for him to continue to do so after a particular date which the council chose to appoint? Counsel for the council submitted that, while it might not be disgraceful for an H I

* When the Medical Disciplinary Committee was subsequently established by the Medical Act, 1950, s. 14 (29 HALSBURY'S STATUTES (2nd Edn.) 569), a right of appeal was given by *ibid.*, s. 20 (3). The right of appeal given by that Act is to the Judicial Committee. Much of the Medical Act (21 & 22 Vict. c. 90), i.e., the Act of 1858, has been repealed and replaced as from Jan. 1, 1957, by the Medical Act, 1956, which has also superseded the sections of the Medical Act, 1950, here referred to: see 36 HALSBURY'S STATUTES (2nd Edn.) 567.

A architect to practise as a house agent, it became disgraceful to do so once the general opinion of the profession decided against such practice. That seems to me only to state the proposition in a different way. If, for reasons applicable to the individual concerned, his conduct could not fairly be considered disgraceful as an architect, in my opinion a disapproval of that conduct in other members of the profession cannot make his conduct disgraceful. I do not doubt for one moment the right of the profession to lay down rules of professional conduct and to enforce them, but it must be remembered that we are here dealing with what may be described as a transitional state of affairs. They were obliged to register persons whose only qualification was that they were actually practising as architects, and, though I am not of course saying that this applied to the appellant, it might well be that their professional competence was of the slightest.

C The number admitted under this provision will in time disappear and probably by this time is very much reduced. It was, in my opinion, wrong to apply the same considerations and standards to them in all respects as to new entrants. For a time the profession would include qualified and unqualified members and by unqualified I mean those who were admitted without examination or without the degree which was accepted in lieu of examination, and then only if they had

D applied within two years of the Act coming into force. I do not wish it to be thought that I am saying that architects admitted to the register as was the appellant are not bound by any rules of professional conduct, nor has he so contended. There are rules of conduct which all professional men must observe. Refraining from advertising would, I think, clearly be one. But considering the ground on which Parliament gave the appellant the right to be registered,

E in my opinion he cannot be held to be guilty of conduct that by any standard can be said to be disgraceful because he continued to practise in exactly the same way after registration as he had done before and that practice did not disqualify him for registration.

I would allow the appeal, and would quash the order removing the appellant's name from the register, and order it to be restored.

F **HILBERY, J.:** In the course of the argument in this case I inclined to the view that in this appeal we were limited in the way in which the court was limited in the case of an appeal to the court by a doctor who has been struck off the register of medical practitioners by the General Medical Council acting under the powers given to them by the Medical Act (1858) (21 & 22 Vict. c. 90)*. In

G *Allinson v. General Council of Medical Education & Registration* (2) ([1894] 1 Q.B. 750) **LORES, L.J.**, said (*ibid.*, at p. 763):

“Then I come to the question of ‘infamous conduct in a professional respect’, and, in my opinion, if there was any evidence on which the council could reasonably have come to the conclusion to which they did come, their decision is final. If, on the other hand, there was no evidence upon which

H they could reasonably arrive at that conclusion, then their decision can be reviewed by this court.”

If, therefore, on this appeal we were limited to the considerations stated by **LORES, L.J.**, I should have found it very difficult to say that there was no evidence on which the committee in this case could reasonably have come to the conclusion to which they did come. I am now, however, completely satisfied

I that the position of the court under the Architects (Registration) Act, 1931, exercising the appellate jurisdiction given to it by the Act, is not limited as it was in the cases under the Medical Act where there was no appeal to this court.

My Lord's judgment has satisfied me that our situation is entirely different and that this case is heard by us sitting as a court of appeal with all the powers of a court of appeal. Being persuaded that this is the right view I concur with the judgment of my Lord for the reasons which are given in his judgment.

* See the footnote to p. 440, ante.

DEVLIN, J.: The Architects (Registration) Act, 1931, s. 7, gives the council power to strike the name of an architect from the register if he has been "guilty of conduct disgraceful to him in his capacity as an architect". I cannot accept the argument that the term "disgraceful" is in any sense a term of art. In accordance with the usual rule it is to be given its natural and popular meaning; but it is qualified by the phrase "in his capacity as an architect". The effect of that qualification is twofold. First, the conduct must not only be what would ordinarily be considered disgraceful, but it must also be a disgrace which affects him professionally: to that extent the qualification diminishes the term. Secondly, conduct which is not disgraceful for an ordinary man may be disgraceful for a professional man: to that extent the qualification amplifies the term. The amplification does not, however, require that "disgraceful" is to be given any technical meaning: it requires only that the ordinary meaning of the word should be applied in relation to the special obligations and duties of a professional man. It must not be forgotten that if the finding of the committee stands, anyone may hereafter say of the appellant with impunity that he was struck off the register for disgraceful conduct and may add that that means what it says.

What then is the disgraceful conduct with which the appellant is charged? It is not simply that he combined the activities of architect and house agent. There is nothing inherently disgraceful in that. The council make no such allegation and could not without exposing themselves to the charge that they had for the last twenty years at least condoned disgraceful behaviour. What they say about it is that it is a "wrong practice" to which the profession as a whole is opposed, as witnessed by its condemnation in the code. I accept that this condemnation is reasonable and that the code, while it has no statutory or contractual force, does on this point at least express the best opinion in the profession; but the pursuit of a wrong practice is not of itself disgraceful, and the council's allegation does not rest solely on that.

I do not say that the pursuit of an undesirable practice can never be disgraceful. Every profession has practices which it bars. Among the commonest of these are advertising, poaching and undercutting. These activities which are considered in the business world to be laudable examples of enterprise—so much so that their restraint is *prima facie* contrary to public policy—have always been considered offensive professionally. If a man joins a profession in which the use of trade weapons is barred, and then proceeds to employ them, he is taking an unfair advantage over his fellows. They restrain themselves, believing rightly or wrongly that such restraint is essential to the good health of the profession as a whole; he gets the benefit of their restraint and fills his purse at their expense. He is defaulting on the obligation, by which explicitly or impliedly he undertook to be bound, when they made him of their company. Such conduct could be thought disgraceful not merely by those of the profession, but by outsiders who were not themselves bound by the same standards. This is in fact the basis of the finding against the appellant, which is expressed in the following terms:

"the [appellant] was deliberately and knowingly flouting, because of his own private interests, the standard which the profession as a whole has set itself and which has been set out in the code of conduct."

In reaching their conclusion, expressed in these terms, that the appellant's conduct is disgraceful, the committee have overlooked the absence from it of an essential element. It is not of itself disgraceful to disagree with a majority view and to act accordingly. It is only if a man has bound himself in honour to accept that view and to act according to the code, that a deliberate breach of the code for his own profit can be called disgraceful. The appellant has never bound himself in that way. He was in practice as an architect and estate agent long before the code was first formulated or the Act of 1931 passed.

A His case differs, not merely in degree but *toto coelo* from that of the new entrant who is admitted on terms, written or unwritten.

I sympathise with the efforts of the council to eradicate undesirable practices from the profession. In a time of transition and when standards are being changed, it is hoped, for the better, it must always be difficult to decide how fast it is fair and reasonable to go. Some might say that the older members,

B who had established themselves in accordance with the standards then current, ought not to be asked to change their ways at cost to themselves, even though their lagging behind puts off the day of complete purification. Others might say that some sacrifice from the older members could fairly be demanded and that the seven years' grace given to them was generous enough. I am bound to say that, having regard to the assurances given in 1937, I should have thought the former course to be the fairer. It is submitted that the one adopted by the council is reasonable. Perhaps it is; and then if the council had power derived from statute or contract to decide the point, that would settle it. But it has not. I do not understand how it can be said that anyone who takes a different view on such a point and acts accordingly is behaving disgracefully.

In truth and in fact, and however plausibly the argument may seek to disguise it, what the council is trying to do is to enforce a code which has no legislative sanction and to coerce a minority, which is free and unpledged, into submission to an arbitrary decision. I do not mean that it is arbitrary in the sense of unreasonable; it is arbitrary because the force that lies behind it is simply that it is an edict of the council—nothing more. It is idle to say that the appellant's offence is that he is flouting the common opinion of the profession. That opinion has existed, so the council say, at least since 1936. The appellant has been flouting it for the last twenty years and for the last seven of them—the period of grace—with the express approval of the council. His offence is, not that he is flouting it, but that he is continuing to flout it far longer than the council consider it reasonable that it should be flouted. They might have said eight years in which case they would have postponed the appellant's disgrace by a year; but they picked on seven. So the appellant had until Dec. 31, 1955, to conform. If in December, 1955, anyone had suggested that the appellant was behaving disgracefully, he could have recovered heavy damages for defamation; but, it is said, when the clock struck midnight he began to sin. So high a degree of punctuality brings the point near to absurdity. Disgrace is not something that gets brought in with the New Year.

G It is said that this is an important case. So it is. But there is something more important than the standing of a profession about which the council is naturally and properly concerned. There is the right of every man to earn his living in whatever way he chooses unless by the law or by his own voluntary submission his way is taken from him; and in the exercise of that right he must not be punished by a professional majority under the pretext—for that is all it is, though I am sure it was not consciously adopted as such—that nonconformity is of itself disgraceful.

Appeal allowed.

Solicitors: *Beale & Co.* (for the appellant); *Field, Roscoe & Co.* (for the respondents).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

DAVIES *v.* DAVIES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Wallington, J.), May 2, 3, 1957.]

Justices—Husband and wife—Maintenance order—Refusal to make order—No concurrent jurisdiction—Appeal to Divisional Court—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 10, s. 11.

By s. 10 of the Summary Jurisdiction (Married Women) Act, 1895, the justices may refuse to make an order where "the matters in question between the parties or any of them would be more conveniently dealt with by the High Court" and in such a case there is no right of appeal against their decision, but the High Court may direct the justices to re-hear and determine the matters.

The wife was German by birth, and there was one child of the marriage. The wife complained to the justices that the husband had deserted her three months before the date of the complaint, that he had been guilty of persistent cruelty towards her and that he had wilfully neglected to provide reasonable maintenance for her and the child. The justices, however, refused to make an order, holding, under the Summary Jurisdiction (Married Women) Act, 1895, s. 10, that the matters in question would be more conveniently dealt with by the High Court. The justices particularly had in mind the fact that if they found any complaint proved, their powers respecting an order for custody of the child were limited compared with the powers of the High Court. The wife appealed. The husband contended that by virtue of s. 10 of the Act of 1895 the wife had no right to appeal against the justices' refusal to make an order.

Held: the order of the justices must be reversed and the case would be remitted for the following reasons—

(i) s. 10 enabled the justices to refuse to make an order only where there was concurrent jurisdiction in the High Court and in the magistrates' court in relation to the "matters in question between the parties", and where this was not so appeal lay under s. 11 of the Act of 1895.

Perks v. Perks ([1945] 2 All E.R. 580) and *Smyth v. Smyth* ([1956] 2 All E.R. 476) applied.

(ii) as the High Court have no jurisdiction to give relief on a charge of desertion for a period of three months, there was no concurrent jurisdiction on this charge.

(iii) the two complaints of persistent cruelty and wilful neglect were integrally bound up with the charge of desertion, so that the justices could not rightly have referred to the High Court the two complaints and have themselves disposed of the complaint of desertion.

Per CURIAM: the "matters in question between the parties" referred to in s. 10 of the Summary Jurisdiction (Married Women) Act, 1895, were the subject-matters of the complaints, viz., the desertion, persistent cruelty and wilful neglect to maintain, and if justices assumed jurisdiction to decide these matters they could not refer to the High Court the question what the consequential order should be as to, e.g., custody (see p. 446, letter D, post).

Appeal allowed.

[**Editorial Note.** In his judgment in this case LORD MERRIMAN, P., draws attention to the fact that under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, the magistrates' court has no power to make an order for custody in favour of the husband; but intimates that where the justices are of opinion that the husband would be the proper custodian he can apply for an order, e.g., under the Guardianship of Infants Acts, 1886 and 1925 (see p. 448, letters E to G, post).

A As to the power of justices to refuse to make an order in a matrimonial case where it is fit for High Court, see 12 HALSBURY'S LAWS (3rd Edn.) 486, para. 1085, note (1); and for cases on the subject, see 27 DIGEST (Repl.) 731, 6976, 6977.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 10, s. 11, see 11 HALSBURY'S STATUTES (2nd Edn.) 854.]

B Cases referred to:

(1) *Perks v. Perks*, [1945] 2 All E.R. 580; [1946] P. 1; 115 L.J.P. 7; 173 L.T. 349; 110 J.P. 94; 27 Digest (Repl.) 731, 6976.

(2) *Smyth v. Smyth*, [1956] 2 All E.R. 476; [1956] P. 426; 120 J.P. 307.

(3) *Beard v. Beard*, [1945] 2 All E.R. 306; [1946] P. 8; 114 L.J.P. 33; 174 L.T. 65; 27 Digest (Repl.) 408, 3369.

C Appeal.

The wife appealed against the refusal of the Carmarthen justices on July 31, 1956, to make any order on her three complaints alleging (i) that the husband had deserted her on and from Mar. 27, 1956, (ii) that he had been guilty of persistent cruelty towards her within the six months before that date, and (iii) that he had been guilty of wilful neglect to provide reasonable maintenance for her and the child of the marriage after Mar. 27, 1956, and before the date of the complaint. The reason for their refusal to adjudicate in the wife's complaints was that the justices held, by virtue of the Summary Jurisdiction (Married Women) Act, 1895, s. 10, that they would be more conveniently dealt with by the High Court.

E *W. R. K. Merrylees* for the wife.
Elson Rees for the husband.

LORD MERRIMAN, P.: The questions are, whether the justices were right to refuse to make any order, and, if their correctness in doing so is in doubt, to put it neutrally, whether that is a proper subject-matter of appeal to this Division. Section 10 of the Summary Jurisdiction (Married Women) Act, 1895, reads as follows:

"If in the opinion of a court of summary jurisdiction the matters in question between the parties or any of them would be more conveniently dealt with by the High Court, the court of summary jurisdiction may refuse to make an order under this Act, and in such case no appeal shall lie from the decision of the court of summary jurisdiction."

There follows a proviso, which I need not read, to the effect that when the matter gets to the High Court the judge may say "I do not agree with this. It would be more convenient for it to be dealt with by the magistrates", and send it back again, or part of it. Then, to add point to it, I ought to read s. 11:

"Save as is hereinbefore provided, an appeal shall lie from any order or the refusal of any order by a court of summary jurisdiction under this Act to the Probate, Divorce and Admiralty Division of the High Court of Justice . . ."

The justices have plainly refused to make an order, and the question is whether that refusal is subject to the right of appeal under s. 11, or whether it is covered by the words "Save as is hereinbefore provided", namely, by s. 10, where no appeal lies.

I want it to be understood throughout the whole of my judgment that I do not think that it is possible to lay down cast-iron rules which are applicable to all cases. For that reason, as I now think rightly, we insisted on reading the evidence in the case up to the point at which the decision to refuse to make an order and to send it up to the High Court was taken. It was suggested that the words "the matters in question between the parties or any of them" were of doubtful interpretation, and that it was not clear whether the words "or any

of them " refer to " the matters " or to " the parties ". Speaking for myself, I think that this is as plain as a pikestaff. Putting it colloquially, " the matters in question between the parties " are hyphenated, and the words " or any of them " refer to " the matters " and not to " the parties ". In other words, the question is whether the subject of litigation between the parties, whom the Act contemplates can only be two, namely, the husband and the wife, can be sub-divided so that there are two or more matters in relation to which a choice to refer the decision to the High Court can more conveniently be made.

In the present case there were three matters before the magistrates' court. There was the matter of the complaint of desertion, there was the matter of the complaint of persistent cruelty, and there was the matter of the complaint of wilful neglect to maintain. In respect of each complaint there was the subsidiary question whether any and if so what order should be made in respect of that particular complaint, if found to be proved. In my opinion the proper approach is to deal with the " matters " as being the several complaints, for I do not think, speaking generally, that magistrates may decide the matter whether the complaint is proved and then refer to the High Court the matter (a) whether a separation order should be made, (b) whether maintenance should be given, and, if so, how much, (c) whether the custody of the child should be given, and, if so, how much maintenance should be allocated in respect of that circumstance. The thing is intended to be dealt with more generally. The matters are the subject-matters of these complaints, namely, desertion, persistent cruelty and wilful neglect to maintain. If justices decide that any of these matters is more conveniently to be dealt with in the High Court, well and good, always assuming, as I will point out in a minute, that the High Court has jurisdiction to deal with it. I do not think that if the justices get to the stage of assuming the jurisdiction to decide the principal matter there is any room for referring to the High Court what the consequential order should be in terms of money or in terms of custody or the like. The point is important, and is more practical than academic. The point in the present case is not academic, for the reason that it is plain that the magistrates have referred these three matters to the High Court because, if the wife had proved her case, which is left in doubt, one of the orders, manifestly, which she could get and which she was claiming, would be the custody of the child of the marriage, with consequential maintenance, and they have thought it better to avoid dealing with any of the matters because in respect of that particular issue it is common ground that they have no power to say that the child is not to be taken out of the jurisdiction. This is a practical proposition here, for on the evidence it is quite plain that this German wife, the widow of a German soldier killed in the war and afterwards married to a British soldier in the army of occupation, is only too anxious to get back to her native land with the child. I express no opinion whatever about the merits of that desire, and, indeed, I am going to express no opinion about the merits of any part of this case, because I think it is absolutely vital that the whole merits of the case, which is not by any means a simple one, should be left open.

I want to deal with the true interpretation of this section, and to consider whether we are being asked to usurp a jurisdiction which the section says that we are not entitled to exercise. We have been referred to two cases on this point, though neither has been read in detail. They are a decision of the Court of Appeal in *Perks v. Perks* (1) ([1945] 2 All E.R. 580) and in particular to the leading judgment of LORD GREENE, M.R., the most material passage of which is to be found (*ibid.*, at p. 583) and a decision of this court, by which, of course, we are bound, in *Smyth v. Smyth* (2) ([1956] 2 All E.R. 476). It will be remembered that the issue which is not appealable is a decision of the justices that the matters or any of them, that is to say, the desertion, the cruelty, or the wilful neglect to maintain complaints, respectively, would more conveniently be dealt with by the High Court than by themselves. That is the question in issue.

- A The decision of the Court of Appeal in *Perks v. Perks* (1) was that that very wording assumed that there was concurrent jurisdiction in both courts, and that it was a mere question of choice of the convenient forum to decide the particular matter. It is perfectly true that in *Perks v. Perks* (1) the question was the revocation of a maintenance order already made in a magistrates' court, and that, as there is no statutory power whatever in the High Court to revoke such an order, there was no concurrent jurisdiction; thus there was no question of choice of forum to which recourse might be had, because there was only one forum which had jurisdiction to revoke such an order, and that was the magistrates' court. That was developed more fully in the rather more complicated case of *Smyth v. Smyth* (2). In my opinion it would be tedious to go through the details of that case. That case decided that in any matter where there is concurrent jurisdiction in a court of summary jurisdiction and in the High Court (so far following what LORD GREENE, M.R., said in *Perks v. Perks* (1)), then, if in the opinion of the court of summary jurisdiction the matter would be more conveniently dealt with by the High Court, the court of summary jurisdiction may, under s. 10 of the Act of 1895, refuse to adjudicate, and there is no appeal, subject to the proviso that the High Court may send the matter back if it thinks fit.
- D Thus it is a condition precedent that the matter may be investigated and determined by either court. It is rightly not disputed that that is a perfectly correct interpretation of the case law as it stands at the moment, and it is not disputed that if that condition, namely, that the matter may be investigated and determined by either court, is not fulfilled, then there is no concurrent jurisdiction, there is no choice between two possible forums, and appeal is allowable.
- E That is how the matter stands as a matter of law. Therefore, in practice, coming again to the matters in question in the present case, the question is whether these magistrates have rightly assumed that this is a case in which there are two equally convenient forums. As I have said, a question of this sort can only be properly investigated in light of the real circumstances of the particular case, because there may be cases in which it might be possible to say that the lack of concurrence in the jurisdiction was wholly irrelevant, and I propose to deal with realities in this case. We have read, and I am glad that we have read, the evidence. It is plain why this multiplicity of issues is, in fact, integrally bound up together. For it is the wife's case that because of the things that she complained of as evidence of cruelty she decided to leave home, and decided, as she says very plainly, never to return to cohabitation with her husband. Whether that is right or wrong is neither here nor there for the moment, but that there is an integral connexion between the two complaints is plain on the face of the evidence. Moreover, it is equally plain that the question of wilful neglect to maintain may be integrally bound up with the wife's success or failure on the charge of desertion. If she had no justification for leaving home it may be that she has put herself out of court, as a deserter, from obtaining maintenance on the ground of wilful neglect to maintain. I am not hinting or pretending to hint at what the decision should ultimately be. I am merely stating what is, in my opinion, an indisputable fact, that the present is a case in which, as a matter of substance and of fact, these three complaints are, or certainly may be, to put it at its lowest, integrally bound up together. The magistrates have declined jurisdiction to decide any one of them, and have sent
- I the whole lot, lock, stock and barrel, to the High Court, chiefly, it is true, because of the issue of custody.

It is plain beyond a peradventure, that since the separation occurred on Mar. 27, 1956, the issue of desertion could not properly be referred to the High Court, because, so far as I know, there is no substantive provision whereby the issue of desertion, three months before the date of the proceedings, can be brought before the High Court for any form of substantive relief. No doubt, incidentally it might arise in other matters. It might arise as a discretionary bar; for

example, it might arise for the purpose of reviving some antecedent offence which had been condoned, as in *Beard v. Beard* (3) ([1945] 2 All E.R. 306) but there is no substantive complaint for desertion for a period which is limited to three months which could properly be brought in the High Court. It is perfectly true that the justices could have said, as a matter of construction of s. 10 of the Summary Jurisdiction (Married Women) Act, 1895, that they would retain the matter of desertion, because they realised that there was no concurrent jurisdiction about that, but would refer the matters of persistent cruelty and wilful neglect to maintain. If they had done that, however, they would have been plainly wrong, because no court can decide the question of desertion on the facts of the present case without linking it up with the question of cruelty and the question of wilful neglect to maintain. That is only a development of what I have said before. But they have not done that, so the case cannot be justified by a division of the "matters" under s. 10. They have referred all the matters, and, in my opinion, this is so plainly wrong on the facts of the present case that it is a matter for appeal because there is plainly no concurrent jurisdiction on the subject of desertion. This, for the reasons which I have given, really lies at the root of the matter. In my opinion we have no option but to reverse this order and send these matters back for determination in the magistrates' court.

I only want to add one other word, because great play has been made about the absence of any jurisdiction on their part to restrict any custody to the wife to this country and to prohibit her taking the child out of the jurisdiction. It is perfectly true that in other respects, too, magistrates have a limited jurisdiction as to custody. It required legislation*, for example, to give them power to deal with the access of the other spouse, but one thing that is clear is that except in certain special cases they have no power to order custody to the husband under the summary jurisdiction code, as distinct from the Guardianship of Infants Acts, 1886 and 1925. It may well be, though I do not say that it should be so, that if they think that a wife is going to smuggle the child out of the jurisdiction, the husband would be the proper custodian; but under this code they have no power to make such an order on a wife's complaint just as they have no power to restrain the wife from taking the child out of the jurisdiction. How precisely they should deal with that is a matter for them if this question of custody becomes a vital issue, but the other complaints, about which I say nothing, are not yet proved. I can see nothing wrong, however, in justices saying that they are not going to make a custody order—that they cannot refer the question of custody on this particular complaint to the High Court because that would be taking two bites at the cherry; but that they can leave the question of custody to be dealt with by either party under the provisions of one Act or jurisdiction or another, and in one court or another, as they think is appropriate. Speaking for myself, I do not think that anybody could complain of that.

For the moment, however, we are concerned with the right of the wife to have her three matters of complaint tried by these justices. In my opinion that is inescapable, and this appeal ought to be allowed.

WALLINGTON, J.: I agree, and having regard to the fact that the judgment just delivered by my Lord has covered every point that arises in the case, I do not find it necessary or desirable to add anything to it.

Appeal allowed.

Solicitors: *Rhys Roberts & Co.*, agents for *W. Davies & Jenkins*, Llanelly (for the wife); *R. I. Lewis & Co.*, agents for *Leslie Williams*, Llanelly (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

* See the Married Women (Maintenance) Act, 1949, s. 5.

A

MELIAS, LTD. v. PRESTON AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), May 14, 24, 1957.]

B

Weights and Measures—Sale of pre-packed articles—Articles of short weight—Manager of shop responsible that articles of correct weight—Liability of owners of shop—Liability of manager of shop—“Actual offender”—Sale of Food (Weights and Measures) Act, 1926 (16 & 17 Geo. 5 c. 63), s. 12 (5).

C

The appellants, a limited company with shops in various localities, were convicted of being in possession for sale on two occasions of certain pre-packed articles of food not made up in one of the quantities specified in s. 4 (2) of the Sale of Food (Weights and Measures) Act, 1926. The shop in question was managed for the appellants by the second respondent, who, on the first occasion, had made up certain pre-packed articles of food before he went on leave, and was absent on leave when they were weighed by an inspector of weights and measures and found to be deficient in weight. On

D

the second occasion, the second respondent was present when the article in question was weighed by an inspector and found to be deficient in weight but he had not made it up though he admitted that it was his duty to check the weight and that he had failed to do so. The appellants preferred informations against the second respondent under s. 12 (5) of the Act alleging that he was the actual offender and that he had committed the offences without any consent, connivance or wilful default on their part. The justices dismissed the informations against the second respondent, but there was no finding that any other person had been appointed to manage the shop in the second respondent's absence. On appeal by the appellants,

E

Held: the conviction of the appellants must stand though they were exempted from penalties, and the second respondent must be convicted and penalties imposed on him since—

F

(i) the “actual offender” within s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, meant the person whose act or default had brought about the particular circumstances that constituted the offence, and that person was the second respondent, and

G

(ii) on both the first and the second occasion the second respondent was in possession of the goods for sale, although on the first occasion he was absent from the shop and on the second occasion he had not himself made up the packet.

Dictum of LORD HEWART, C.J., in *A. Walkling, Ltd. v. Robinson* ((1930), 94 J.P. at p. 76) not followed.

Hotchin v. Hindmarsh ([1891] 2 Q.B. 181) applied.

H

Appeal allowed.

[As to the defence of an employer charged with an offence under the Weights and Measures Act that he is not the actual offender, see 33 HALSBURY'S LAWS (2nd Edn.) 703, para. 1265.

For the Sale of Food (Weights and Measures) Act, 1926, s. 12, see 26 HALSBURY'S STATUTES (2nd Edn.) 1302.]

I

Cases referred to:

(1) *A. Walkling, Ltd. v. Robinson*, (1930), 99 L.J.K.B. 171; 143 L.T. 105; 94 J.P. 73; Digest Supp.

(2) *Pearks, Gunston & Tee, Ltd. v. Ward, Hennen v. Southern Counties Dairies Co.*, [1902] 2 K.B. 1; 71 L.J.K.B. 656; 87 L.T. 51; 66 J.P. 774; 25 Digest 81, 101.

(3) *Hotchin v. Hindmarsh*, [1891] 2 Q.B. 181; 60 L.J.M.C. 146; 65 L.T. 149; 55 J.P. 775; 25 Digest 98, 222.

- (4) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. A
718; 113 L.J.K.B. 513; 171 L.T. 113; *affd.* H.L., [1946] 1 All E.R. 98;
[1946] A.C. 163; 30 Digest (Repl.) 225, 691.

Case Stated.

This was a Case Stated by justices for the Borough of Royal Leamington Spa in respect of their adjudication as a magistrates' court sitting at Leamington Spa on Dec. 10, 1956. On Oct. 26, 1956, the first respondent, John Sidney Preston, an inspector of weights and measures, acting on behalf of the Warwickshire County Council, preferred three informations against the appellants, charging that on certain dates the appellants unlawfully had in their possession for sale certain pre-packed articles of food of one of the kinds set forth in the Sale of Food (Weights and Measures) Act, 1926, Sch. 1, which articles were not made up in one of the quantities specified in s. 4 (2) of the Act, namely, in quantities of two ounces, or in multiples of two ounces up to a limit of eight ounces, in multiples of one quarter pound up to a limit of two pounds, in multiples of one half pound up to a limit of four pounds, or in multiples of one pound, in that the weights of the articles were of short weight, contrary to s. 4 (2) of the Act. The first two informations charged such possession on Oct. 3, 1956, of thirteen packets of lard and ten packets of dried peas respectively; and the third information charged such possession on Oct. 18, 1956, of a packet of butter. At the hearing of the informations, the appellants, having served notice in accordance with the provisions of s. 12 (5) of the Act in relation to each of the informations, the second respondent, Victor Reynolds, was brought before the court on informations preferred by the appellants charging that in relation to each of the informations against them, they having used due diligence to enforce the execution of the Act, the second respondent had committed the offence in question without their consent, connivance or wilful default, and that he was the actual offender. The following facts were found. The appellants were a limited company owning, inter alia, a grocery stores at Clemens Street, Leamington Spa, of which the second respondent was the manager. On Oct. 3, 1956, one Alan Evans, a duly appointed officer under the Act, entered the stores and weighed the contents of certain pre-packed articles of food including thirteen packets of lard none of which was made up in accordance with s. 4 of the Act, and each of which was of short weight. The second respondent was absent with leave from the stores on that date but the packets of lard had been weighed up and packed at the stores by him on a date previous to his absence with leave. Alan Evans on the same date also weighed the contents of ten packets of peas at the stores, none of which was made up in accordance with s. 4 of the Act, and each of which was of short weight. On Oct. 18, 1956, one Raymond George Funnell, a duly appointed officer under the Act, entered the stores and in the presence of the second respondent weighed the contents of certain pre-packed articles of food, including one packet of butter. The packet of butter was not made up in accordance with s. 4 of the Act, and was of short weight. The second respondent, as manager, was in charge of the shop, and was responsible that the articles weighed in the shop were weighed and made up for sale in accordance with s. 4, and he was under direct and positive instructions from the appellants that he should so weigh and make them up. The second respondent was experienced in his duties and had been employed by the appellants for thirty years. He had been properly and sufficiently instructed as to the provisions of the Act and his duty to comply therewith.

It was contended on behalf of the appellants (a) that while offences under s. 4 of the Act had been established, the appellants had satisfied the court that they had used due diligence to enforce the execution of the Act, and that the offences in question were committed without their consent, connivance or wilful default; and (b) that they should be exempt from any penalty in relation to any of the offences charged. It was contended on behalf of the first respondent that the

A second respondent could not be the actual offender in relation to any of the offences, because, as manager of the stores, he could not be held to have been in possession of the articles of food; and (b) that in relation to the offences of Oct. 3, 1956, the second respondent could not be the actual offender because, although he weighed up and packed the articles of food at an earlier date, he was not, on the date in question, present in the stores.

B The justices convicted the appellants and dismissed the appellants' informations against the second respondent, and the appellants now appealed.

John Thompson, Q.C., and J. M. Davies for the appellants.

Paul Wrightson for the first respondent.

S. Bolton for the second respondent.

C *Cur. adv. vult.*

May 24. The following judgments were read.

D **LORD GODDARD, C.J.:** This Special Case is stated by the justices for Royal Leamington Spa before whom the appellants were summoned for three offences against s. 4 (2) of the Sale of Food (Weights and Measures) Act, 1926, of being in possession for sale of pre-packed articles of food not made up in one of the quantities specified in the section. The first two informations referred to packets of lard and peas respectively, which were alleged to be in the appellants' possession on Oct. 3, 1956, while the third referred to a packet of butter on Oct. 18. The appellants took the steps necessary to bring the second respondent, who is the manager of their shop at Leamington Spa, before the court under s. 12 (5), alleging that he was the actual offender and had committed the offence without any consent, connivance or wilful default on their part. Accordingly they contended that, while they could be convicted of the offences, they were exempted from penalties and that the second respondent must be convicted and the penalties imposed on him.

E The appellants are a limited company with shops in various localities. On the dates mentioned in the informations, an inspector of weights and measures weighed the articles referred to and found certain deficiencies amounting to a few drachms in the packets he weighed. The second respondent had been in the appellants' service for thirty years and had been fully instructed in his duties and in the provisions of the various Acts relating to the sale of food. The justices were evidently satisfied that the deficiencies were caused without any fault on the part of the appellants. The packets of lard and peas had been weighed and prepared by the second respondent before he went on leave, but when the inspector visited the shop on Oct. 3 he was absent on holiday. On Oct. 18, when the packet of butter was weighed, the second respondent was present. He had not made up the packet but we were told that he admitted it was his duty to check the weight and that he failed to do so. It seems that the second respondent had pleaded guilty to the three informations before the justices but they held that the appellants were liable to be convicted and were not exempt from the penalties and, as we understand, they dismissed the summonses against the second respondent notwithstanding his pleas. The justices held that they were bound by the decision of this court in *A. Walkling, Ltd. v. Robinson* (1) ((1930), 94 J.P. 73), and that the second respondent could not be held responsible as he was on leave on the date in question in the first two informations and that the case referred to also applied to the offence on Oct. 18.

I The first point for the decision of this court is what is meant by the words "the actual offender" in s. 12 (5). This section is designed to afford a measure of relief to an employer who, for statutory offences of this description, is liable for the acts of his servants on the principle generally known as vicarious liability. The absence of mens rea in the matter had been held in a series of cases to afford no defence. This applies to a corporate body as to an individual: see *Pearks, Gunston & Tee, Ltd. v. Ward* (2) ([1902] 2 K.B. 1), especially the judgment of

CHANNELL, J. (*ibid.*, at p. 10). The Act which the court had there to consider was the Sale of Food and Drugs Act, 1875, and s. 5 of that Act did permit a defendant charged under s. 3, which dealt with adulteration, to prove as a defence that the adulteration was unknown to him and that he had acted with all due care, but the Act did not give a like defence to a charge under s. 6 which dealt with sales to the prejudice of a purchaser. In the present Act, sub-s. (2) of s. 12 affords a defence where a deficiency in weight was due to the action of some person over whom the defendant had no control. Sub-section (5) deals with the case of master and servant and, while not affording the former a defence exempts him from penalties if he shows he was in no way to blame and brings the actual offender before the court. The actual offender for this purpose must, therefore, be a servant of the employer. In my opinion, the object of the sub-section is twofold: first to relieve from penalty, though not from conviction, a person who is not morally to blame, and secondly to put pressure on the thoughtless or careless servant to do his whole duty and so protect the public by imposing the penalty on him. "Actual offender" accordingly, in my opinion, means the person whose act or default has brought about the particular circumstances that constitute the offence. The use of such a wide and non-technical expression indicates, in my opinion, that the court is not to be concerned with nice matters such as the distinction between possession in law and custody in fact, or that in law the party to a sale is the owner of the shop or of the goods sold and not the shop assistant who sells on his behalf. It is the physical act that matters, and this is clearly shown by *Hotchin v. Hindmarsh* (3) ([1891] 2 Q.B. 181). Where the employer is a limited company it would seem that the case is a fortiori. A company can only sell by the hand of its servant and can only possess goods by their being in the possession of those employed to obtain and keep them. I should feel no doubt on the matter were it not for the case which, the magistrates felt, bound them to decide as they did, namely, *A. Walkling, Ltd. v. Robinson* (1). There LORD HEWART, C.J., said in terms that the articles in that case were always in the possession of the employers and not of their manager, and it is at least open to question whether we ought to treat this observation or those of AVORY, J., as merely obiter. It is, however, difficult to see what protection s. 12 (5) can afford to any employer, let alone a company, for an offence against s. 4 if that is right. It is unfortunate that *Hotchin v. Hindmarsh* (3) was not cited to the court and, had it been, while the actual decision might have been the same, the expressions relied on by the prosecution in this case as to the possession of the property would not, I think, have been used. *Hotchin v. Hindmarsh* (3) shows that, for the purpose of these statutes, regard is to be had to the person who does the physical act. A sale, or an exposure for sale, may be effected not only by the master but also by the servant who actually sells or is in actual charge of the article for sale, and, as MATHEW, J., in a short but pithy judgment, points out (*ibid.*, at p. 189), it would be an odd result if a guilty servant were to escape and his innocent employer alone were to be convicted. As this case was not cited to the court in *A. Walkling, Ltd. v. Robinson* (1), in accordance with the principles laid down in *Young v. Bristol Aeroplane Co., Ltd.* (4) ([1944] 2 All E.R. 293), we are not bound to follow the expressions in *A. Walkling, Ltd. v. Robinson* (1).

The question now arises whether any distinction is to be drawn between the offences alleged in the first two informations and the third. In the first two, the packets had been prepared by the second respondent but he was on leave on the day of the inspector's visit, while in the third he had not prepared the packet but had not, as was his duty, checked it on his return from leave and he was in the shop when the inspector called. As the manager for the company, he was entrusted with the general management and, in my opinion, the lard and the peas were always in his possession for sale though he was temporarily absent. To hold otherwise would, it seems to me, amount to saying that a manager for a company is not in possession of his employers' goods while he is out of the shop

- A for a temporary purpose or at night if he did not live on the premises. There is no finding that anyone else had been appointed to manage the shop while he was on leave and to his credit be it said he did not take any such point but admitted his responsibility. He was clearly in possession of the butter for sale when he returned from leave and must take responsibility for that package, whether he made it up or not, and again he does not seek to say otherwise.
- B The case must go back to the justices with a direction that, while the conviction of the appellants stands, they are exempt from penalties, and the justices must convict the second respondent and impose the penalties on him. The first respondent must pay the costs of the appellants on this appeal and also of the second respondent as he had always pleaded guilty and did not dispute his liability in this court. The costs below must be dealt with by the justices. That we are
- C differing from them is no reflection on the justices, for in view of the authority that was cited to them they could not have decided otherwise than they did.

HILBERY, J.: I have had the advantage of reading the judgment which my Lord has just delivered, and I agree with it, but I wish, however, to add my comment on *A. Walkling, Ltd. v. Robinson* (1) ((1930), 94 J.P. 73). It appears to me that in *A. Walkling, Ltd. v. Robinson* (1) it was not necessary to the decision of the court that they should express an opinion on the two questions asked by quarter sessions which led to the words used by LORD HEWART, C.J., which have been regarded by the justices in this case as a binding decision, that the manager of a shop cannot be a person in actual possession of the goods of his employer so as to be responsible under the provisions of s. 12 (5).

- E In *A. Walkling, Ltd. v. Robinson* (1) there had been three informations before the justices preferred by Robinson against *A. Walkling, Ltd.*, under s. 6 (2) of the Sale of Food (Weights and Measures) Act, 1926, the first charging them with having in their possession for sale at North Circular Road, Hendon, loaves of bread which did not weigh one pound or an integral number of pounds; the second charging them with unlawfully selling a loaf of bread which did not
- F weigh one pound or an integral number of pounds; the third charging them that at Folkestone House, Brent Street, Hendon, they had in their possession for sale loaves of bread which did not weigh one pound or an integral number of pounds. *A. Walkling, Ltd.*, preferred three informations under s. 12 (5) against F. A. Pearce, their employee, charging him with being guilty as the actual offender of each of the offences with which Walkling's were charged as aforesaid. Walkling's
- G were convicted by the justices on all three informations against them. The informations against Pearce were dismissed.

The question, therefore, which had arisen under s. 12 (5), whether Walkling's servant Pearce was the person who had committed the offence in question, was no longer open since he had been acquitted. None the less, at quarter sessions, to which court Walkling's appealed, Walkling's still sought to set up, amongst

H other grounds of appeal, the assertion that they were not guilty of the offence, and that Pearce was the actual offender under s. 12 (5) and had committed the offence in question. Quarter sessions asked the opinion of the King's Bench Division first on two questions: (i) Were the proceedings proceedings in respect of an alleged deficiency in weight? (ii) Was there evidence on which the court of quarter sessions could hold that the appellants had discharged the burden of

I proving (a) that the deficiency was due to a bona fide mistake or accident or other cause beyond the appellants' control; and (b) that all reasonable precautions had been taken and all due diligence exercised by the appellants to prevent the occurrence of such deficiency?

The Lord Chief Justice and the two other judges were unanimously of opinion that there was no evidence on which the court of quarter sessions could hold that the appellants had discharged this burden set out in question (ii), and that left the matter concluded because the conviction of Walkling's would have to stand.

Quarter sessions had, however, added two further questions asking: (iii) Had the court of quarter sessions power to exempt the appellants from any penalty under s. 12 (5), having regard to the fact that Pearce had been acquitted? (iv) On the facts proved or admitted was Pearce the actual offender within the meaning of s. 12 (5) of the said statute?—(a) in the case of the loaves on the roundsman's barrow; (b) in the case of the loaves at the shop? As the court pointed out, it was not open to quarter sessions to go into the matters which were the subject of these two questions.

The Lord Chief Justice said in his judgment (94 J.P. at p. 76):

“ Before the justices Pearce was acquitted, and I do not think that at quarter sessions it was open to these appellants to allege or to argue that Pearce was wrongly acquitted. In order that they might avail themselves of s. 12 (5), it was necessary for them to say that notwithstanding the acquittal at petty sessions, nevertheless in truth and in fact the actual offender was Pearce, and it was he who had committed the offence in question. It seems to me that it was not open to the appellants to attempt to prove that proposition . . . ”

and then unfortunately the Lord Chief Justice added the words (ibid.) “ and, even if it had been, upon these materials they could not prove it ”. Immediately thereafter, notwithstanding what he had said he did, however, offer an answer to the last question saying that so far as the loaves on the barrow were concerned, the facts had shown that Pearce was not the actual offender and so far as the loaves in the shop were concerned, true, he was the manager of the shop, but he was no more in possession of these loaves than was any other person employed on those premises. The possession of the loaves in the shop was the possession of A. Walkling, Ltd., the appellants. These observations were not necessary in the case. The question need not have been answered because Pearce had been acquitted and it seems to me, therefore, that there is something to be said for regarding them as obiter.

If the court there did intend to say that because Pearce was the manager and an employee he could not be in possession of the loaves at the shop for sale, then they were saying something which is quite contrary to the whole purpose and effect of s. 12 (5), which is designed to give relief against the penalty where the master is vicariously responsible for what are in truth the acts of his employee.

If *A. Walkling, Ltd. v. Robinson* (1) decided that the manager of the shop could not be the actual offender, because the loaves in that case were no more in his possession than that of any other person employed on these premises, it would be tantamount to deciding that an employer could never get the benefit of s. 12 (5). I would regard the observations of the court in that case on this topic as not necessary for the decision and as made per incuriam, the decision in *Hotchin v. Hindmarsh* (3) ([1891] 2 Q.B. 181) not having been cited to the court, the court's attention not having been called to the principles applied in that case.

DEVLIN, J.: I agree.

Appeal allowed.

Solicitors: *Arthur Taylor & Co.*, agents for *Mace & Jones*, Liverpool (for the appellants); *Sharpe, Pritchard & Co.*, agents for *R. M. Willis*, Warwick (for the first respondent); *Thompson, Quarrell & Megaw*, agents for *Blythe, Owen, George & Co.*, Leamington Spa (for the second respondent).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

H.M. TREASURY v. HARRIS.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J.), May 20, 1957.]

Criminal Law—Sentence—Imprisonment and fine—Further term of imprisonment in default of payment—Death of felon while serving sentence for felony and before fine paid—Whether Crown entitled to recover fine from felon's personal representatives—Criminal Justice Act, 1948 (11 & 12 Geo. 6 c. 58), s. 14 (1), s. 15.

Fine—Recovery from personal representatives of deceased felon—Debt of record.

On May 17, 1952, H., having been convicted for felony on an indictment containing four counts, was sentenced to two years' imprisonment on each count, the sentences to run concurrently, and, under s. 13 of the Criminal Justice Act, 1948, was fined £250 in respect of each count, viz., a total fine of £1,000. It was further ordered pursuant to s. 14 (1) (c) of the Act of 1948, which empowers the court to fix a term of imprisonment if a fine is "not duly paid or recovered", that H. should undergo four months' additional imprisonment in respect of each fine, in default of payment. The fines and the order relating to them were enrolled by the clerk of the peace under s. 2 of the Levy of Fines Act, 1822. H. died in January, 1953, while serving the sentence of two years' imprisonment imposed on him on May 17, 1952, and before any part of the fines was paid or levied. The Crown now sought to recover from H.'s personal representatives the total amount of the fines, viz., £1,000.

Held: the Crown was entitled to recover from H.'s personal representatives the fines imposed on H. because, the fines imposed for felony were debts of record due to the Crown which the Crown could recover by process of law (*R. v. Woolf* (1819), 2 B. & Ald. 609, applied), and the fact that H. had died and therefore could no longer be imprisoned did not do away with the fines; moreover there was nothing in s. 14 or s. 15 of the Criminal Justice Act, 1948, which altered the position.

Observations on s. 15 of the Criminal Justice Act, 1948, at p. 460, letters A to I, post.

[As to the imposition of fines at common law and by statute, and as to the powers of quarter sessions in relation to fines, see 10 HALSBURY'S LAWS (3rd Edn.) 494, paras. 901, 902, p. 496, para. 907; for cases on the subject of fines, see 14 DIGEST (Repl.) 568, 5683-5691.

For the Levy of Fines Act, 1822, s. 2, see 14 HALSBURY'S STATUTES (2nd Edn.) 723; and for the Criminal Justice Act, 1948, s. 14, s. 15, see 28 HALSBURY'S STATUTES (2nd Edn.) 364, 365.]

Cases referred to:

- (1) *R. v. Woolf*, (1819), 2 B. & Ald. 609; 1 Chit. 428; 106 E.R. 488; 14 Digest (Repl.) 568, 5687.
- (2) *R. v. Brook*, [1949] 1 All E.R. 787; [1949] 2 K.B. 138; [1949] L.J.R. 1457; 113 J.P. 219; 14 Digest (Repl.) 568, 5688.

Action.

This was an action brought by Her Majesty's Treasury, the plaintiffs, suing on behalf of the Crown pursuant to s. 17 (2) of the Crown Proceedings Act, 1947, to recover a fine of £1,000 imposed on one Arthur Frank Harris (referred to hereinafter as the deceased), against Elizabeth Harris and Frank Harris, the defendants, in their capacity as personal representatives of the deceased. The defendants had been granted letters of administration to the deceased's estate.

At the general quarter sessions held in the County Borough of Southampton on May 17, 1952, the deceased was convicted on indictment on four counts of

receiving stolen property knowing it to be stolen. The deceased was sentenced to two years' imprisonment, on each of the four counts, to run concurrently, and fines of £250 were imposed in respect of each of the four counts, viz., a total fine of £1,000, and the deceased was ordered to pay costs of £250. Further, pursuant to s. 14 (1) of the Criminal Justice Act, 1948, it was ordered that in default of payment of the fines there should be "a further sentence of four months' imprisonment consecutive in respect of each fine". The indorsement on the indictment read:

"Two years' imprisonment concurrently and fine of £250 on each of the first, second, third and fourth counts and to pay £250 towards costs and four months' additional imprisonment in respect of each fine in default of payment."

Similarly, the certificate of conviction contained the words "... and to undergo four months' additional imprisonment in respect of each fine in default of payment". The fines and the order relating to them were duly copied by the clerk of the peace on a roll pursuant to s. 2 of the Levy of Fines Act, 1822, in the following terms:

"Arthur Frank Harris of 47, Belmont Road, Southampton (at present serving two years' imprisonment from May 17, 1952) for four charges of receiving stolen goods knowing them to have been stolen. Two hundred and fifty pounds (£250) in respect of each of the four charges (amounting to one thousand pounds—£1,000). If not paid at expiration of term of imprisonment now being served, four months' additional imprisonment in respect of each sum of £250 not paid, to be served consecutively."

The deceased died on Jan. 7, 1953, while serving the sentence of two years' imprisonment passed on him on May 17, 1952, and before any part of the fines had been paid or levied. The following entry dated Oct. 26, 1956, appeared in the sheriff's estreat roll:

"Fines . . . at any previous sessions which have not been fully levied or discharged at opening date of these sessions, [viz. Sept. 17, 1956] Arthur Frank Harris . . . now deceased for 4 convictions of receiving goods knowing them to have been stolen. Fines imposed at Easter quarter sessions 1952—two hundred and fifty pounds (£250) in respect of each of the 4 convictions (amounting to one thousand pounds—£1,000). To be paid on or before expiration of term of imprisonment to which sentenced at the same sessions."

Her Majesty's Treasury contended that the fines totalling £1,000 were recoverable from the deceased's estate because as soon as they were imposed, or alternatively, when they were enrolled under s. 2 of the Act of 1822, they became debts of record which were due and payable to the Crown either on the deceased's death, viz., Jan. 7, 1953, or on May 17, 1954, when the sentence of two years' imprisonment would have expired. The defendants contended that (i) under s. 15 of the Act of 1948 a fine was only recoverable by the sheriff; (ii) under s. 15 (3)* of the Act of 1948 the power of recovery was not exercisable; (iii) the additional terms of imprisonment imposed in default of payment of the fines ran from May 17, 1952, and the deceased, therefore had served a proportion of those terms when he died on Jan. 7, 1953, and the fines should be proportionally abated under s. 15 (5) (b) of the Act of 1948; and (iv) under the Act of 1948, a fine was a punishment personal to the debtor and lapsed on his death.

Rodger Winn for the plaintiffs, H.M. Treasury.
E. S. Fay, Q.C., and *T. R. Crawford* for the defendants.

* For the terms of s. 15 (3) see p. 459, letter H, post.

A **LORD GODDARD, C.J.:** This is an action brought by Her Majesty's Treasury pursuant to the Crown Proceedings Act, 1947, to recover against the personal representatives of Arthur Frank Harris (referred to hereinafter as the deceased), the sum of £1,000, which was imposed on him in the shape of four fines of £250 each for certain offences for which he was convicted before the recorder of Southampton on May 17, 1952. The convictions were for felony, and the recorder passed a sentence of two years' imprisonment and ordered that the deceased should pay a fine of £250 on each of the four counts and costs and should undergo four months' additional imprisonment in respect of each fine in default of payment.

B I say at once that, in my opinion, the words "additional imprisonment" mean imprisonment to follow on the sentence of two years' imprisonment which C had been awarded in the earlier part of the conviction. That is to say, the deceased received two years' imprisonment, to run concurrently, on each of the four counts in the indictment, a fine of £250 on each count, and an additional (that is to say, consecutive) sentence of four months' imprisonment in respect of each fine if he did not pay it. I think that can be the only meaning, because if the complication which arose in this case (that is to say, the deceased's death), D had not arisen, it would be contended that he owed £1,000 when he went into prison, but that the additional sentence could not take effect until he had failed to pay the money and until he had served the concurrent sentence, because otherwise it would not be a sentence "additional to" the substantive sentence of imprisonment which had been passed on him.

E The question which arises in this case is whether or not the personal representatives of a dead man, on whom a sentence involving the payment of a fine has been imposed, can be sued by the Crown for the fine. Apparently, there is no authority on the point that the industry of counsel can find. We also have to consider the provisions of the Criminal Justice Act, 1948.

F It is important to remember that the deceased was here convicted of and fined for a felony, and if it had not been for s. 13 of the Act of 1948 he could not have been sentenced to pay a fine, because it is extremely doubtful whether a fine ever could be imposed for a felony at common law. In fact, it was not until the Larceny Acts and certain other Acts were passed in the middle of Queen Victoria's reign that provision was made for imposing the penalty of a fine in certain cases of felony, but then only in those cases which could be dealt with summarily. So it can be stated quite definitely that a court of indictment had no power until 1948 to G impose a sentence other than imprisonment for a felony.

Section 13 of the Criminal Justice Act, 1948, provides:

H "Any court before which an offender is convicted on indictment of felony (not being a felony the sentence for which is fixed by law) shall have power to fine the offender in lieu of or in addition to dealing with him in any other manner in which the court has power to deal with him."

Section 14 (1) of the Act of 1948 provides:

I "Subject to the provisions of this section, where a fine is imposed by, or a recognizance is forfeited before, a court of assize or quarter sessions, an order may be made in accordance with the provisions of this section—(a) allowing time for the payment of the amount of the fine or the amount due under the recognizance; (b) directing payment of the said amount by instalments of such amounts and on such dates respectively as may be specified in the order; (c) fixing a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered; (d) in the case of a recognizance, discharging the recognizance or reducing the amount due thereunder: Provided that any term of imprisonment fixed under this sub-section in default of payment of a fine shall not exceed twelve months."

Sub-section (3) of s. 14 provides:

"Where any person liable for the payment of a fine or a sum due under a recognizance to which this section applies is sentenced by the court to, or is serving or otherwise liable to serve, a term of imprisonment, the court may order that any term of imprisonment fixed under para. (c) of sub-s. (1) of this section shall not begin to run until after the end of the first-mentioned term of imprisonment."

It might have been as well if the words used in that sub-section were followed by, "where the court intends the sentence of imprisonment for non-payment of the fine to follow on the first mentioned term of imprisonment"; but I am satisfied that that was the intention of the learned recorder in giving judgment, when he directed "four months' additional imprisonment in respect of each fine in default of payment."

Counsel for the defendants, in the course of a careful argument, submitted that under the provisions of s. 14 and s. 15 of the Act of 1948 this action cannot lie because, amongst other things, the sheriff is the only person who can recover the fine, and there has been no default.

The first thing that we have to consider is: what is the nature of a fine? The nature of a fine, of course, is a monetary penalty, but it is a monetary penalty which is due to the Crown, and, in my opinion, when a man is sentenced to pay a fine there at once arises a debt of record to the Crown. A civil debt can be a debt of record, a judgment debt is a debt of record, and I think that a fine is a debt of record; the person entitled to the fine is the Crown, except in the very few exceptional cases where corporations have sometimes, by charter, been given the right to be paid certain fines; but, generally speaking, the fine goes to the Exchequer and it is a debt due to the Crown.

In *R. v. Woolf* (1) ((1819), 2 B. & Ald. 609), it was held:

"Where a defendant, in an indictment for a misdemeanour, has received judgment of fine and imprisonment: held that a *levari facias* may issue immediately to take his goods in execution for the fine."

It seems that, for some reason which, I dare say, is founded on history, if a debt had to be levied by the sheriff at the suit of the Crown the writ was called a *levari facias*, but I do not think it differs, really, in any material respect from a *fiari facias*.

Here was a decision in 1819 that as soon as the judgment of fine was pronounced the sheriff could levy the fine. It is true that in 1822 the Levy of Fines Act, 1822, was passed which is referred to in s. 15 (1) of the Criminal Justice Act, 1948, as if it is an effective and live Act, but the judgment of the Court of Criminal Appeal in *R. v. Brook* (2) ([1949] 1 All E.R. 787), shows that very considerable amendments have been made in the Act of 1822 by reason of the provisions which are contained in the Act of 1948. It seems to me, however, that there is nothing in either s. 14 or s. 15 of the Criminal Justice Act, 1948 (to which I will refer in a moment) which in any way alters the law that a fine is a debt due to the Crown. The Levy of Fines Act, 1822, was passed, as the preamble shows, to provide for "the more speedy return and levying of fines, penalties and forfeitures, and recognizances estreated". I suppose that it may have been passed partly owing to the decision of *R. v. Woolf* (1), because it was thought that a more expeditious method of levying fines would be thereby provided. We are concerned, however, only with the provisions of s. 14 and s. 15 of the Act of 1948 and, as I have said, in s. 14 (1) (c) it is provided that the court may fix

"a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered", and I think that the use of the word "recovered" shows that the Crown may take steps to recover the money. The ordinary steps which the Crown would take would be to recover the money by means of a writ; it would be difficult for the Crown to take proceedings under the Levy of Fines Act, 1822.

- A The difficulty in this case has arisen because while the deceased was undergoing the sentence of two years' imprisonment which was passed on him on May 17, 1952, he died, in January, 1953, and the fine had never been levied because it was thought that the deceased would have until he had finished his sentence to pay the fine. I need not decide now whether, under an order drawn up as this order was, it is to be presumed that the recorder gave him time to pay the fine until he came out of prison. I think that he probably did not. It looks to me as if the fine was immediately payable, and if the deceased did not pay it, or if it was not paid on his behalf by whoever had the management of his affairs while he was in prison—and, of course, a receiver could be appointed if necessary—he would have to undergo, instead of two years' imprisonment, a sentence of two years and four months, but he could always avoid the additional four months by paying the fine. If it is necessary for me to decide it, under the form of order and conviction drawn up here, it does not seem to me that the payment of the fine was postponed until the deceased came out of prison. But whether it was or whether it was not, the time has long gone by when that fine should have been paid, and the question is whether the fact of the deceased's death, so that he could no longer be imprisoned in default of payment of the fine, has done away with the fine.
- D In my opinion, it has not. I think that the fine is a debt due to the Crown and remains a debt due to the Crown. Although there may be various consequences which can be imposed by the court if a man does not pay, I do not think that there is anything in s. 15 and s. 14 of the Act of 1948 which says that a man can prevent the Crown recovering a fine by electing to go to prison—although if he does go to prison I have no doubt that the imprisonment wipes out the fine.
- E It is not uncommon, where a fine has been imposed by the court, for somebody, some sympathiser or person interested in the particular matter in respect of which a convicted person has gone to prison, to pay the fine for him. If the Crown gets the money I do not think that the Crown can keep the person in prison, and I doubt very much whether, once the money has been paid, that person can say: "I am not coming out of prison; I am going to stay in prison". This court has
- F had to deal with curious cases in which persons in prison for contempt, for not executing deeds and documents, and that sort of thing, have refused to apply to be let out of prison, even though they have only got to sign the documents, and the court has begged and implored them so to do. In one or two cases we have had people who have said they were more comfortable in prison than they were out and that they preferred to stay in prison. That occurs in civil process, but in
- G criminal process I do not think that would apply. If a sympathiser comes forward and pays the fine, he has discharged the Crown's debt, the Crown has received the money, and I do not think a prisoner can say that he objects to the payment and will remain in prison.

- H Counsel for the defendants called attention to the provisions of s. 15* of the Act of 1948 and pointed out the difficulty of reconciling those provisions with the Levy of Fines Act, 1822†. I think that if this case goes to the Court of Appeal

* Section 15 (3) provides: "Where an order under [s. 14 (1) of the Act of 1948] allowing time for the payment of the amount of the fine . . . or directing payment of the said amount by instalments, is enrolled under [s. 2 of the Levy of Fines Act, 1822, in accordance with sub-s. (1) of s. 15 of the Act of 1948], or notice of the making of any such order is given to the officer responsible for the recovery of the fine . . . in accordance with [sub-s. (2) of s. 15], that officer shall not exercise his powers until there is a default in complying with the order."

† Section 2 of the Levy of Fines Act, 1822, provides inter alia that fines imposed at quarter sessions must be copied on to a roll by the clerk of the peace who must, within twenty-one days after the adjournment of the quarter sessions, send a copy of the roll together with a writ of execution to the sheriff, "which shall be the authority to such sheriff . . . for proceeding to the immediate levying and recovering of such fines . . . on the goods and chattels of [the debtors], or for taking into custody [of their bodies], in case sufficient goods and chattels shall not be found whereon distress can be made for recovery thereof . . ."

it will be open to that court to consider the judgment of the Court of Criminal Appeal in *R. v. Brook* (2), and the Court of Appeal will, no doubt, be free to say whether they agree with that judgment in which it was said in effect ([1949] 1 All E.R. at p. 789), that very little of the Act of 1822 remained in operation after the passing of the Criminal Justice Act, 1948. I cannot find anything in s. 15, which, in my opinion, is a machinery section only, to say that if a defendant has assets there is anything to prevent the sheriff levying on them. If the levy cannot take place, it is difficult to understand what meaning can be given to the words "or recovered" in para. (c) of s. 14 (1) which I have already read. I do not think those words can be confined to the case where the Crown is recovering the fine by being paid by a friend or relative of the person convicted. They must mean that the fine is either "paid or recovered" by process of law.

Section 15 was necessary because of the fact that the Act of 1948, in s. 14 (1), contemplates that time may be given in which to pay the fine; that once time is given, the convicted person may make further applications for further time; and that there may be an order for payment by instalments and the convicted person can ask the court to vary the instalments. Then there are the provisions of s. 15 (5) that if a man is sentenced to pay a fine and does not pay it and is taken to prison, he can buy his release by paying the fine. Moreover, if he pays a part of the fine, s. 15 (5) (b) provides:

"... the total number of days in the term of imprisonment shall be reduced proportionately, that is to say, by such number of days as bears to the said total number of days less one day the proportion most nearly approximating to, without exceeding, the proportion which the part paid bears to the amount of the fine . . ."

In other words, if a man was sentenced to a month's imprisonment and a week has gone by and he can afford to pay three-quarters of the fine, if he pays the three-quarters of the fine, or substantially three-quarters of the fine, he can be discharged. Considering the provisions of s. 15, which I hold to be a machinery section—indeed, the marginal note is "Incidental provisions as to fines and forfeited recognizances"—it seems to me that, although the matter is not altogether clear, the debt remains until it is paid.

Turning to the authority of the sheriff to levy, his only authority is to levy on the goods of the person himself, and if that person has died a difficulty arises. If it was a levy in a civil suit provision is made, by R.S.C., Ord. 42, r. 23, for an application to be made to the court for leave to issue execution against the dead man's assets, which would be in the hands of his executors; but there seems to be no provision made in s. 15 of the Act of 1948 for the eventuality of the death of a man who has been sentenced to a fine or imprisonment and who has died without paying the fine. There is a difficulty, I think, in ordering the sheriff to seize the dead man's assets, but in the case of a convicted person sentenced to pay a fine, who is alive, execution can issue against his assets, although if he does not pay he may also be liable to be imprisoned. The sheriff may take his body or he may take his goods, and if the goods do not realise the whole amount of the fine but only part of it, s. 15 (5) of the Act of 1948, which relates the length of imprisonment to the proportion of the fine that is paid, would apply. But as this is a criminal matter and not otherwise provided for, I see no reason why the Crown should not sue for the amount of the fine. I still think it is a debt and, for those reasons, I think the Crown can issue a writ for the amount of the fine that has been imposed.

It seems to me that it is desirable that the Crown should do so although the deceased is dead. I do not think that any doubt could be thrown on the power of the court in cases of this sort, not only to punish the man for the crime which he has committed, but also to take steps to see that he should not benefit by keeping the result of the crime; and I think it is equally important, that if a man is dead, his estate should not benefit by the proceeds of the crime.

A For these reasons, although, as I say, the point is not an easy one and it is a new point, I think there must be judgment for Her Majesty's Treasury for the sum of £1,000 and costs.

Judgment for the plaintiffs (H.M. Treasury).

Solicitors: *Treasury Solicitor* (for the plaintiffs); *Speechly, Mumford & Craig*, agents for *Lamport, Bassitt & Hiscock*, Southampton (for the defendants).

B [Reported by WENDY SHOCKETT, Barrister-at-Law.]

NATIONAL COAL BOARD v. INLAND REVENUE COMMISSIONERS.

C [HOUSE OF LORDS (Lord Morton of Henryton, Lord Reid, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm), April 8, 9, May 29, 1957.]

Profits Tax—Allowance—Industrial building or structure—Annual allowance for dwelling-houses built for and occupied by men at colliery—Buildings likely to have no value at date when mine worked out—Buildings having substantial value if mining ceased at the time of assessment—Income Tax Act, 1945 (8 & 9 Geo. 6 c. 32), s. 8 (3), proviso.

D The appellant board owned a number of dwelling-houses in Nottinghamshire which were occupied by their employees working at Thoresby Colliery in that county. The houses would probably become valueless through age about fifty years before the mine was worked out, but if the colliery were closed at the present time the houses would have a substantial value.

E The board, having been assessed to the profits tax for 1951, claimed annual allowances for the houses as industrial buildings within s. 8 of the Income Tax Act, 1945. By sub-s. (3)* of that section a dwelling-house was excluded from being an industrial building unless (in the words of the proviso) "the building . . . is likely to have little or no value to the person carrying on the trade when the mine . . . is no longer worked . . ."

F **Held:** the board was not entitled to the annual allowances claimed, since the intention of s. 8 (3) of the Income Tax Act, 1945, was that dwelling-houses should not rank for allowance unless they were so intimately connected with the enterprise that, if it ceased, they would have no value; as these houses would not be rendered valueless by the closing of the mine, they were not within the proviso to s. 8 (3), and the fact that they would become valueless owing to old age before the mine might be expected to be worked out was irrelevant.

G Appeal dismissed.

[**Editorial Note.** The Income Tax Act, 1945, s. 8 (12 HALSBURY'S STATUTES (2nd Edn.) 620) has been repealed by the Income Tax Act, 1952, and replaced by s. 271 of that Act, for which, see 31 HALSBURY'S STATUTES (2nd Edn.) 264.]

Appeal.

I Appeal by the National Coal Board from an order of the Court of Appeal (SINGLETON, MORRIS and ROMER, L.JJ.), dated July 24, 1956, reversing an order of ROXBURGH, J., dated Mar. 2, 1956, whereby an appeal by the Crown on a Case Stated by the Commissioners for the Special Purposes of the Income Tax was dismissed. The following facts are taken from the Case Stated. On Mar. 21, 1955, the appellant board appealed against an assessment made on it to profits tax for the chargeable accounting period beginning on Jan. 1, 1951, and ending on Dec. 31, 1951, in the sum of £1,150,000. The only question the Special Commissioners were asked to determine was whether or not the board was entitled to annual allowances under Part I of the Income Tax Act, 1945, and, consequently, under para. 1 of Part I of Sch. 8 to the Finance Act, 1947,

* The terms of s. 8 (3) are set out at p. 464, letter F, post.

in respect of certain dwelling-houses at Edwinstowe, Nottinghamshire, owned by the board and occupied by persons employed by the board at Thoresby Colliery. There were 124 houses in 4th Avenue, Edwinstowe, comprising twenty-nine pairs and twenty-two terraces of three each. They were built for, and occupied at the relevant times by, persons employed at Thoresby Colliery. Fifty-three were of the "Parlour type" and seventy-one of the "Non-Parlour type". The aggregate maximum yearly rents of the houses permitted by the Rent Restriction Acts (exclusive of rates and water charges) was £2,555 16s., from which the board had to meet the annual costs of repairs, fire insurance and management. The houses were constructed between 1926 and 1928. It was agreed between the parties (a) that if mining operations at Thoresby Colliery had ceased during 1951 or 1952 or should cease in any of a number of years following, the houses would have had or would have a substantial value, and would not have "little or no value" within the meaning of the proviso to s. 8 (3) of the Income Tax Act, 1945, and (b) that some fifty years before 2141 (at which time it was estimated that the coal seams at Thoresby Colliery would be exhausted) the houses would have "little or no value" within the meaning of the proviso to s. 8 (3). This agreement was subject to a reservation made by the Solicitor of Inland Revenue in a letter dated Mar. 16, 1955, to the board's solicitor:

"The Revenue agree that if working continues at the colliery in the manner expected it will probably be exhausted in 188 years. But mining operations may, in the meanwhile, cease for other reasons and the Revenue do not agree that it is possible to forecast the reason for which, or the time at which, they will cease."

The Special Commissioners found that, on the suppositions (i) that coal continued to be extracted from the mine at the present rate of extraction, and (ii) that nothing happened to result in a premature closing of the mine before the seams were exhausted, the mine would cease to be worked in or about the year 2141. These two suppositions were reasonable, and no evidence of any sort was produced to contradict or throw doubt on them. For those reasons, they found that the mine was likely to be no longer worked in or about the year 2141 and not earlier, and, in so far as it might be necessary for the purpose of the appeal to decide when the mine would in fact be no longer worked, they found that it would be no longer worked in or about the year 2141 for the same reasons. They also found that, until the year 2091, the houses in question were likely to have some substantial value, and that after the year 2091 they were likely to have little or no value.

John Pennycuick, Q.C., and *D. C. Miller* for the appellant board.
Geoffrey Cross, Q.C., and *Sir Reginald Hills* for the Crown.

The House took time for consideration.

May 29. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, I have had the privilege of reading in print the opinion which is about to be delivered by my noble and learned friend, LORD RADCLIFFE, and I agree with it, but I shall add a few words in view of the striking difference of judicial opinion which has arisen in this case.

Your Lordships have to construe the proviso to s. 8 (3) of the Income Tax Act, 1945, and, in particular, the words

"if the building or structure is likely to have little or no value to the person carrying on the trade when the mine, oil well or other source or the plantation is no longer worked."

Counsel for the appellant board claimed throughout his argument that the meaning which the board seeks to apply to the words in question is their "natural meaning", and that any other construction of the words involves either giving

A to them a strained or unnatural meaning, or inserting into the section words which are not there.

My Lords, I reject this claim. To my mind the most natural meaning of the words used is the meaning attributed to them by the majority of the Court of Appeal, and it is the meaning which the words at once conveyed to my mind when they were first read by counsel for the board. I think it would be a natural
B and correct use of language if a valuer expressed himself as follows, after viewing a row of miners' cottages beside a mine in a lonely and desolate spot :—" In my opinion these cottages will have little or no value to the owners when the mine is no longer worked. When that time comes it will be impossible for the owners to sell or let these cottages, because they are so far from any town or village ". A case of this kind would be, in my opinion, an example of the situation which
C the legislature had in mind when the proviso to s. 8 (3) of the Act of 1945 was enacted.

I do not see any necessity for inserting any words into the proviso, but if I sought to expand the phrase " when the mine is no longer worked " so as to make its meaning clear beyond any possibility of doubt, I should insert after the word " when " the words with a scriptural flavour " it comes to pass that ".

D Having regard to the course which this case has so far taken, I realise that the words in question cannot be as clear as they seem to me. In my opinion, however, any doubt is removed when one considers the context in which these words appear, and the general scheme of allowance to industrial buildings which is revealed in the Income Tax Act, 1945. On this part of the matter I can add nothing to the opinion of LORD RADCLIFFE.

E I would dismiss the appeal.

LORD REID: My Lords, I agree.

LORD RADCLIFFE: My Lords, the question raised by this appeal is whether the National Coal Board is entitled to claim the annual tax allowance for industrial buildings and structures in respect of a number of dwelling-houses
F at Edwinstowe in Nottinghamshire which belong to the board and are occupied by some of its employees who work at Thoresby Colliery in the same county. The tax against which the allowance is sought is profits tax assessed on the board's profits for the chargeable accounting period represented by the calendar year 1951. Nothing, however, turns on the details or the machinery of the assessment. It is common ground that the validity of the claim depends on
G the true construction of s. 8 of the Income Tax Act, 1945, in particular sub-s. (3) of that section, as applied to the circumstances of this case; and that the allowances given by that section, if admissible in the assessment of profits under Sch. D to the income tax, would also be admissible in a profits tax assessment for the comparable period or periods.

H The point was presented to us as a very short one. Do these houses come within the description which is found in the proviso to s. 8 (3),

" a building or structure . . . likely to have little or no value to the person carrying on the trade when the mine, oil well or other source or the plantation is no longer worked " ?

I It was even said that the whole point at issue turns on the meaning to be assigned to the word " when " in that sentence. My Lords, I agree that the point is indeed a short one; and, perhaps, in one sense it may be said that the issue comes down to one of deciding what the word " when " means in the context of the proviso which I have just quoted. Nevertheless, the solution has produced a diversity of judicial opinion. The Special Commissioners held that the houses did qualify for allowance. On appeal to the High Court, ROXBURGH, J., agreed with them. The Court of Appeal by a majority reversed this decision, SINGLETON and MORRIS, L.JJ., holding that the allowance was not claimable, ROMER, L.J., in a dissenting judgment, holding that it was. I think, myself, that the

true meaning and effect of the proviso are better ascertained by setting it in the context of the general scheme of industrial building allowance introduced by the Income Tax Act, 1945, than by concentrating any close attention on the rich variety of permissible uses which the English language allows to the word "when". A

As is well known, the Act of 1945 introduced into our tax code the first general scheme for the allowance of depreciation in tax assessments. Even then, though general, the scheme was by no means comprehensive. The first six Parts of the Act, extending from s. 1 to s. 47, classified allowable expenditure under separate heads, industrial buildings and structures, machinery and plant, mines and oil wells, agricultural land and buildings, patents, scientific research. No place was found for expenditure on dwelling-houses in this scheme, except so far as it ranked as expenditure on an industrial building under the special provisions of Part 1, with which we are now concerned, or as expenditure on a farm-house or cottage under s. 33, which appears in Part 4. B C

The effect of the allowances given by Part 1 was to provide an initial allowance of one-tenth and an annual allowance of one-fiftieth of his capital expenditure to every person who incurred such expenditure on an industrial building or structure occupied for purposes of trade. Thus, by the end of forty-five years, ignoring complications, the whole of the original capital expenditure would have been written off as an allowance against assessable profits. The definition of what was meant by "industrial building or structure" for this purpose was supplied by s. 8. The scheme of that section is that, by sub-s. (1), the expression "industrial building or structure" is defined as meaning a building or structure in use for any one of a number of industrial purposes which are there listed, including, in sub-head (e) D E

"... the purposes of a trade which consists in the working of any mine, oil well or other source of mineral deposits, or of a foreign plantation":

by sub-s. (2), provision, not now material, is made for applying the section to a part of a trade or undertaking where it cannot be applied to the whole; and sub-s. (3) is in the following terms: F

"Notwithstanding anything in sub-s. (1) or sub-s. (2) of this section, but subject to the provisions of sub-s. (4) of this section, the expression 'industrial building or structure' does not include any building or structure in use as, or as part of, a dwelling-house, retail shop, showroom, hotel or office or for any purpose ancillary to the purposes of a dwelling-house, retail shop, showroom, hotel or office: G

"Provided that this sub-section shall not apply to, or to part of, a building or structure which was constructed for occupation by, or for the welfare of, persons employed at, or in connexion with the working of, a mine, oil well or other source of mineral deposits, or for occupation by, or for the welfare of, persons employed on, or in connexion with the growing and harvesting of the crops on, a foreign plantation, if the building or structure is likely to have little or no value to the person carrying on the trade when the mine, oil well or other source or the plantation is no longer worked, or will cease to belong to such person on the coming to an end of a foreign concession under which the mine, oil well or other source, or the plantation, is worked." H

It seems to me fairly plain what these rather complicated provisions were intended to secure. The general rule was to be that capital expenditure on dwelling-houses, retail shops, showrooms, hotels, or offices was not to rank as industrial expenditure or, accordingly, to rank for depreciation allowance, even though it was made or they were occupied for purposes of trade. But a special exception was to be made in taxing the profits arising from the working of mines, oil wells and foreign plantations. Capital expenditure on dwelling-houses, etc., put up by those conducting such enterprises could be treated as I

- A expenditure and allowed accordingly if the assets created by the expenditure were so intimately connected with the enterprise, either by character, situation or the terms of working imposed by a foreign concession, that they could not be expected to have any value apart from their contribution to the conduct of the enterprise. In the special circumstances thus envisaged, expenditure on the construction of such dwelling-houses was, in truth, expenditure
- B on an industrial building and nothing else, and, unlike expenditure on other dwelling-houses, its useful life must necessarily expire with the expiry of the working of the mine, oil well or plantation or, alternatively, its value to the trader disappear with the end of the concession. It is common knowledge that many mines, oil wells and plantations worked abroad by traders taxable in this country are in isolated places. Townships, large or small, have to be created,
- C with dwelling-houses, shops, and offices, for the occupation of those serving the enterprise in these remote spots. So far as this country is concerned, the mining camp has never been one of its features; and the mining village which was wholly dependent on the continued working of the local mine is, I dare say, becoming a thing of the past. But that means only that there will be less occasion for conceding the allowance in respect of dwelling-houses in this country
- D than in respect of dwelling-houses, differently situated, overseas.

- Now the houses which are the subject of the present appeal have, in my opinion, very little to do with the kind of scheme that I have outlined above. It is true that they were built between 1926 and 1928, and were built for and have always been occupied by men employed at Thoresby Colliery. But there is no suggestion that their value as houses is confined to their use for housing
- E Thoresby miners. On the contrary, it is agreed that, if mining operations had stopped there in 1951 or 1952 or in any of a number of years following, the houses would still have had, or have, a substantial value. In other words, they are dwelling-houses in their own right; the expenditure on them cannot be described as expenditure that was exclusively devoted to the mining enterprise at Thoresby or as having little or no value apart from the continuance of the
- F enterprise. *Prima facie*, therefore, they do not come within the scope of the proviso. The board's claim to allowance rests, however, on a different consideration. In effect, it depends on a comparison of the expected physical life of the houses with the expected working life of the colliery. There is an agreement between the parties that the life of the colliery will probably end in the year 2141, if
- G working there continues in the manner now expected. It is also agreed that about the year 2091 the houses would have become of little or no value, having by that time exhausted their useful life as subjects of occupation. From the comparison of these figures, which have not, of course, the precision of astronomical calculations, it is deduced that the houses can be described as likely to have little or no value at the time when the mine is no longer worked and,
- H therefore, that the expenditure on them is within the proviso to sub-s. (3) of s. 8.

- The majority members of the Court of Appeal found themselves somewhat startled at the idea that the Income Tax Act should have produced a scheme under which tax allowances are conceded or withheld in accordance with estimates of this kind. And, indeed, it is not easy to take the figures too seriously. The
- I Special Commissioners supported their decision in favour of the board by accepting as reasonable two suppositions: (i) that coal will continue to be extracted from the mine at the present rate of extraction, and (ii) that nothing will happen to result in a premature closing of the mine before the seams are exhausted. I dare say that these may be reasonable suppositions about a period of some 180 years of the future. But I could not infer from that that they are the only reasonable suppositions about such a matter. I can think of two others: (i) that coal will not continue to be extracted from the mine

over the period of its working at the same average rate as prevails today, and (ii) that something will happen which will result in a premature closing of the mine before the seams are exhausted. Could anyone say today which suppositions are the more reasonable? In the nature of things there can be no great validity about any of them. A

Nevertheless, in my opinion, the board's argument does not fail by reason of any special vagueness in the calculations it invites. We can accept its general premise that Thoresby Colliery is a coalmine with a very long expected life, and that the life of the mine is likely to be substantially longer than the physical life of the houses. Where I think that the board's argument fails is that this consideration is not relevant to the proviso which confers the allowance. The value to be taken account of for that purpose is value as affected by the circumstance of the closing of the mine; it is not value as affected by the normal physical decay of the building itself. All that is proved by the comparison which the board invites between the expected life of the mine and the expected life of the houses is that the owner is never likely to be threatened with any loss of the value of his expenditure on housing by reason of the close of the industrial enterprise, because the enterprise is likely to be longer lived even than an ordinary dwelling-house. That comparison takes the case away from the special cases for which the proviso is designed. It contributes nothing to bring it within the proviso. B C D

The argument for the board has been rested throughout on the proposition that the "natural meaning" of the words of the proviso necessarily covers its claim, and that is all that matters. And this argument has received much support in the judgments that have been given in the earlier courts. I do not think that it is all that matters, anyway; but, that apart, I do not agree that the construction contended for does represent any natural meaning of the relevant words. Such a construction involves treating the words "when the mine . . . is no longer worked" as if they were the equivalent of the words "when the mine . . . is likely to be no longer worked"; and they are not the equivalent. The date when an event occurs is not the same thing as the date when, as seen at any one moment, it is thought likely to occur. What is being referred to is the circumstance of the mine ceasing to work, whenever that may be, not the date, necessarily unknown, when that circumstance will occur. Secondly, if the figures put forward by the board are to be our guide, it is not a natural use of words to say of these houses that they are likely to be of little or no value when the mine stops working. What would be accurate would be to say of them that they cannot possibly be of any value on that event because they will not exist to have value attributed to them. They will have ceased to exist for any purpose some two generations of human life before! E F G

These considerations help to show, I think, what it is that the proviso is confined to allowing. The wording may not be very happy and there may be other difficulties in applying it which have not yet appeared. But the general range of circumstances to be covered by the exemption is reasonably clear. The assumption which underlies the exemption is that the building in question is in existence at a date, whatever it may be, when the industrial enterprise itself comes to an end or, in the case of a concession, comes to an end for its owner by the expiry of the concession. The question to be asked, in order to see whether it qualifies for allowance now, is whether it is of such a character or so situated, or, in the case of a concession, whether the terms of the concession are such that, in the event postulated, the capital expenditure incurred in respect of the building would be likely to have any appreciable residual value for the owner. If the answer is "Yes", then the expenditure does not qualify for industrial allowance: if the answer is "No", it does. H I

I would dismiss the appeal. The houses are shown to have a likely alternative use as ordinary dwellings and they are not, therefore, within the proviso.

A **LORD COHEN:** My Lords, I agree with the speech delivered by my noble and learned friend, LORD RADCLIFFE, and have nothing to add.

LORD KEITH OF AVONHOLM: My Lords, I also agree.

Appeal dismissed.

B Solicitors: *Donald H. Haslam* (for the appellant board); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by G. A. KIDNER, Esq., Barrister-at-Law.*]

Re WHITRICK (*deceased*).
SUTCLIFFE v. SUTCLIFFE AND OTHERS.

[COURT OF APPEAL (Jenkins, Romer and Sellers, L.J.J.), May 17, 1957.]

Will—Omission—Words of will showing accidental omission or mistake—Literal construction possible—Supplying of words by the court.

D By her will a testatrix left her whole estate to her husband, and then “in the event of my husband . . . and myself both dying at the same time” gave the whole of her estate on trusts for three relations. The testatrix’ husband predeceased her. He had made a will in the same terms, mutatis mutandis, as the testatrix, under which will she had succeeded to the whole of his estate. On the question whether the court should read words into the testatrix’ will to enable the gift in favour of her relations to take effect,

F **Held:** the words “in the event of my husband and myself both dying at the same time” did not express the whole contingency for which the testatrix intended to provide, and it was reasonably plain that she intended to provide for the contingency of the husband not surviving her, i.e., for the alternative events of her husband’s dying in her lifetime or of both of them dying at the same time; and accordingly words giving that effect to her will should be supplied.

Re Smith ([1947] 2 All E.R. 708) approved and applied.

Appeal allowed.

[As to supplying omissions from wills, see 34 HALSBURY’S LAWS (2nd Edn.) 215, para. 272; and for cases on the subject, see 44 DIGEST 597, 4214 et seq.]

G Cases referred to:

- (1) *Re Smith, Veasey v. Smith*, [1947] 2 All E.R. 708; [1948] Ch. 49; [1949] L.J.R. 765; 2nd Digest Supp.
- (2) *Re Ridge’s Trusts*, (1872), 7 Ch. App. 665; 41 L.J.Ch. 787; 27 L.T. 141; 44 Digest 780, 6378.
- H (3) *Mellor v. Daintree*, (1886), 33 Ch.D. 198; 56 L.J.Ch. 33; 55 L.T. 175; 44 Digest 599, 4242.
- (4) *Sweeting v. Prideaux*, (1876), 2 Ch.D. 413; 45 L.J.Ch. 378; 34 L.T. 240; 44 Digest 1258, 10,864.
- (5) *Towns v. Wentworth*, (1858), 11 Moo. P.C.C. 526; 31 L.T.O.S. 274; 14 E.R. 794; 44 Digest 553, 3706.
- I (6) *Key v. Key*, (1853), 4 De G.M. & G. 73; 22 L.J.Ch. 641; 22 L.T.O.S. 67; 43 E.R. 435; 44 Digest 580, 3999.
- (7) *Wilkinson v. Adam*, (1813), 1 Ves. & B. 422; 35 E.R. 163; *affd.* H.L., (1823), 12 Price 470; 147 E.R. 780; 44 Digest 807, 6607.
- (8) *Re Follett, Barclays Bank, Ltd. v. Dovell*, [1955] 2 All E.R. 22; 3rd Digest Supp.

Appeal.

The plaintiff administratrix appealed from an order of HARMAN, J., dated Feb. 7, 1957, pursuant to his decision that the testatrix, Amanda Whitrick

deceased, died wholly intestate. The facts appear in the judgment of JENKINS, A L.J.

W. S. Wigglesworth for the plaintiff administratrix, the appellant.
The defendants did not appear and were not represented.

JENKINS, L.J.: The appellant, the plaintiff in the proceedings, is the administratrix, with will annexed, of the estate of the testatrix Amanda Whitrick. The testatrix made a will which, in the events which happened, necessarily resulted in an intestacy as to one-third of her residuary estate owing to the death in her lifetime of one of three named residuary legatees. The matter in dispute is whether the testatrix died intestate as to the whole of her estate, and not merely as to one-third of it, on the ground that, in the events which happened, she made no effective disposition of her estate.

The first defendant is one of the residuary legatees under the will of the testatrix, and his interest would be to present argument limiting the intestacy to one-third. The remaining four defendants (there are five in all) are representative of the next of kin of the testatrix, and their interest would be to argue for a total intestacy.

The proceedings have had an unfortunate history. The plaintiff, Beatrice Sutcliffe, as administratrix, naturally wanted this question determined. The summons was accordingly issued with the parties I have mentioned as defendants, as being proper parties to argue either side of the question on which a decision was required. Most unfortunately from the court's point of view, none of the defendants have thought fit to take any part in these proceedings. I understand that they did not enter appearances to the summons, and were not represented at the hearing; and they have not been represented at the hearing before us. The notice of appeal has been filed in the offices of the court, and the parties have been notified of the appeal by registered letter; and one can thus say that everything that need or ought to have been done has been done to secure their attendance, without result. The court, therefore, finds itself in the somewhat embarrassing position of having to determine the question in the presence of one side only. Counsel for the administratrix has presented a most fair and balanced argument, as one would expect, and has given us all the assistance which he possibly could. That, however, is not a satisfactory substitute for having the matter argued in the presence of all parties interested.

The circumstances which give rise to the question are these. The testatrix made a will dated Aug. 9, 1935, and it was, as far as material, in these terms. She revoked all former wills, and provided as follows:

"(2) Subject to the payment of all my just debts funeral and testamentary expenses I give devise and bequeath the whole of my real and personal estate whatsoever and wheresoever the same shall be at my decease unto my husband the said Thomas Whitrick absolutely and I appoint my said husband to be the sole executor of this my will. (3) In the event of my husband the said Thomas Whitrick and myself both dying at the same time then and in that case the following provisions shall apply namely. (4) I appoint my sister Beatrice Sutcliffe (hereinafter called 'my trustee') to be the sole executrix and trustee of this my will. (5) I give devise and bequeath the whole of my real and personal estate whatsoever and wheresoever the same shall be at my decease to my trustee upon trust to sell collect call in and convert into money the same or such part or parts thereof as shall not consist of money [then follow the usual directions as to payment of debts and so forth and the clause continues] Upon further trust to pay and divide the residue of such proceeds and of my ready money unto and equally between my sisters the said Beatrice Sutcliffe and Clara Scott and my nephew William Sutcliffe for their own use and benefit absolutely."

A Clara Scott was the named residuary legatee who died in the lifetime of the testatrix, and on account of her death there must in any event be an intestacy as to one-third of the residuary estate.

The question as to total intestacy arises in this way. The will begins with an absolute gift to the testatrix' husband. It then goes on in express terms to provide for the event of both the testatrix and her husband dying at the same

B time. I will read cl. (3) again:

"In the event of my husband the said Thomas Whitrick and myself both dying at the same time then and in that case the following provisions shall apply namely."

I think it is plain beyond argument that everything in the will which follows

C cl. (3) is governed by cl. (3), and consequently, according to the literal meaning of the language, there is only a disposition there in the event of both dying at the same time.

The testatrix' husband made a will of the same date in favour of the testatrix in similar form, so far as cll. (1), (2) and (3) are concerned, to the will of the testatrix herself; that is to say, there is a gift to the testatrix absolutely, followed

D in cl. (3) by the provision:

"In the event of my wife the said Amanda Whitrick and myself both dying at the same time then and in that case the following provisions shall apply namely."

The provisions which follow that clause in the husband's will are different from those in the wife's will, but it is unnecessary to go into the details of that.

E The husband died on Oct. 20, 1948, leaving the testatrix him surviving. Consequently, so far as his will was concerned, the gift in favour of the testatrix took effect. The testatrix proved his will on Dec. 16, 1948.

The testatrix died on Mar. 26, 1954, and, as she had survived her husband, the primary gift in his favour in cl. (2) of the will did not take effect. Letters of administration of her estate were granted to the administratrix, the present

F appellant.

The question which we are asked to decide is whether there should be read into this will, by necessary implication, provision for the contingency of the husband dying in the testatrix' lifetime, so that the provisions of cll. (4) and (5) of the will take effect, or whether the court is constrained to confine itself to the actual

G language used in the will, in which case the provisions of cll. (4) and (5) cannot take effect, as on that view they are only limited to take effect in the event of both the testatrix and her husband dying at the same time, which event did not happen.

The reading of words into a will as a matter of necessary implication is a measure which any court of construction should apply with the greatest caution. Many wills contain slips and omissions and fail to provide for contingencies

H which, to anyone reading the will, might appear contingencies for which any testator would obviously wish to provide. The court cannot re-write the testamentary provisions in wills which come before it for construction. This type of treatment of an imperfect will is only legitimate where the court can collect from the four corners of the document that something has been omitted and,

I further, collect with sufficient precision the nature of the omission. HARMAN, J., felt unable to make the necessary implication, and accordingly he decided that there was a total intestacy; and the administratrix now appeals to this court from that decision.

Counsel for the administratrix has referred us, amongst other cases, to *Re Smith, Veasey v. Smith* (1) ([1947] 2 All E.R. 708) decided by VAISEY, J. The learned judge had to deal in that case with a will of a married woman whereby, having appointed her husband and the plaintiff executors and bequeathed specific and pecuniary legacies, including a legacy of chattels to her husband,

she provided that, in the event of her husband predeceasing her or, if surviving her, dying within one calendar month of the date of her death, the executors were to hold the residuary estate in trust to be divided among a number of persons, all relatives of the husband, and three charities. The will contained no disposition of the residue in the event (which happened) of the husband surviving the wife by more than one calendar month. The wife died in 1945, leaving no issue. VAISEY, J., held that it was clear that there was an omission of certain words from the will, there being no provision for the event which had happened; that it was certain that an alternative was intended and that, as a matter of necessary implication, the defect must be supplied by a gift of the residue to the husband absolutely, he having survived his wife by more than one calendar month. A
B

The learned judge in his judgment referred to a number of authorities, and he quoted ([1947] 2 All E.R. at p. 710) this passage from JARMAN ON WILLS (7th Edn.), Vol. I, p. 556*, C

“Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context.” D

VAISEY, J., cited ([1947] 2 All E.R. at p. 711) *Re Ridge's Trusts* (2) ((1872), 7 Ch. App. 665), saying:

“In *Re Ridge's Trusts* (2) SIR WILLIAM JAMES, L.J., implied certain cross limitations which had been omitted from the will and which he thought the general scheme of the will required to be inserted. In his judgment, he says (7 Ch. App. at p. 668): ‘It is a case in which we are authorised and bound to fill in the will, and to supply the gaps by judicial implication of the testator’s meaning . . . the court is not striking out a single word; it is not contradicting anything in the will, but it is giving to every sentence its plain, grammatical, and ordinary meaning. If any of the events provided for happen, then the will takes effect according to its letter. The implication only applies to events for which the testator has not in terms provided, but as to which no person applying merely common sense to the will can have any doubt what he intended’ [then VAISEY, J., continued:] . . . in the light of common sense I am justified, and, indeed, bound, to imply a gift to the husband in the event which has happened.” E
F

VAISEY, J., also referred ([1947] 2 All E.R. at p. 711) to *Mellor v. Daintree* (3) ((1886), 33 Ch.D. 198 at p. 205) for this statement by NORTH, J.: G

“I decline altogether to decide the case on any mere conjecture of what the testator intended. It is unnecessary for me to refer to any authorities other than two [*Sweeting v. Prideaux* (4) ((1876), 2 Ch.D. 413) and *Towns v. Wentworth* (5) ((1858), 11 Moo. P.C.C. 526)]. In the former case HALL, V.-C., quoted the words of KNIGHT BRUCE, L.J., in *Key v. Key* (6) ((1853), 4 De G.M. & G. 73 at p. 84):] ‘In common with all men I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter; cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages, would disappoint and defeat the intention with which the instrument, read as a whole, persuades and convinces him that it was framed. A man so convinced is authorised and bound to construe the writing accordingly’.” H
I

VAISEY, J., concluded by saying that he was prepared to make a declaration in favour of giving the husband an interest in the events which had happened.

* This passage is also in the 8th Edn., Vol. I, p. 592.

A He prefaced his review of the authorities by dealing with the question as it appeared to him. He said ([1947] 2 All E.R. at p. 710):

B “It is, in my judgment, surprising that a lady who appoints her husband to be an executor and trustee of her will and bequeaths to him a large part of her personal chattels . . . and who was evidently on the best of terms with his relations as is shown from the alternative gifts to which I have referred, should leave no disposition of her estate either to him or to his relations in the event which happened of his surviving her for more than one calendar month. I am bound to say that, if I had read this will in draft and had been asked whether I saw anything the matter with it, it would, I think, have leapt to the eye that there was an omission of a provision operating in the alternative. The question is whether, having come to that conclusion, I am able to say [what that omission is] as a matter of necessity, that is to say, ‘not natural necessity’, . . . but because of ‘so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed’. I quote those words from *Wilkinson v. Adam* (7) ((1813), 1 Ves. & B. 422) which is referred to in *HAWKINS ON WILLS* (3rd Edn.), p. 8 . . . I am asked, to consider, not only the question whether there has been an omission, but also the question whether I can guess with reasonable certainty, as a matter of necessary implication, what the omission was . . .”

E I have read enough of that case and the authorities reviewed in it to indicate the principles to be applied, which, in my view, are correctly stated by the learned judge.

F We were also referred to *Re Follett, Barclays Bank, Ltd. v. Dovell* (8) ([1955] 2 All E.R. 22), a case in this court where, with reference to provisions of a quite different nature, the court held that, although there were clearly omissions in the clause in question, the nature and wording of what had been left out was not sufficiently certain to enable the court to supply words, and still less to transform what, according to the letter of the clause, was a general power of appointment into a special power. This court there indicated the principles to be applied in dealing with a question of this sort; and I think the observations in regard to those principles accord with what was said by VAISEY, J., in *Re Smith* (1) ([1947] 2 All E.R. 708).

G The question, then, is whether the court can be certain, looking simply at this will, not only that the testatrix omitted something, but also what it was that she omitted. A curious feature of the case is the circumstance, to which I have already alluded, that precisely the same form of words was used in the husband's will.

H If the testatrix had simply made a will giving all her property to her husband absolutely and had made no other disposition, it is absolutely plain beyond possibility of argument that no court could there imply any gift in the event of the husband predeceasing the wife. It would be quite impossible to do that, because one could not say with certainty, if that was the form of the will, that she meant to make any other provision, nor could one say with certainty, or hazard a guess, what disposition the testatrix might have made had she made one. This case, however, is of a different character. The will begins with the absolute gift to the husband. Then the testatrix goes on to provide for a certain contingency, and the contingency provided for is, according to the express language used, that of the testatrix and the husband dying at the same time. Can one possibly believe that in making this alternative provision the testatrix really intended to make it operative only in the event of herself and her husband dying at the same time? That was an event extremely unlikely to happen.

I To my mind, it cannot be accepted for a moment that the words used, “in the event of my husband and myself both dying at the same time”, comprise the whole of the contingency for which the testatrix intended to provide. It seems

to me reasonably plain from the language and frame of the will that what the testatrix set out to do by cl. (3) and the subsequent clauses was to provide for the contingency of her husband not surviving her. The contingency of her husband not surviving her might take the form of the husband dying in her lifetime or of his failing to survive her by reason of his dying at the same time as the testatrix herself. It is reasonably plain that, in setting out to provide for the contingency of the husband not surviving her, the testatrix expressed imperfectly the contingency for which she intended to provide; and I think the court can say with sufficient certainty that the alternatives which she intended to provide for were the event of herself and her husband both dying at the same time or the event of his dying in her lifetime. That makes the will a sensible and complete disposition. In my view, although, as I have said, the court should be very sparing of implying words or reading words into a will, this is one of those rare cases where it is possible to say as a matter of necessary implication that there was an intention to provide for the contingency which I have mentioned, and that through some mischance the necessary words were omitted.

I have been puzzled as to the effect which one ought to attribute to the really remarkable circumstance that the husband, in his will of the same date, fell into the same error. That might be seized on as suggesting that it was not an error at all, but that the will was drawn in this way advisedly to meet some eccentric whim of the spouses. On the other hand, it might be said that, if it is improbable that the wife should make a disposition to take effect only in the contingency of herself and her husband both dying at the same time, it is doubly improbable that the husband should have had the same capricious notion. On the whole, I think that this matter does not greatly affect the case one way or the other. At some stage in the preparation of one or other of these wills, whichever was prepared first, this error crept in, or this omission was made; and, once an error has crept in or an omission has been made in a document, it is not improbable that it will find its way into any copies or adaptations of the document which may be prepared.

The point is a short one and admits of no great elaboration; but, for the reasons which I have endeavoured to express, I think that there is sufficient certainty here as to the omission of words, and as to what the words omitted were, to justify the court in taking a different view from the learned judge and declaring accordingly. I would therefore allow this appeal.

ROMER, L.J.: I agree. I observe that SIR RAYMOND EVERSHED, M.R., in *Re Follett* (8) ([1955] 2 All E.R. 22) said in the course of his judgment (*ibid.*, at p. 25):

"We have not been referred to all the cases, but I do not myself think that cases are of much assistance, except to express or enshrine a principle."

With that observation I respectfully agree. It is the principle that matters; and that, as my Lord has already stated, is set out quite clearly in *JARMAN ON WILLS* (8th Edn.), Vol. 1, p. 592, as follows:

"Where it is clear on the face of a will that the testator has not accurately or completely [and I stress the word "completely"] expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context."

The first question, then, which we have to consider is whether, taking this will as we find it, we think it clear that the testatrix here has not completely expressed her meaning by the words which she has used. The learned judge, as I understand it, from the notes which we have of his judgment, has said that it must be admitted that something has been left out of the will, except perhaps on one view

A of the matter which in fact is irrelevant; but he decided against the administratrix because he did not feel certain what form the omission in the will should take. Different minds, of course, take different views on a matter of this sort; but such doubt as I have felt on this case lay rather on whether it was clear on the face of the will that there had been an omission. That doubt, I am bound to say, is somewhat emphasised by the fact that the husband's will executed on the same day had, *mutatis mutandis*, precisely the same clause in it; so that if there was an accidental omission from the wife's will there was a similar omission from the husband's; and that is a rather peculiar feature of this case. It is rather more difficult, I imagine, to assume that something has been omitted by mistake from two wills than from one, but I have come to the conclusion that the testatrix has incompletely expressed her meaning in the words which she has used, and that that mistake or omission found its way from one will into the other.

C The reason why I think it is reasonably clear that there has been an omission is that it would be capricious in the highest extreme to suppose that the testatrix intended her sisters and her nephew to take if she, the testatrix, and her husband died simultaneously, but that they were not to take if the husband predeceased her. One cannot see any shadow of a reason for that. I think, with my Lord,

D that her intention was to make provision for her husband if he survived her, which she did by cl. (2), and then to make provision for her sisters and her nephew if her husband did not survive her; and that she did that in an incomplete way by merely limiting her disposition to the case of a simultaneous death, which, of all things, is the most highly improbable thing to happen. It does appear to me, therefore, taking the will as a whole, that the intention was to benefit the sisters and the nephew if by any chance the husband, through predeceasing his wife, was himself unable to take. Therefore I think that the first part of the rule as stated in *JARMAN ON WILLS* is satisfied.

E

I do not think myself that there is any great difficulty about providing the words which this testatrix, *ex hypothesi*, has omitted. It is not necessary, of course, to know the precise language which the testatrix must be deemed to have had in her mind; it is sufficient if one knows that she did intend to make a particular provision and what that particular provision was. In my judgment, the provision which she did intend to make, but omitted to make, was that the sisters and nephew were to take either in the event of the husband predeceasing the wife or in the event of the husband and the wife both dying simultaneously. I accordingly agree that the rule or principle stated in *JARMAN ON WILLS* applies to this case and that the appeal should be allowed.

G

SELLERS, L.J.: I agree that the appeal should be allowed. I cannot believe that the testatrix and her husband, in his turn, were both of them so playful, cynical or eccentric that they decided, by cl. (5) of their respective wills, to leave part of their estate to their relatives or friends only in the most highly improbable event of their both dying at the same time. The will is a simple one and, construing it in accordance with the principles which my Lord has stated and which I think are well summed up for this purpose in what *SIR RAYMOND EVERSHED, M.R.*, has recently (in *Re Follett* (8), [1955] 2 All E.R. 22 at p. 26) called "the happy phrase of *Knight Bruce, L.J.*, in *Key v. Key* (6) ((1853), 4 De G.M. & G. at p. 84)"*, I would regard this will as stating on its face, in effect,

H that in the event of the husband living at the time of the wife's death he would succeed to the whole of her estate, but that in the event of her living beyond him the bequest made in cl. (5) should go as there directed. There is an unfortunate omission in both of the wills which have been put before the court. *HARMAN, J.*, was of the opinion that something had been left out. What troubled him was what should be put in. I think that, if one is seeking to find the precise words, it would be difficult to say that there might not be many alternatives to fulfil

I

* I.e., that set out in the citation from *Key v. Key* (6) at p. 470, letter H, ante.

the intention of the testatrix; but to my mind the intention was that, if the husband was not to partake of her estate on her death because he was no longer alive, her estate should go in accordance with cl. (5). Otherwise cl. (5), which is the most detailed clause in the will, would be practically useless and ineffective.

Appeal allowed. Order varied by substituting a declaration accordingly.

Solicitors: *J. Eaton & Co.* (for the plaintiff administratrix, the appellant).

[*Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.*]

Re HAYWARD (*deceased*).

KERROD *v.* HAYWARD.

[COURT OF APPEAL (Jenkins and Sellers, L.J.J., and Vaisey, J.), May 21, 22, 23, 1957.]

Administration of Estates—Hotchpot—Intestacy—Nominations by deceased in favour of son of middle age—Relevance of size of payments in deciding whether advancement intended—Administration of Estates Act, 1925 (15 Geo. 5 c. 23), s. 47 (1) (iii)—Statute of Distribution (1670) (22 & 23 Car. 2 c. 10), s. 3.

On Oct. 31, 1946, a father nominated savings certificates valued at £315, and on Nov. 21, 1946, the amount (which was £191) standing to his credit in the Post Office Savings Bank, in favour of his elder son. In 1949 the father died intestate leaving a net estate of £1,779 which was divisible between his two sons on the statutory trusts in accordance with the Administration of Estates Act, 1925, s. 47 (1). At the time of the nominations, the elder son was forty-three, married and in employment, but childless. No evidence as to the intention of the father in making the nominations was adduced. On the question whether the savings certificates and bank balance were nominated by way of advancement and should accordingly be brought into account in the division of the intestate's estate as having been paid towards satisfaction of the share of the elder son by virtue of s. 47 (1) (iii) of the Act of 1925,

Held: the nominations were not shown to have been made by way of advancement and therefore did not have to be brought into account, since they had not been made early in the life of the elder son and were not of themselves sufficiently large to give rise to a presumption that they had been made by way of advancement, viz., permanent provision for the son; moreover on the evidence the only factor which tended to show that they were made by way of advancement was that they formed a relatively large proportion of the father's estate, but that factor should not be pressed too far and in this case was insufficient.

Dicta of SIR GEORGE JESSEL, M.R., in *Taylor v. Taylor* ((1875), L.R. 20 Eq. at pp. 157, 158), and of BOWEN, L.J., in *Re Lacon* ([1891] 2 Ch. at p. 497), and *Re Scott* ([1903] 1 Ch. 1) applied.

Per CURIAM: section 47 (1) (iii) of the Administration of Estates Act, 1925, is, if anything, narrower than s. 3 of the Statute of Distribution, 1670*, but decisions on the old Act are, generally speaking, applicable to the new . . . Under the Statute of Distribution, 1670, any provision made for a child

* The relevant terms of s. 3 of the Statute of 1670 are printed at p. 476, letter I, to p. 477, letter C, post.

- A by way of settlement was looked on as an advancement by portion . . . but under s. 47 (1) (iii) the settlement must be either by way of advancement or on the marriage of the child concerned (see p. 477, letter D, and p. 479, letter C, post).

Observations on the meaning of the word "advancement" (see p. 480, letter F, post).

- B Decision of UPJOHN, J. ([1956] 3 All E.R. 608) affirmed.

[**Editorial Note.** Analysing the judgments in *Taylor v. Taylor* ((1875), L.R. 20 Eq. 155), JENKINS, L.J., cites as characteristic of an advancement (i) the giving of a large sum by a father to a child, (ii) the giving of it in one payment, and (iii) the giving of it early in life (see p. 478, letter I, p. 479, letter E, and p. 482, letter B, post).

As to payments by way of advancement, see 16 HALSBURY'S LAWS (3rd Edn.) 403, para. 777; and for cases on the subject, see 20 DIGEST 463, 464, 1890-1898.

For the Administration of Estates Act, 1925, s. 47 (1) (iii), see 9 HALSBURY'S STATUTES (2nd Edn.) 754.]

- D Cases referred to:

- (1) *Edwards v. Freeman*, (1727), 2 P.Wms. 435; 1 Eq. Cas. Abr. 249; 24 E.R. 803; 20 Digest 458, 1824.
- (2) *Taylor v. Taylor*, (1875), L.R. 20 Eq. 155; 44 L.J.Ch. 718; 20 Digest 458, 1825.
- (3) *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482; 60 L.J.Ch. 403; 64 L.T. 429; 20 Digest 453, 1770.
- (4) *Re Scott, Langton v. Scott*, [1903] 1 Ch. 1; 72 L.J.Ch. 20; 87 L.T. 574; 20 Digest 459, 1840.
- (5) *Re Livesey's Settlement Trusts*, [1953] 2 All E.R. 723; 3rd Digest Supp.

Appeal.

- F The younger son, the defendant, appealed against the decision of UPJOHN, J., dated Oct. 17, 1956, and reported [1956] 3 All E.R. 608, that the nominations by the father, the intestate, in favour of the elder son did not have to be brought into account in the distribution of the father's estate. The facts appear in the judgment of JENKINS, L.J.

Jean Graham Hall for the defendant, the younger son.

- G *E. F. R. Whitehead* for the plaintiffs, the executors of the elder son.

JENKINS, L.J.: This is an appeal from an order made by UPJOHN, J., on Oct. 17, 1956 (reported [1956] 3 All E.R. 608), on the further consideration of an action for the administration of the estate of an intestate, Frank Charles Hayward, who may be conveniently referred to as the father. The father died on Dec. 11, 1949, and the intestacy was due to the circumstance that the only testamentary disposition which he made was in favour of his wife who predeceased him, having died in January, 1944. The father left him surviving two sons, Frank Cyril Hayward, the elder son, and the defendant, Reginald Charles Hayward, the younger son. The younger son obtained a grant of administration to the father's estate dated Nov. 22, 1951. The elder son, Frank Cyril Hayward, had applied for a grant but the younger son placed a caveat on the file, and the elder son died on Aug. 11, 1951. The plaintiffs in the present proceedings are the executors of the elder son, and the defendant (now appellant) is the younger son.

On Oct. 31, 1946, the father nominated certain National Savings Certificates of the amount of £315 15s. 6d., standing in his name to the elder son. On Nov. 21, 1946, the father nominated £191 17s. 11d., the balance in his name in the Post Office Savings Bank, also in favour of the elder son.

The point at issue in this appeal, which the learned judge decided in favour A
of the plaintiff executors, is whether under the provisions of s. 47 (1) (iii) of
the Administration of Estates Act, 1925, the value of the National Savings
Certificates and Post Office Savings Bank balance ought to be brought into
account against the elder son in the distribution of the estate on intestacy, the
distribution apart from that question being a simple distribution equally between B
the two sons. The dispositions by way of nomination carried out by the testator
with respect to the savings certificates and the Post Office Savings Bank balance
were special forms of disposition, authorised in respect of such certificates and
such balances by certain statutory rules and orders* to which we were referred.
Put very shortly, the effect of a nomination is that it operates as a disposition in
favour of the nominee, taking effect on the death of the nominator and revocable C
by the nominator at any time in his lifetime. Such a distribution, therefore,
partakes to some extent of the nature of a revocable settlement where the settlor,
represented by the father in this case, makes a provision for a child to take effect
on the settlor's death, and in the meantime revocable by the settlor.

The net estate of the father, apart from these amounts of savings certificates
and Post Office bank balance, amounted to £1,779 8s. 1d. At the period of the
nominations the elder son was aged forty-three; he was married but had no child D
and he was employed as a civilian clerk in the War Office.

These are the whole of the facts in the possession of the court, and, for the
purpose of reaching any decision on the point at issue, they are meagre indeed.
We have the bare fact of these two nominations; we have the fact that they
amounted in all to some £500, and we have the fact that the net estate, exclusive
of the nominated assets, amounted to only £1,779 8s. 1d. This shows that the E
amounts nominated, though not in themselves to be classed as very large sums
as money goes nowadays, were nevertheless no inconsiderable proportion of the
father's estate. If one treats the estate for purposes of calculation as including
the amounts in question, the proportion would be between one-quarter and one-
fifth.

These being the facts, are the certificates and the bank balance to be brought F
into account under s. 47 (1) (iii) of the Administration of Estates Act, 1925?
That provision reads:

"Where the property held on the statutory trusts for issue is divisible
into shares, then any money or property which, by way of advancement or
on the marriage of a child of the intestate, has been paid to such child by the G
intestate or settled by the intestate for the benefit of such child (including
any life or less interest and including property covenanted to be paid or
settled) shall, subject to any contrary intention expressed or appearing
from the circumstances of the case, be taken as being so paid or settled in or
towards satisfaction of the share of such child or the share which such child
would have taken if living at the death of the intestate, and shall be brought H
into account, at a valuation (the value to be reckoned as at the death of
the intestate), in accordance with the requirements of the personal
representatives."

It is on the true construction of that provision that the present case must turn.
It is a provision with a long history behind it, in that it takes the place of the
provisions for accounting for advancements by portion contained in the Statute I
of Distribution, 1670. By s. 3 of that Act "the whole surplusage" of the estate
of an intestate was to be divided "in manner and form following", namely:

"... one third part of the said surplusage to the wife of the intestate, and
all the residue by equal portions to and amongst the children of such persons
dying intestate, and such persons as legally represent such children in case

* I.e., the Savings Certificates Regulations, 1933 (S.R. & O. 1933 No. 1149), reg. 17,
and the Post Office Savings Bank Regulations, 1938 (S.R. & O. 1938 No. 556), reg. 35.

A any of the said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children, to whom such distribution is to be made:

B “And in case any child other than the heir at law who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid, then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate as shall make the estate of all the said children to be equal as near as can be estimated.”

C It will be seen that these provisions treat the interests taken by the children on an intestacy as portions, and the children are required to bring into account any sums representing advances by portion made to them respectively. It will be seen that the present provision, the provision in s. 47 (1) (iii) of the Administration of Estates Act, 1925, radically departs from the language of the Statute of Distribution, 1670, containing, as it does, no reference at all to portions, save in so far as a reference to portions is to be imported by implication from the use of the word “advancement”. To my mind s. 47 (1) (iii) of the Administration of Estates Act, 1925, is, if anything, narrower than the provisions of the Statute of Distribution, but decisions on the old Act are, generally speaking, applicable to the new.

E The earliest case to which we were referred was *Edwards v. Freeman* (1) ((1727), 2 P.Wms. 435) where I find this passage (*ibid.*, at p. 441):

F “The occasion of making the Statute of Distribution, was to put an end to the long contest which had been betwixt the temporal and spiritual courts, for when the spiritual courts ordered any distribution, or bond to be given by the administrator for that purpose, the temporal courts sent a prohibition, being of opinion, that the administrator had a right to all, and that the spiritual court could not break into that right; and so this statute was made in favour of the practice of the spiritual court, which proceeded to order distribution as often as the common law courts did not prohibit them, and the act intended to make the children’s provision equal, which was agreeable to the civil law, where goods movable and immovable (i.e. lands) are considered as the same, though our law would never let the civil law meddle with lands. In SWINBURNE 165, it is said, that if a father by deed settle an annuity on his child, to commence after his death, this is an advancement pro tanto; and by the same reason, a reversion settled on a child, as it may be valued, is an advancement also.”

H The next case, which is the leading case on this topic and has been referred to over and over again where questions of this sort arise, is *Taylor v. Taylor* (2) ((1875), L.R. 20 Eq. 155). It was a case of intestacy. The headnote is this:

I “An ‘advancement by portion’ within the meaning of s. 5* of the Statute of Distributions is a sum given by a parent to establish a child in life or to make a provision for the child. Sums given for the following purposes: (1) payment of the admission fee to one of the Inns of Court in the case of a child intended for the Bar; (2) the price of a commission and outfit of a child entering the army; (3) the price of plant and machinery and other payments for the purpose of starting a child in business:—Held, ‘advancements by portion’. Sums given for the following purposes: (1) payment of a fee to a special pleader in the case of a child intended for the Bar; (2) price of outfit and passage money of an officer in the army and his wife

* I.e., s. 3 in Statutes Revised and 9 HALSBURY’S STATUTES (2nd Edn.) 658.

on going out to India with his regiment; (3) payment of debts incurred by an officer in the army; (4) assisting a clergyman in paying his house-keeping and other expenses:—Held, not ‘advancements by portion’.

In the first of the two judgments he delivered in the case *SIR GEORGE JESSEL, M.R.*, said this (*L.R. 20 Eq. at p. 157*):

“I have always understood that an advancement by way of portion is something given by the parent to establish the child in life, or to make what is called a provision for him—not a mere casual payment of this kind. You may make the provision by way of marriage portion on the marriage of the child. You may make it on putting him into a profession or business in a variety of ways: you may pay for a commission, you may buy him the goodwill of a business and give him stock-in-trade; all these things I understand to be portions or provisions. Again, if in the absence of evidence you find a father giving a large sum to a child in one payment, there is a presumption that that is intended to start him in life or make a provision for him; but if a small sum is so given you may require evidence to show the purpose. But I do not think that these words ‘by portion’ are to be disregarded, nor is the word ‘advancement’ to be disregarded. It is not every payment made to a child which is to be regarded as an advancement, or advancement by way of portion. In every case to which I have been referred there has either been a settlement itself, or the purpose for which the payment was made has been shown to be that which everyone would recognise as being for establishing the child or making a provision for the child.”

In the second judgment* *SIR GEORGE JESSEL, M.R.*, said (*L.R. 20 Eq. at p. 158*):

“... that nothing could be more productive of misery in families than if he were to hold that every member of the family must account strictly for every sum received from a parent. According to his view, nothing was an advancement unless it were given on marriage, or to establish the child in life. *Prima facie*, an advancement must be made in early life; but any sum given by way of making a permanent provision for the child would come within the term establishing in life. The entry money at the Middle Temple was clearly for the establishment of the child, and must be accounted for ...”

Then he referred to some of the other payments and continued (*ibid.*, at p. 159):

“Again, the sums paid for debts in India appeared to be in the nature of temporary assistance; thus, if a child were in business and required further capital, a sum given for that purpose would be an advancement; but a sum given merely to assist him temporarily would not. The sum given to pay the debts in India therefore need not be accounted for. On the other hand, the payments in respect of the mining operations in Wales appeared to have been made for starting the plaintiff in business, and ought to be accounted for.”

That is a very well known case, and those two short judgments of *SIR GEORGE JESSEL* have always been regarded as the nearest approach to a definition of what is an advancement that our case law has achieved. There are one or two points to which I should especially refer. The learned Master of the Rolls said (*L.R. 20 Eq. at p. 158*):

“Again, if in the absence of evidence you find a father giving a large sum to a child in one payment, there is a presumption that that is intended to start him in life or make a provision for him ...”

* The first judgment dealt with the sums paid to one son, the clergyman, the second judgment with the sums paid to the other son, who attempted the law, the army and commerce in turn.

A I call attention to that because counsel for the younger son relied on the relatively substantial amount of the value of the certificates and the bank balance here in question as compared with the total estate of the father.

Then the learned Master of the Rolls said (*ibid.*):

B “In every case to which I have been referred there has either been a settlement itself, or the purpose for which the payment was made has been shown to be that which everyone would recognise as being for establishing the child or making a provision for the child.”

C Now it seems that under the Statute of Distribution, 1670, any provision made for a child by way of settlement was looked on as an advancement by portion, and it seems to me that that is recognised by the language of the Master of the Rolls to which I have just referred. However, we have to apply the terms of s. 47 (1) (iii) of the Administration of Estates Act, 1925, and the language of that enactment seems to me to show that it is not every settlement, the benefits taken under which must be brought into account, but that the settlement must be either by way of advancement or on the marriage of the child concerned. So that in this case if one regards the nominations as equivalent to a settlement, that cannot conclude the matter; it is necessary still to see whether the disposition was in the nature of an advancement.

D I would particularly refer again to this in the second judgment of the learned Master of the Rolls (L.R. 20 Eq. at p. 158):

E “According to his* view, nothing was an advancement unless it were given on marriage, or to establish the child in life. *Prima facie*, an advancement must be made in early life; but any sum given by way of making a permanent provision for the child would come within the term establishing in life.”

F So *prima facie*, an advancement must be made early in life. One must note, in relation to this consideration, that the elder son at the date of these nominations was forty-three years old. Then there is the question whether the subject-matter of the relevant dispositions in the present case was given by way of making a permanent provision for the elder son. That is a matter to which I will return.

G I do not wish to burden this judgment by unnecessary citations from well known authorities, but in view of the course taken by the argument I should, I think, refer to the judgment of BOWEN, L.J., in *Re Lacon, Lacon v. Lacon* (3) ([1891] 2 Ch. 482 at p. 497). It is to be observed as regards this authority that it does not deal with an intestacy, but with the application of the rule against double portions in its strict sense; that is to say it is a case where a testator made a will disposing of property in favour of his children in a certain way, and the question arose whether a benefit given to a particular child after the date of the will must be brought into account under the rule against double portions. Of course that doctrine proceeds on the ground that the testator in making his will has *prima facie* set out his ideas of equality or fairness as between his children; it is not necessarily mathematical equality that is concerned. The testator is taken to have set out his intentions on that subject in his will, and accordingly if an advancement by way of portion is made to a child between the date of the will and the date of the death, then, unless the contrary is shown, it must be brought into account, so as not to disturb the intended scheme of division.

I BOWEN, L.J., said this (*ibid.*, at p. 497):

“Accordingly, in order to establish a case for the application of this rule as to double portions, there must be two matters, I think, made out, and it will be seen upon reflection that there are two presumptions really which are to be considered, and not one. In the first place, both of the suggested gifts or donations must be gifts in the nature of a portion. The first presumption here comes under discussion: it is said that, whatever gifts are

* I.e., JESSEL, M.R.

made by the father, which it may be supposed will have to be distributed among the children, or which are given by the father to one child with a view to establishing him in life, are presumed to be portions within the meaning of the rule. We have, therefore, to ask ourselves, in the first place, were these two shares which were received during the lifetime of the father received under such circumstances as to justify their being treated and considered as a portion? But, supposing both gifts are gifts in the nature of portions, then comes a further question, for the solution of which a further presumption is invoked. That question is, whether it was intended that the former gift or portion should take the place of an advancement of the gift which is given by the will, and there the second presumption which is invoked has to be dealt with—a presumption to the effect that the former gift, the gift *inter vivos*, was intended as an advancement *pro tanto* of the gift under the bequest—a presumption, it is said, which ought to be made in favour of equality amongst children, it being the view of the law that equality is what the father, in dealing with his children, would, in most cases, presumably intend. This, like the former, is a presumption which may be rebutted. The circumstances may show that a gift given during the lifetime is not intended as an advancement of the bequest. Circumstances may show (to put it in different language) that equality was not the intention of the father.”

There BOWEN, L.J., is saying, in effect: you must find a will which leaves a child a portion and you must find some subsequent gift to the child in the nature of a portion; until you find a gift in the nature of a portion made to the child *inter vivos*, no question of double portion arises, but where you do find that there is a gift in the nature of an advancement, then the further question arises whether that gift is intended to be given by way of anticipation of the child's interest under the will; on that aspect of the matter there is a presumption in the affirmative which can be rebutted by showing that the parent did not intend the gift in question to be by way of anticipation of the benefit under the will, but intended it to be additional.

The law on this subject is rendered less easy to follow by the circumstance that the word “advancement” seems to be used in two ways. First, there is the typical gift by way of advancement for establishing a child in life; the child is there spoken of as being advanced because he is forwarded in life and made to stand better with the world. On the other hand, the word “advancement” is sometimes used in relation to the second branch of BOWEN, L.J.'s observations, that is to say, as being an advancement or anticipation of the interest under the will or, in cases like the present, the interest taken under the intestacy. Be that as it may, the first thing that has to be established in any case of this kind is that the gift, which it is said should be brought into account, was in itself in the nature of an advancement by portion.

I have only one other citation to make from the authorities and that is *Re Scott, Langton v. Scott* (4) ([1903] 1 Ch. 1). I will not go into the facts of that case; I will confine myself to referring to certain passages in the judgment on which counsel for the younger son relied. VAUGHAN WILLIAMS, L.J., said this (*ibid.*, at p. 10):

“Now, with regard to the son John the gift, or whatever it may be called, of this sum of £5,000—a large sum of money—bears so much the characteristics of a portion that, in the absence of anything to rebut the conclusion, we ought, I think, to assume that the first of the presumptions mentioned by BOWEN, L.J., applies.”

There VAUGHAN WILLIAMS, L.J., founded himself partly on the size of the sum of money in question, and he described £5,000 as a large sum of money. Then STIRLING, L.J., said ([1903] 1 Ch. at p. 13):

- A "I shall assume that this sum of £5,000, being a large one, would, in the case of an ordinary estate, be prima facie taken to be an advance within the rule against double portions . . ."

Finally, COZENS-HARDY, L.J., said (ibid., at p. 16):

- B "I agree with him [i.e. with counsel] that, if nothing more had been known than that such a large sum as £5,000 had been given to a child by his father in the interval between the date of his will and that of his death, there would be a presumption, which in that case would not be rebutted, that it was to be taken by the child in partial satisfaction of the provision made for him by the will."

- C Then the learned lord justice went on to discuss this aspect of the matter and he said (ibid., at p. 17): "We are dealing here with a very wealthy man, whose estate was worth £200,000 or £250,000."

- D I should mention that we were also referred to the recent decision of ROXBURGH, J., in *Re Livesey's Settlement Trusts* (5) ([1953] 2 All E.R. 723). All I have to say about that case is that it seems to me to have turned on the language of the particular document; I do not think any assistance is to be found in it for the purposes of the question which we have now to decide.

- Returning to sub-s. (1) (iii) of s. 47 of the Administration of Estates Act, 1925, the question is whether the certificates and the bank balance in this case were

- E "any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child."

- F It is clear that the words "has been paid to such child by the intestate or settled by the intestate for the benefit of such child" are governed by the words "by way of advancement or on the marriage of a child"; so that it is indispensably necessary for the younger son's success in the present case, a gift on the occasion of marriage not being here in question, that the court should be able to say that these dispositions, whether one terms them payments or settlements, were made by way of advancement. SIR GEORGE JESSEL, M.R., indicated in *Taylor v. Taylor* (2) the kinds of payment which should be regarded as advancements by portion for the purposes of this provision.

- G The difficulty in the way of the younger son in this case is the complete absence of evidence as to the circumstances in which these nominations were made. We have no information whatever except the age of the elder son, which was forty-three, and, therefore, "prima facie", as SIR GEORGE JESSEL said (L.R. 20 Eq. at p. 158) against the view that there was an advancement. We have no evidence as regards the elder son's means or needs at the time; we have nothing whatever to throw any light on the matter. The only purpose in the way of advancement that can here be collected is the general purpose of making a permanent provision for the elder son so as to come within the words of SIR GEORGE JESSEL, M.R. (ibid.)

"that any sum given by way of making a permanent provision for the child would come within the terms of establishing in life".

- I Can one say, on the bare facts of these nominations having been made, that they were made by way of permanent provision for the elder son? There is nothing to aid us to that conclusion except the size of the fund. As I have already indicated, the fund in itself is not large as the value of money goes today, but it is no inconsiderable portion of the whole amount that the father had to dispose of. Is it then, regarding the matter relatively as well as absolutely, a large enough sum to make it possible for this court to say that, prima facie, this was an advancement by way of permanent provision for the elder son and that it must, therefore, be brought into account unless the presumption to that effect can be

rebutted? There being no rebutting evidence, the matter could in that event be decided on the presumption the other way, that is to say, the presumption to the effect that the giving of this relatively large amount, if unexplained, must be taken to have been an advancement.

I have found this case a difficult one and I agree with UPJOHN, J.'s description of it ([1956] 3 All E.R. at p. 611) as a "border-line case", but, giving the best consideration to the matter I can, I cannot regard these savings certificates and this bank balance, given as they were on two separate occasions, albeit the dates were close together, as constituting a fund of such size or importance even when considered in relation to the intestate's other assets, as to be capable of being described as *prima facie* constituting an advancement. I appreciate the force of counsel for the younger son's argument based on relative values, but it does not seem to me that this should be carried too far. I think that, in order to raise a *prima facie* case for accounting, it must be shown that the fund in question was sufficiently substantial in itself to be in the nature of a permanent provision without pressing too far the question of proportion. If that were not so an intestate who only had £50 in the world, £25 in cash and £25 in National Savings Certificates, could properly be held to be making a permanent provision for one of his sons by giving him a nomination in respect of the certificates, because they represented no less than half his estate, although the sum given would in itself be trifling.

For these reasons, which I am afraid I have expressed at undue length, I think that UPJOHN, J., came to a right conclusion in this case, and I would dismiss this appeal.

SELLERS, L.J.: I entirely agree with my Lord.

UPJOHN, J., described the case ([1956] 3 All E.R. at p. 611) as "a border-line case" in respect of the question whether there had been an advancement to the elder son by reason of the father's disposition. It was indeed, in my view, a border-line case and very little might have been necessary by way of evidence to permit of that finding. If even the elder son had been twenty years younger it might have been sufficient, but, in the circumstances, I think that any inference to be made on the evidence was too uncertain to justify an affirmative finding that this was an advancement.

VAISEY, J.: I agree with everything that has fallen from my Lords and I have nothing of my own to add. I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Mark Lemon* (for the defendant, the younger son); *H. W. & S. Patey* (for the plaintiffs, the executors of the elder son).

[*Reported by* HENRY SUMMERFIELD, Esq., *Barrister-at-Law.*]

A INLAND REVENUE COMMISSIONERS v. POLLOCK & PEEL, LTD. (in liquidation).

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Pearce, L.J.J.), May 20, 21, 22, 24, 1957.]

B *Profits Tax—Distribution—Gross relevant distribution—“Repayment or return of share capital”—Exclusion of distribution of capital—Company in voluntary liquidation—Transfer of assets to new company—Balance less expenses paid to shareholders—Finance Act, 1947 (10 & 11 Geo. 6 c. 35), s. 35 (1)—Finance Act, 1951 (14 & 15 Geo. 6 c. 43), s. 31 (1), (5).*

C In November, 1952, a limited company of which the two sole shareholders were the directors capitalised £28,056 of its profits by applying that sum in paying up ordinary shares which were issued as fully paid bonus shares to the shareholders. All the shares of the company were ordinary shares. In October, 1953, the company went into voluntary liquidation for reconstruction purposes, and, except for a sum in cash, all its assets were transferred to a new company in return for an issue of shares of the new company. After discharging the liabilities of the old company and the costs of administration, the liquidator paid £15,030, the balance of the cash, to the shareholders of the old company in proportion to their shareholdings. The company was assessed to profits tax in respect of the £15,030 as being a “repayment or return of share capital” which was deemed (by s. 31 (1), (5) of the Finance Act, 1951) to be a “gross relevant distribution” within the meaning of s. 35 (1) of the Finance Act, 1947. By s. 35 (1) (c) of the Finance Act, 1947, a distribution made after the end of the last chargeable accounting period in which a business was carried on was excluded from being a gross relevant distribution if it was a distribution of capital.

E **Held:** (i) the company was not liable for the profits tax in respect of the £15,030, because:

F (a) assuming that the payment of £15,030 was a repayment or return of share capital within the definition of reduction of capital in s. 31 (5) of the Finance Act, 1951, the statutory consequence of that would be merely that the payment would be a “distribution” within s. 35 of the Finance Act, 1947, and the payment would still be excluded from being a “gross relevant distribution” by s. 35 (1) (c) since, being a distribution of assets in a winding-up, the payment was a “distribution of capital” within s. 35 (1) (c) (see p. 492, letter E, and p. 494, letters G to I, post).

G Dictum of LORD MACNAGHTEN in *Birch v. Cropper, Re Bridgewater Navigation Co., Ltd.* ((1889), 14 App. Cas. at p. 546) applied.

H (b) (per LORD EVERSLED, M.R., PEARCE, L.J., concurring) in the present case, where the shares in the old company were all of the same class, the payment of the £15,030 was not a “repayment or return of share capital” within s. 31 (5) of the Finance Act, 1951, and therefore was not deemed to be a distribution within s. 35 of the Finance Act, 1947 (see p. 489, letter I, to p. 490, letter A, post).

I (ii) the case should not be remitted to the commissioners to find whether the £15,030 was capital, since the court should be extremely slow to remit a case and to adopt that course here would serve no purpose, for the facts had been found and the question whether the distribution was a distribution of capital within s. 35 (1) (c) of the Act of 1947 was a question of law (see p. 493, letters C to E, post).

Decision of UPJOHN, J. ([1956] 2 All E.R. 776) affirmed.

[For the Finance Act, 1947, s. 35 (1), see 12 HALSBURY'S STATUTES (2nd Edn.) 779; and for the Finance Act, 1951, s. 31 (1), (5), see 30 HALSBURY'S STATUTES (2nd Edn.) 173-175.]

Cases referred to:

- (1) *Inland Revenue Comrs. v. Universal Grinding Wheel Co., Ltd.*, [1953] 2 All E.R. 1592; [1954] Ch. 117; *affd.* H.L., [1955] 2 All E.R. 29; [1955] A.C. 807; 35 Tax Cas. 551; 3rd Digest Supp.
- (2) *Inland Revenue Comrs. v. Blott*, [1920] 2 K.B. 657; *affd.* H.L., [1921] 2 A.C. 171; 90 L.J.K.B. 1028; 125 L.T. 497; 8 Tax Cas. 101; 28 Digest 107, 663.
- (3) *Birch v. Cropper, Re Bridgewater Navigation Co., Ltd.*, (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 10 Digest (Repl.) 1065, 7391.
- (4) *Inland Revenue Comrs. v. Burrell*, [1924] 2 K.B. 52; 93 L.J.K.B. 709; 131 L.T. 727; 9 Tax Cas. 27; 28 Digest 108, 665.
- (5) *Hill (R.A.) v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A.C. 720; 144 L.T. 65; sub nom. *Re Hill (Richard)*, *Hill v. Permanent Trustee Co. of New South Wales*, 99 L.J.P.C. 191; Digest Supp.

Appeal.

The taxpayer company appealed against an assessment to profits tax for the chargeable accounting period Jan. 1, 1953, to Oct. 31, 1953, of £4,406 14s. 10d. being a distribution charge of £22,033 10s. 2d. at twenty per cent. The matter in dispute was whether £15,030 cash distributed by the liquidator of the company to its members was a "gross relevant distribution" within the meaning of s. 35 (1) of the Finance Act, 1947, having regard to the terms of s. 31 (1) of the Finance Act, 1951.

The company was incorporated on May 12, 1942, to acquire and carry on an engineering business. Its share capital was £2,500 divided into 2,500 shares of £1 each of which 2,004 were issued. In November, 1952, its issued capital was increased to 30,060 £1 shares under a special resolution for the capitalisation of profits, comprising £28,056 standing to the credit of a capital reserve account and a profit and loss appropriation account, which was used to pay up as fully paid bonus shares 28,056 ordinary shares of £1 each allotted to the existing shareholders on the basis of fourteen new bonus shares for each ordinary share then held. The only directors and shareholders of the company were Mr. J. C. Pollock (who died on Nov. 8, 1953) and his wife. On Oct. 31, 1953, the company went into voluntary liquidation. As part of a scheme of reconstruction, its business was transferred on Nov. 6, 1953, to a new company also called Pollock & Peel, Ltd., under an agreement between the liquidator of the taxpayer company and that company. The new company took over all the taxpayer company's assets, except a sum of cash, in consideration of shares in the new company which were received by the executors of Mr. Pollock and by Mrs. Pollock. This distribution of shares did not give rise to any liability for profits tax because of a joint election by the two companies within the terms of s. 36 (4) of the Finance Act, 1947. After this transfer of assets, the payment of all the taxpayer company's debts and liabilities and the costs of winding-up, and the company's cessation of business, £15,030 remained in the hands of the liquidator. This he distributed to the executors of Mr. Pollock and to Mrs. Pollock, the shareholders.

The company contended that: (i) under s. 35 (1) of the Finance Act, 1947, which was not overridden by s. 31 of the Finance Act, 1951, only so much of a distribution, made after the end of its last chargeable accounting period by a body corporate with a share capital, in excess of the nominal amount of the body corporate's paid up share capital could be treated as a gross relevant distribution, and the £15,030, being less than the nominal amount of the paid up share capital of the company (£30,060), was not a gross relevant distribution; (ii) the sum of £15,030 was not a sum applied in "reducing" the taxpayer company's share capital for the purpose of s. 31 (1) of the Act of 1951, and was therefore not a distribution within that provision for profits tax purposes; (iii) alternatively only a rateable part of the £15,030 could be treated as a sum applied in "reducing" the company's share capital.

A The Crown contended that: (i) the £15,030 was a sum applied in reducing capital within the meaning of s. 31 of the Act of 1951 and was therefore deemed to be a distribution of a like sum and a gross relevant distribution under s. 35 (1) of the Act of 1947; (ii) the provisions of s. 35 (1), specifying distributions which were to be treated as distributions of capital, had no application to sums deemed to be distributions by virtue of s. 31 (1); (iii) the shares in the new company were not to be taken into account in arriving at the gross relevant distributions, because under s. 36 (4) of the Finance Act, 1947, which applied by virtue of the election of the two companies under that enactment, the distribution of shares was deemed not to be a distribution for the purposes of s. 35.

B The commissioners held that s. 31 of the Finance Act, 1951, did not override the requirements of s. 35 (1) of the Finance Act, 1947, and that for the purposes of s. 35 (1) (c) distributions were to be treated as distributions of capital except to the extent to which they exceeded the paid up share capital. As the £15,030 did not exceed the £30,060 paid up share capital it was not a gross relevant distribution to proprietors for the purposes of profits tax. They allowed the appeal and reduced the assessment to £2,042 at twenty per cent., i.e., £408 8s. tax. On June 14, 1956, UPJOHN, J., dismissed the Crown's appeal by Case Stated against that decision ([1956] 2 All E.R. 776). The Crown appealed to the Court of Appeal.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Sir Reginald Hills and E. Blanshard Stamp for the Crown.

Roy Borneman, Q.C., and H. B. Magnus, Q.C., for the company.

E *Cur. adv. vult.*

May 24. LORD EVERSHERD, M.R.: The question raised in this appeal is whether the tax known as profits tax, or more strictly a certain aspect of profits tax called the "distribution charge", is leviable in respect of the sum of £15,030 which was paid out (to use a neutral phrase) by the liquidator of the taxpayer company, Pollock & Peel, Ltd., to the two shareholders of that company in the course of its liquidation. The company was incorporated in May, 1942, for the purpose of carrying on an engineering business. At the close of the calendar year, ended Dec. 31, 1951, which was also the chargeable accounting period, the issued share capital of the company consisted of 2,004 fully paid shares of £1 each, all of the same class. Mr. and Mrs. Pollock were the sole shareholders and the two directors of the company. On Nov. 6, 1952, by an appropriate resolution under the articles, the company capitalised a sum of £28,056 of profits and applied that sum in paying up on behalf of the two shareholders 28,056 £1 shares, the capital being increased accordingly. Thereafter, the issued share capital was 30,060 shares of £1 each.

G On Oct. 31, 1953, that company went into voluntary liquidation, and a week later, on Nov. 6, the liquidator entered into an agreement for the sale of the assets and undertaking of the company with one exception to a new company incorporated for the purpose of acquiring the assets, and having the same name as the liquidated company and having also as its shareholders the same two individuals, Mr. and Mrs. Pollock. The consideration for the sale was the issue by the new company to the liquidator of the taxpayer company of 30,060 shares of £1 each fully paid up in the new company, and those shares in the course of the liquidation were distributed to the two shareholders, Mr. and Mrs. Pollock. Mr. Pollock on Nov. 8, 1953, unhappily died, so that his part of the share consideration passed to his personal representatives.

I The one exception was a sum of cash which, so far as is relevant for present purposes, may be stated as £15,030, a figure which was arithmetically exactly fifty per cent. of the amount of the issued capital of the taxpayer company. There was some discussion before us as to the exact amount retained, for I understand that something was also retained for the purpose of paying the costs of the liquidation and so forth. But, so far as this appeal is concerned, we

are concerned with a balance figure of £15,030, which sum in the due course of liquidation was paid out, to use again a neutral phrase, to the representatives of Mr. Pollock and to Mrs. Pollock as the contributories of the old company. A

The claim of the Crown has been that a distribution charge is payable in all the circumstances in respect of that £15,030. Profits tax, *née* national defence contribution, began its fiscal life in 1937. It acquired its later appellation under s. 44 of the Finance Act, 1946. For the purpose of this appeal, none of the statutory provisions before the Finance Act, 1947, is relevant. In substance this appeal turns on the meaning, in the proper context of the other relevant sections, of s. 35 of the Act of 1947, and of s. 31 of the Finance Act, 1951, which in certain respects amended or supplemented the provisions of the Act of 1947. B

Section 30 of the Finance Act, 1947, after varying the rate of profits tax, made provision in sub-s. (2) for what was called non-distribution relief. The purpose of non-distribution relief was this: that, if the profits of the company which *prima facie* would bear profits tax were not in fact all distributed in any chargeable accounting period, a certain relief was given in respect of that part of them which was not distributed. For the purpose of making the necessary calculations and of arriving at the amount of the levy, a formula was devised, known as "net relevant distribution", and the relief was arrived at in respect of the difference in any chargeable accounting period between the net relevant distributions and the total profits for that period. But sub-s. (3) imposed what is called in later sections of the Act a distribution charge. The point of that charge was as follows: where a company had obtained non-distribution relief and during a later chargeable accounting period distributed profits which were in excess of the profits for that period, i.e., where the company availed itself, for the purpose of distribution in that year, of profits previously earned and not distributed, and in respect of which therefore non-distribution relief had been claimed, a distribution charge on the excess distributed over the profits for the year of distribution was imposed. That distribution charge was subject to a limit stated in the proviso to sub-s. (3). The section is relevant first as introducing the formula "net relevant distributions", and, secondly, because a distribution charge in any chargeable accounting period depends on the business, or in this case the company, having previously had the benefit of non-distribution relief. The taxpayer company had in a previous year enjoyed the non-distribution relief so that the question of a distribution charge arose in the period with which we are concerned. C D E F

The formula "net relevant distributions" is defined in s. 34 (2) of the Act of 1947. They are discovered by taking a proportion therein indicated of the gross relevant distributions. Section 35, one of the two vital sections, provides the meaning of "gross relevant distributions". Section 35 (1) of the Finance Act, 1947, provides: G

"Subject to the provisions of this and the two next succeeding sections, the gross relevant distributions to proprietors for any chargeable accounting period of a body corporate, society or other body, are the total distributions to the members of the body corporate, society or other body, not being distributions . . ."

therein stated, ". . . and being either—(a) dividends declared . . ." as therein more precisely defined; ". . . or (b) distributions . . ." other than such dividends ". . . made in the period; or . . ."—and this is the most relevant— I

"(c) in the case of the last chargeable accounting period in which the trade or business is carried on, so much of any distribution made after the end of that period (not being a distribution to which para. (a) of this sub-section applies) as is not a distribution of capital, and, for the purposes of para. (c) of this sub-section, the distributions which are to be treated as distributions of capital shall not, in the case of distributions made by a body corporate with a share capital, exceed an amount equal to the total nominal

A amount of the paid up share capital thereof together, where the body corporate has issued shares at a premium for cash, with the aggregate of the amounts of the premiums."

The last two lines have no application here, for this body corporate had not issued shares at a premium at all.

B The last chargeable accounting period of the taxpayer company began on Jan. 1, 1953, and ended with its liquidation on Oct. 31 of that year. At that date the total nominal amount of the paid up share capital of the taxpayer company was £30,060, if the bonus shares issued in the previous year are treated as paid up share capital at the relevant date, as I think they must be.

C Section 36 defines distributions. Gross relevant distributions consist, not of all distributions, but of such distributions as are specified in s. 35 (1). By the wording of the sub-sections, all the distributions which make up gross relevant distributions are distributions *to the members*. Section 36 provides what are distributions, forming as it were the general class out of which the gross relevant distributions will be extracted. One example is from sub-s. (1):

D "Subject to the provisions of the next succeeding sub-section, wherever . . . (b) assets are distributed in kind to any person . . . there shall be deemed for the purposes of the last preceding section to be a distribution to that person . . . of an amount equal to the value of those assets."

If, therefore, any assets in the first company were distributed to any person, then that person would have been treated as having had distributed to him an amount equal to the value of those assets.

E Then there comes a proviso:

"Provided that no sum applied in repaying a loan or in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution."

F As I read it, that is to say that sums applied in reducing capital are not regarded as distributions at all, and therefore it follows that, as the Act then stood, such distributions could not be regarded as possibly comprising gross relevant distributions.

G Section 36 (4) deals with a particular kind of case, of which the present is one, namely, a scheme of amalgamation or reconstruction whereby the assets of one company are transferred to another. Putting it generally, its object was that, if both the transferor and the transferee companies agreed in writing, addressed to the commissioners as therein stated, certain of the obligations for a distribution charge which might have fallen on the first company were thrown on the second. Thus, where such a transfer and election have been made, the sub-section provides that Part 4* of the Act applies,

H "... subject to the following modifications, that is to say—(i) any distribution of those shares [in the second company] to any person in a winding-up of the first company shall, notwithstanding anything in sub-s. (1) of this section, not be deemed for the purposes of the last preceding section to be a distribution to that person; and (ii) in considering what distribution charge, if any, falls to be made on the second company, any difference on which non-distribution relief for chargeable accounting periods before the transfer was given to the first company . . . shall, except so far as it has already operated to increase a distribution charge on the first company, be taken into account as if it had been a difference arising in relation to the second company on which non-distribution relief had been given to that company, and shall also be taken into account, in the case of the last chargeable accounting period of the second company, so as to increase the amount which, for the purposes of para. (c) of sub-s. (1) of the last preceding section, is to be treated as not a distribution of capital."

* I.e., s. 30-s. 48 of the Finance Act, 1947.

That throws one back to s. 30, and particularly to sub-s. (3). But the effect is that, in calculations to see (among other things) what limit ought to be placed on the distribution charge, the second company is treated as though the differences from which the non-distribution relief was calculated for the first company have been facts in the life of the second company. A

I do not think that the last few lines of the sub-section, to which some attention was directed in the argument, assist to solve the present problem. The last chargeable accounting period of the new company has not arisen, and I cannot find in these last few lines, and in particular in the reference to "distribution of capital", anything which materially affects the proper construction of the phrase "distribution of capital" in s. 35. But there is this significance of s. 36 to the present facts. Election by the taxpayer and the new companies was made pursuant to sub-s. (4), and it seems to me to follow inevitably that the distribution of the shares in the new company to the persons who were in fact the shareholders of the taxpayer company cannot be treated as distributions to those persons at all for any relevant purposes, including, of course, the purposes of s. 36 (1) and s. 35. B C

Second junior counsel for the Crown argued that we should treat the distribution of the shares in the new company to the shareholders in the taxpayer company as being a relevant distribution of capital on any view under s. 35 (1) (c), so that the limit in the last six lines of s. 35 (1) would have been passed before the £15,030 came to be distributed. I do not think that can be right because, in my reading of these sections, in the circumstances, one cannot look on the distribution of the new company's shares as being distributions at all for any relevant purpose. D E

Section 31 (1) of the Finance Act, 1951, provides:

"Subject to the provisions of this section, where—(a) whether before or after the passing of this Act but after [a date which has long since passed] a body corporate, unincorporated society or other body capitalises any distributable sum: and (b) then or thereafter, whether before or after the passing of this Act but after Apr. 10, 1951, any sum is applied in reducing its capital, there shall be deemed for the purposes of s. 35 of the Finance Act, 1947 (which defines the expression 'gross relevant distributions to proprietors' for profits tax purposes), to be a distribution to the members of the body corporate . . . of an amount equal to the sum so applied or to the total amount of the distributable sums previously capitalised by it as aforesaid, whichever is the less, taking place when the sum is so applied." F G

Sub-section (2) covers the converse case where the reduction of capital precedes the capitalisation. Sub-section (5) contains definitions, the last five lines of which are in these terms:

". . . and references to the reduction of capital shall be deemed to include references to the repayment or return of share capital and the repayment or redemption of loan capital . . . " H

In s. 35 (1) of the Act of 1947 para. (c) relates to distributions which take place after the end of the last chargeable accounting period referred to. In that respect it is unlike, e.g., para. (b), which is limited to distributions made in the chargeable accounting period itself. Paragraph (c), however, does not in terms deal with a company which has ceased to carry on any trade or business because it is being wound up, as distinct from a company which has ceased to carry on a particular trade or business but continues to exist as a company carrying on perhaps other trades or businesses; the sort of case which has been met with in these courts in coal mining companies where the coal mining operations of the businesses have ceased. It was held in *Inland Revenue Comrs. v. Universal Grinding Wheel Co., Ltd.* (1) ([1953] 2 All E.R. 1592) that, though not limited thereto, s. 35 (1) (c) I

A does apply to cover the case of a company which has ceased to carry on business altogether through having gone into liquidation.

In this court the argument of the Crown, who are appellants from the judgment of UPJOHN, J., was first based on s. 31 of the Act of 1951. The case has involved some refinement of argument on the language which it is sought to construe, and, I think, one of the difficulties in the way of the Crown's argument (not of course fatal) is that they say that, although the payment out of the £15,030 is a repayment of capital within s. 31 of the Act of 1951, it is not a distribution of capital within s. 35 of the Act of 1947. The maintenance of that distinction has made the argument at times a little difficult to follow; each side has accused the other of advancing arguments on one section which are inconsistent with their arguments on the other. However, I do not myself think that the argument of the taxpayer company here, which prevailed before UPJOHN, J., fails through any inconsistency, and my conclusion is that UPJOHN, J.'s judgment was right and ought to be affirmed.

C The argument of the Crown was that this payment of the £15,030 was a return of capital within the meaning of s. 31 of the Act of 1951. One question which arises, at the first reading of s. 31, is whether the section is really intended to apply at all otherwise than to a company which is at all relevant times continuing in existence.

D The process of reducing the capital of a company may take the form of reducing capital which is lost by reducing the amount of the nominal as well as the paid up share capital by cancellation, nothing being returned to any shareholder. On the other hand, where capital is in excess of the company's wants, it may take the form of returning excess capital to the shareholders, at the same time reducing the nominal amount of the capital by corresponding figures. To my mind, at first reading, the statement in the definition clause that a reduction of capital is to be deemed to include a repayment or return of share capital as a matter of ordinary sense, is applicable to the sort of case, of which my last example was an illustration, in which the shareholder receives a return of his capital because the capital is in excess of the company's business requirements.

E I think UPJOHN, J., was inclined to the view that s. 31 did not deal with a case in which the company at any stage had gone into liquidation. Sub-section (2) cannot apply to a company which has gone into liquidation at any relevant date, because the second of the two operations there mentioned is the capitalisation which must *ex necessitate rei* take place during the company's life; but, in sub-s. (1), it is possible that the reduction of capital which takes the form of repayment might occur after the company has gone into liquidation—provided the repayment in the liquidation could be regarded as a repayment or return of share capital within the meaning of that sub-section as defined.

G I will assume in favour of the Crown, without expressing any view on it, that s. 31 (1) should not be treated as limited in its application only to cases where the whole of the operations have occurred during the company's life. I will assume that, if there has been a capitalisation and the company then goes into liquidation, the sub-section may be apt to cover an operation taking place after liquidation—provided, of course, that operation can fairly be described as a return of share capital. But it was the view of UPJOHN, J., that the payment out by the liquidator to the shareholders in this case could not properly be described as a reduction of share capital within the meaning of s. 31 (1)*, and I agree with him on that point. Like the learned judge, I think that in some cases, where a company's capital consists of shares of different classes and shareholders of one class are limited under the company's regulations strictly in a liquidation to what has been described as a return or repayment of capital paid up (on the assumptions I am making), such an operation might be treated as falling within

* The terms of the definition of reduction of share capital, which includes repayment or return of capital, are set out at p. 488, letter H, ante.

s. 31 (1) to the extent that the shareholders whose capital had been "reduced" were shareholders of a class whose rights were limited as I have mentioned. But in this case the shares are all of one class, and I cannot myself fit into the scheme of the actual operations anything which could fairly be described as a return or repayment of share capital as contemplated by s. 31 (1) of the Act of 1951. A

In support of this part of his argument, the Attorney-General referred to language used by SCRUTTON, L.J., in *Inland Revenue Comrs. v. Blott* (2) ([1920] 2 K.B. 657 at p. 675): B

"A company is liquidated during the year of assessment, and the liquidator returns to the shareholders, (1) their original capital, (2) accretions to capital due to increase in value of the assets of the company, (3) the reserve fund of undivided profits in the company, (4) the undivided profits of the last year of assessment. Heads (3) and (4) will have paid income tax through the assessment of the company; but it appears to me that none of the heads will be returnable to super-tax as assessment; they are not income from property, but the property itself in course of division." C

As a factual statement of what happens in the case of a solvent company it is no doubt accurate to say that the liquidator may proceed in the order that SCRUTTON, L.J., stated. But I do not think that the lord justice was intending to make a general statement applicable to a case in which the point was that with which we are concerned in this case. *Inland Revenue Comrs. v. Blott* (2) related to an assessment to super-tax of individuals under the Finance (1909-10) Act, 1910, the claim of the Crown being to charge the individuals with super-tax on certain shares which had been allotted as bonus shares. I therefore do not think that any help for present purposes can be taken from that particular language of SCRUTTON, L.J., used in its context. D

Let me assume, however, that it is proper and possible to say that the £15,030 might be treated as a return or repayment of capital, at any rate for some purposes, within s. 31 (1) of the Act of 1951. It is clear, I think, that that alone does not achieve the necessary result for the Crown. The Attorney-General therefore went on to say that s. 31 of the Act of 1951 must be treated as adding, as it were, two additional paragraphs, which he called (d) and (e), to s. 35 (1) of the Act of 1947, following after para. (c); with this effect, that "gross relevant distributions" will include as a separate head, and unlimited by any restrictions found in para. (c), the distributions which are described in s. 31. The Attorney-General frankly stated that he did not press that argument too strongly on us, and, encouraged perhaps by that admission, I reject it. I do so on two grounds. In the first place, it seems to me that difficulty would be created in that there is no statement in s. 31 (which would at any rate be applicable in this case) of the chargeable accounting periods to which these distributions would be related; and, secondly, as the learned judge pointed out, s. 31 is only stating that certain sums of money, or their equivalent, are to be treated as "distributions" for the purpose of s. 35; and, as I have earlier said, not all distributions constitute gross relevant distributions automatically. It is only such of the distributions as fulfil the qualifications of s. 35 that become gross relevant distributions. It seems to me, therefore, that the attempt to rely exclusively on s. 31 by adding something new and distinct to s. 35 fails. E F G H I

The Attorney-General also submitted that s. 35 (1) para. (c) must be treated as having added to it, by virtue of the Act of 1951, some words to this effect, "and including so much of any distributions as are deemed to be such by virtue of s. 31 of the Act of 1951". It was contended that those words or comparable words would remove "the deemed distributions" of s. 31 from the limitation of the last few words in para. (c), "as is not a distribution of capital". Again I find myself unable to accept that argument. I cannot see any justification for adding such words to s. 35. It seems to me that the joint effect of the two sections

A is this; that, in considering what distributions may amount to gross relevant distributions, it must be borne in mind that s. 31 has provided that certain things are distributions; and, if they answer the other characteristics set out in s. 35, they may become gross relevant distributions.

B The matter is perhaps made a little complicated because, although s. 31 of the Act of 1951 is expressed as amending or adding to s. 35, its more immediate effect was rather to amend s. 36; for at the end of s. 36 (1) there was this proviso: "Provided that no sum applied . . . in reducing the share capital . . . shall be treated as a distribution". As the Act originally stood, therefore, it seemed to follow that sums applied in reducing share capital were not distributions at all. By virtue of s. 31 of the Act of 1951, certain sums applied in reducing share capital may be distributions. But I cannot myself accept the argument of the
C Attorney-General, if I rightly apprehend it, that the amendment went further, and had the rather oblique result of making the proviso to s. 36 (1) read: "Provided that no sum applied in reducing the share capital shall be treated as a distribution of capital within s. 35". It seems to me that there is no justification for making that emendation to the language of s. 36.

D The last point on which the argument mostly turned in the end was that, apart altogether from anything that s. 31 might have done, the sum of £15,030 is not a "distribution of capital" within s. 35 (1) (c). As already indicated, this argument of the Crown is not easy to reconcile with some of the argument on s. 31; but it is a legitimate alternative argument. Putting it simply, the Attorney-General was saying that, once the company has gone into liquidation, all the distinctions between capital and income for the liquidator's purposes are gone.
E No such distinction exists. All he has got is assets, and all he can distribute is assets. They cease to have labels such as capital, or income, or revenue, or profits, or anything like that. And he said, accordingly, that this formula "distribution of capital" ought to be confined to something which really was and could fairly be described on the facts of the case as a return eo nomine of capital to some class of shareholder—which this payment was not.

F I said earlier that para. (c) clearly applied to a company in liquidation, but also that it was not exclusively referable to such a case. The language which the draftsman selected must be applicable to the case both of a company in liquidation and of a company making a payment out to shareholders when a particular business has ceased in the last chargeable accounting period to be carried on; and it seems to me that the formula chosen, and I suggest happily chosen in
G the circumstances, is "distribution of capital". If the draftsman had said, not "distribution of capital", but "return or repayment of capital", having his eye mainly, if not exclusively, on the case of a company which was still a going concern, it might have made the argument in the present case easier, particularly where there was strictly no return of capital in the liquidation at all. I do not repeat what I have already said of the same kind in reference to s. 31 of the
H Act of 1951. But the draftsman has not said "return of capital". If he had been thinking only of a company in liquidation, he might again have said "distribution of assets". But that would have been inapposite as a phrase in the case of a company which was still a going concern; and, although that would have made the argument in this case very short and simple, again the answer to the point is that he has not said it. He has said "distribution of capital".

I Reference was made to many well-known authorities on the duties of liquidators and the subject-matter of their operations when they carry out the final winding-up of a company, including *Birch v. Cropper*, *Re Bridgewater Navigation Co., Ltd.* (3) ((1889), 14 App. Cas. 525) and *Inland Revenue Comrs. v. Burrell* (4) ([1924] 2 K.B. 52). UPJOHN, J., cites from both those cases and there is no need for me merely to repeat citations already found in the reports of his judgment. But LORD MACNAGHTEN in *Birch v. Cropper* (3), in a passage also cited by UPJOHN, J., said (14 App. Cas. at p. 546):

"I think it rather leads to confusion to speak of the assets which are the subject of this application as 'surplus assets' as if they were an accretion or addition to the capital of the company capable of being distinguished from it and open to different considerations. They are part and parcel of the property of the company—part and parcel of the joint stock or common fund—which at the date of the winding-up represented the capital of the company. It is through their shares in the capital, and through their shares alone, that members of a company limited by shares become entitled to participate in the property of the company. The shares in this company were all of the same amount."

The last sentence I have read because it is strictly applicable to this case.

The formula used by the draftsman is, for better or worse, "distribution of capital". If, as the Attorney-General says, the word "capital" is not appropriate in a winding-up, nevertheless the formula has been used by the draftsman in a context which requires it to be applied to a winding-up. If in the hands and mind of the liquidator the distinction between capital and income is not significant, to a shareholder whether what he receives is capital or income may well be significant. In the case of shares held under a trust, whereunder persons are entitled to income or for life only and others are entitled to corpus, it is well established that, once a liquidation has supervened, anything coming to the trustees from the liquidator, whatever its earlier source may have been, must in the absence of something special in the trust instrument be received by the trustees as capital.

I think that in using this short phrase the draftsman must be taken to have had in mind something of that kind. The vital word for present purposes is "distribution". Here is a distribution of assets which in their nature and certainly in the hands of the recipients will be capital rather than, or as distinct from, revenue. That is the consequence of the liquidation. Without elaborating the point at length, I therefore think it inescapable that, on the facts of this case, the £15,030 was a "distribution of capital" in the sense that it was a distribution of something which was capital, so far as it was relevant to consider the distinction between capital on the one hand and income or revenue on the other. If that is so, then, of course, the qualification of the last six lines of s. 35 (1) applies. Indeed, I think that the existence of that qualification,

"... and, for the purposes of para. (c) of this sub-section, the distributions which are to be treated as distributions of capital shall not ... exceed an amount equal to the total nominal amount of the paid up share capital thereof together ..."

does lend emphasis and support to the view that it was that consideration which the draftsman had in mind. I have already stated that, for the purpose of the last six lines, the limit was I think £30,060 and not the original figure of £2,004; and therefore on any view, if I am right in saying that the £15,030 was a distribution of capital, it has not exceeded the limit and is excluded from the gross relevant distributions under para. (c).

On this last part of the case I am content to accept and indorse the language of UPJOHN, J., in his judgment ([1956] 2 All E.R. at p. 783):

"Section 36 (1) proviso of the Finance Act, 1947, provides that a reduction of capital is not to be treated as a distribution. Section 31 of the Finance Act, 1951, in effect amends that section by providing that, if certain conditions are fulfilled, a reduction of capital is for the purposes of s. 35 'to be a distribution' not, be it noted, 'to be a gross relevant distribution'. Reference back to s. 35 is then necessary to see whether this distribution is included in the definition of 'gross relevant distribution' for the relevant chargeable accounting period, i.e., the period that ended with the commencement of the liquidation. The relevant paragraph is (c), and that does not apply to

- A distributions of 'capital'. Thus, this return of capital, though a distribution for the purposes of s. 35, is found not to be a 'gross relevant distribution' because it is a distribution of capital. If the liquidator had returned, not 10s. in respect of each £1 share, but a sum which exceeded the total allowed as capital by the concluding words of the sub-section, the excess would for the purposes of the tax be treated not as capital but as income and would fall to be included in the gross relevant distribution for the period. Reading the sections together, that seems to be how the scheme works and I see no conflict real or apparent between the sections and certainly no justification whatever for reading in the words which counsel for the Crown submits ought to be read in".
- B

- One final point should be mentioned, though it was not much pressed before us.
- C It was said, quite truly, that the Special Commissioners in the Case did not in terms find that the £15,030 was capital. It was therefore suggested, particularly in the court below, that the proper course would be to refer the matter back to the Special Commissioners in order that they might investigate the origins of this figure and say whether it, or if not the whole what part of it, was capital. I am satisfied that it would be wrong for us to follow that course for two reasons. In
- D the first place, it has been laid down authoritatively that this court should be extremely slow to send a case back to the Special Commissioners. Moreover, I do not think that any useful purpose could be achieved by so doing, and that is more important. All the necessary facts about the history of this company and what happened to its assets in the liquidation have been found, and are not in dispute. The question whether this particular figure is a distribution of capital is one of law to be determined on the meaning of para. (c) of s. 35 (1) of the Finance Act, 1947, not one of fact for the Special Commissioners.
- E

For these reasons I think this appeal fails, and should be dismissed.

- MORRIS, L.J.:** The question which arises is whether for the purposes of the profits tax the payment by the liquidator of the sum of £15,630 to the members of the company constituted a "gross relevant distribution" within the meaning of s. 35 (1) of the Finance Act, 1947, having regard to the provisions of s. 31 of the Finance Act, 1951. It is said by the Crown that the effect of s. 31 of the Act of 1951, as applied to the facts of this case, is that an amount equal to the sum of £15,030 is deemed for the purposes of s. 35 of the Finance Act, 1947, to be a distribution to members. It is further said that the consequence of this is that such a distribution should be regarded as being or forming a part of a
- F "gross relevant distribution" for the purposes of s. 35 of the Act of 1947. It is said that this results either, first, because the intent and the effect of s. 31 of the Finance Act, 1951, was notionally to add distributions as described by s. 31 of the Finance Act, 1951, to distributions described under para. (a) or (b) or (c) of s. 35 (1) of the Finance Act, 1947, or, secondly, because the wording of para. (c) of s. 35 (1) of the Act of 1947 must be read as impliedly modified in the case of any distribution covered by s. 31 of the Act of 1951.
- G
- H

- In considering these submissions, the question arises whether s. 31 of the Finance Act, 1951, has application to the facts of this case. A section which relates to capitalising distributable sums and to reducing capital would not seem on first approach to be a section which would operate during the course of a liquidation. The provisions of s. 31 (2) would not come into operation after the commencement of a liquidation. There would not after such date be a capitalisation of a distributable sum in the sense in which the word "capitalisation" is defined in the section. It is said, however, that the provisions of s. 31 (1) could operate after a liquidation. It is said that the provisions of para. (a) of sub-s. (1) are satisfied because of the capitalisation of profits which took place in November, 1952. It is then said that the provisions of para. (b) are satisfied in that the £15,030 which the liquidator paid to the members of the company was a sum "applied in reducing its capital".
- I

When the liquidator paid out the £15,030 it would be surprising if the process could be described as one which effected a "reducing" of capital. By sub-s. (5) of the section, however, it is provided that references to the reduction of capital are to be deemed to include references to the repayment or return of share capital. It is submitted that a distribution by a liquidator of money which remains in his hands can be regarded as including or performing the operation of repaying or returning share capital. Reliance was placed on certain observations to be found in *Inland Revenue Comrs. v. Blott* (2) ([1920] 2 K.B. 657 at p. 675), *Inland Revenue Comrs. v. Burrell* (4) ([1924] 2 K.B. 52 at p. 64), and *R. A. Hill v. Permanent Trustee Co. of New South Wales, Ltd.* (5) ([1930] A.C. 720 at p. 729), and in certain other cases. But even assuming that the payment out by the liquidator of the sum of £15,030 could be regarded as a repayment or return of share capital, in my judgment the only result is that the sum is then, by the operation of s. 31, deemed for the purposes of s. 35 of the Finance Act, 1947, to be a distribution to the members of the company of an amount equal to the sum so applied. On this footing, attention must then be directed to s. 35 of the Act of 1947, and I do not feel able to accept the submissions that at this stage the provisions of s. 35 must be regarded as either extended or, alternatively, modified. I can see no statutory provision which warrants this. The provisions of s. 35 must then merely be construed and operated. This will be so whether s. 35 comes directly under consideration or comes under consideration because made applicable by s. 31 of the Act of 1951.

Section 35 extends to cover a liquidation. In his speech in *Inland Revenue Comrs. v. Universal Grinding Wheel Co., Ltd.* (1) ([1955] 2 All E.R. 29), LORD COHEN said (*ibid.*, at p. 37):

"It deals with the position in a liquidation when every distribution is strictly a distribution of assets, not of profits, and it imposes a necessary limitation for the protection of the revenue."

In considering s. 35, it is clear that the payment out of the £15,030 is not covered by the words of either para. (a) or para. (b) of sub-s. (1). In regard to para. (c), the last chargeable accounting period was that between Jan. 1, 1953, and Oct. 31, 1953. I think that the payment out of the £15,030 was a distribution. It was made after the end of the period. The question then arises: was it a distribution of capital? If it was, then, subject to the operation of the proviso, it was not a "gross relevant distribution", and it did not fall to be treated as a part of or as swelling the total of the gross relevant distributions.

There is, however, the proviso. The sum which for the purposes of para. (c) is to be treated as a distribution of capital must not, in the case of a distribution made by a body corporate with a share capital, exceed an amount equal to the total nominal amount of the paid up share capital together with the aggregate of the amounts of any premiums where the body corporate has issued shares at a premium for cash. In the present case, the £15,030 was less than the nominal amount of the paid up share capital, which must, I think, be said to be £30,060.

The only question, therefore, is whether the £15,030 which was distributed was capital. The word "capital" is used in a context which distinguishes it from "share capital". It is recorded in the Case Stated that, after the transfer of assets to the new company and after the liquidator had paid all debts and liabilities of the company, including the costs of winding it up, there remained a sum of cash belonging to the company amounting to £15,030. The shares in the new company, which were received in consideration of the transfer of the business to the new company, were distributed; but s. 36 (4) enjoins that such distributions must be ignored. In those circumstances was the £15,030 capital? In my judgment, it was.

It was submitted on behalf of the Crown that proof should be forthcoming that the sum was capital. But, leaving aside any question where the onus of proof lies, the facts as found lead to the conclusion, that the sum was capital.

A The £15,030 represented what was left in the hands of the liquidator, the surplus assets in his hands. In *Inland Revenue Comrs. v. Burrell* (4) ([1924] 2 K.B. 52), SARGANT, L.J., said (*ibid.*, at p. 73):

B “In the liquidation of a limited company the distribution of the surplus assets of the company is almost necessarily of a final and non-recurrent character, and reaches the hands of the shareholders quite irrespective of the sources from which the assets have accrued to the company.”

In my judgment the payment out of the £15,030 was a distribution of capital within the meaning of para. (c) of s. 35 (1). I would dismiss the appeal.

PEARCE, L.J.: I agree, and I have nothing to add.

C *Appeal dismissed. Leave to appeal to the House of Lords refused.*

Solicitors: *Solicitor of Inland Revenue; Frank Simmonds, Parker & Hammond, agents for Percy Holt & Nowers, Croydon* (for the company).

[*Reported by F. A. AMES, ESQ., Barrister-at-Law.*]

D Re EDWARDS (*deceased*).

MACADAM v. WRIGHT AND OTHERS.

[COURT OF APPEAL (Jenkins, Romer and Sellers, L.JJ.), May 15, 16, 17, 1957.]

E *Equity—Election—Agreement for valuable consideration to devise testatrix' house to sister—House devised in testatrix' will, made before the agreement, as part of residue—Share of residue thereby bequeathed to sister—Will unaltered at testatrix' death—Sister subsequently granted specific performance of agreement—Whether sister put to election—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24.*

F *Will—Ademption—Devise of house as part of residue given on trusts for several beneficiaries—Subsequent agreement by testatrix for valuable consideration to devise house to one beneficiary—Specific performance of agreement ordered after death of testatrix—Whether gift adeemed—Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), s. 24.*

G By her will dated Feb. 8, 1952, a testatrix, after giving specific and pecuniary legacies, provided: “I direct that 78, Albion Road, Hounslow, and the remainder of my estate and effects real and personal of which I may die possessed be sold and the proceeds divided equally amongst the following relatives who may survive me . . .” and she named seven relatives including her sister Mrs. W. In May, 1952, the testatrix entered into an oral agreement with Mrs. W. to devise No. 78, Albion Road, to Mrs. W. for valuable consideration (which was given). On July 30, 1952, the testatrix died without having altered her will, and by an order of court dated Oct. 2, 1953, and made at the suit of Mrs. W., the agreement of May, 1952, was declared valid and binding. Subsequently the house was conveyed to Mrs. W. On the question whether Mrs. W. had been put to her election under the will of the testatrix,

I **Held:** (i) the consequence of the oral agreement was that at the date of the testatrix' death she was a bare trustee of No. 78, Albion Road, for Mrs. W. and accordingly the gift thereof expressed in the testatrix' will had been adeemed and should be regarded, for all material purposes, as having been struck out of the will before the testatrix' death.

Dictum of LORD ROMILLY in *Lord Chichester v. Coventry* ((1867), L.R. 2 H.L. at p. 90) applied.

(ii) no intention to make a testamentary gift of 78, Albion Road, could, therefore, be imputed to the testatrix at the time of her death, and in the absence of any such intention no question of Mrs. W.'s being put to election arose.

Re Harris ([1909] 2 Ch. 206) applied; *Cooper v. Cooper* ((1874), L.R. 7 H.L. 53) distinguished. A

Per JENKINS, L.J.: I find it impossible to accept the proposition that the question whether a case of election has been raised is to be resolved solely and exclusively by reading the will of the testator or testatrix . . . simply by reference to the facts indicated merely by a reading of the will as at the date of the death. I further find it impossible to accept the proposition that, where it is material to ascertain whether a gift has been adeemed, s. 24 of the Wills Act, 1837, precludes investigation of the circumstances obtaining at the date of the will containing the gift in question, or of any matters which have occurred between the date of the will and the date of the death of the testator or testatrix, bearing on the question whether the gift has been adeemed or not (see p. 501, letter E, post). B

Decision of UPJOHN, J. ([1956] 3 All E.R. 526) reversed. C

[As to the doctrines of election and ademption, see 14 HALSBURY'S LAWS (3rd Edn.) 588, para. 1091, and p. 598, para. 1108, respectively; and for cases on the subjects, see 20 DIGEST 403-408, 1411-1439, and 44 DIGEST 406-408, 2381-2398, respectively.] D

For the Wills Act, 1837, s. 24, see 26 HALSBURY'S STATUTES (2nd Edn.) 1345.]

Cases referred to:

- (1) *Cooper v. Cooper*, (1874), L.R. 7 H.L. 53; 44 L.J.Ch. 6; 30 L.T. 409; 18 Digest 17, 165.
- (2) *Re Harris, Leacroft v. Harris*, [1909] 2 Ch. 206; 78 L.J.Ch. 448; 100 L.T. 805; 20 Digest 413, 1471.
- (3) *Chichester (Lord) v. Coventry*, (1867), L.R. 2 H.L. 71; 36 L.J.Ch. 673; 17 L.T. 35; 20 Digest 449, 1744.
- (4) *Re Gibson, Mathews v. Foulsham*, (1866), L.R. 2 Eq. 669; 35 L.J.Ch. 596; 44 Digest 651, 4913.

Appeal.

The defendant, Elsie Mary Wright, appealed against the decision of UPJOHN, J., dated Oct. 12, 1956, and reported [1956] 3 All E.R. 526, that she had been bound to elect between the share of the residuary estate of the testatrix, Henrietta Phoebe Edwards, bequeathed to the defendant, Elsie Mary Wright, by the testatrix' will, and the property 78, Albion Road, acquired by the defendant from the testatrix for valuable consideration, and that the defendant had elected against the will. The defendant asked also for a declaration that she was entitled to both the property 78, Albion Road and to a full share of the residue of the testatrix' estate. The facts appear in the judgment of JENKINS, L.J. G

S. W. Templeman for Mrs. Wright, the appellant defendant. H

Raymond Walton for the executor, the plaintiff.

T. A. Jones for the other residuary legatees, the respondent defendants.

JENKINS, L.J.: This is an appeal by the first defendant, Elsie Mary Wright, from a judgment of UPJOHN, J., dated Oct. 12, 1956, the effect of which was to put Mrs. Wright to her election either to take a certain house expressed in the testatrix' will to be given to Mrs. Wright and six other persons and, on taking the house, to relinquish all other benefits given to her by the will; or else to surrender the house for the benefit of the residuary estate and to become entitled to one-seventh of the total, the position being that after the testatrix had made the will disposing of the house in favour of Mrs. Wright and the six others the testatrix, if I may use a neutral phrase, made over the house to Mrs. Wright in her lifetime. I

A The facts of the case are these. The will of the testatrix, Henrietta Phoebe Edwards, was dated Feb. 8, 1952. The material provision in that will is this:

“ I direct that 78, Albion Road, Hounslow, and the remainder of my estate and effects real and personal of which I may die possessed be sold and the proceeds divided equally amongst the following relatives who may survive me . . . ”

B Then seven named beneficiaries are set out. The first of them is the testatrix' mother, who survived the testatrix and who has since died. The individuals interested other than Mrs. Wright (the first defendant) are the other defendants, the respondents in the appeal, one of them being also legal personal representative of the testatrix' mother.

C In or about the month of May, 1952, the testatrix and Mrs. Wright entered into a contract concerning No. 78, Albion Road. The effect of that contract was that, in consideration of Mrs. Wright giving up her tenancy of the house in which she then resided and coming to reside with the testatrix at 78, Albion Road, and undertaking certain duties towards the testatrix and performing the work of looking after the house, the testatrix would allow Mrs. Wright to occupy two rooms in the house rent-free during the joint lives of Mrs. Wright and the testatrix, and the testatrix would leave the house to Mrs. Wright absolutely by her will at her decease.

The testatrix attempted to give effect to her part of that bargain by an intended testamentary document, which was not executed in the manner required by the Wills Act, 1837, and consequently had no testamentary effect.

E The testatrix died on July 30, 1952, and on Sept. 20, 1952, her will was proved by the plaintiff, Mr. Thomas Sebastian Macadam. The testatrix never altered her will, so that, notwithstanding the arrangement that had been made with Mrs. Wright in regard to the house between the date of the will and the date of the death, the will still contained on its face the gift of 78, Albion Road, for sale and division to which I have already referred.

F In these circumstances Mrs. Wright brought an action against the plaintiff executor for specific performance of the contract. The case was heard by DANCKWERTS, J., and by his order dated Oct. 2, 1953, he upheld the contract as valid and binding. The material part of the order is this:

G “ This court doth declare that there was a valid and binding contract whereby Henrietta Phoebe Edwards deceased [the testatrix] agreed to devise to the plaintiff the dwelling-house, yard, garages, outbuildings and premises situate and known as No. 78, Albion Road, Hounslow in the County of Middlesex in the pleadings mentioned. And this court doth declare that the defendant as executor of the will of the said Henrietta Phoebe Edwards holds the said property on trust for the plaintiff absolutely. And this court doth order that the defendant do forthwith convey the said property to the plaintiff.”

H In these circumstances the beneficiaries other than Mrs. Wright claimed that the doctrine of election applied on the ground that at the date of the testatrix' death 78, Albion Road, did not in fact belong to the testatrix, yet she, by her will, manifested an intention to leave that property on trust for sale and division, and that, inasmuch as Mrs. Wright, the true owner of the property, was entitled to certain benefits under the will, all the elements necessary to make out a case for election were present.

I The evidence shows as regards the figures that the only course open to Mrs. Wright, on the footing that she was put to her election, was to keep the property and give up her one-seventh share of the residuary estate. The house is estimated to be worth £2,000, whereas the residue amounts to £5,750. Clearly, therefore, it was in Mrs. Wright's interest to take against rather than under the will, and, indeed, it would seem that if the doctrine of election applied at all

Mrs. Wright by bringing the action to enforce the contract did, in fact, elect against A the will. A

For the general principles relating to the doctrine of election we were referred to a passage in 14 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 588, para. 1091, headed "The doctrine of election".

"Where a testator by his will purports to give property to A which in fact belongs to B, and at the same time out of his own property confers benefits on B, the literal construction and application of the will would allow B to keep his own property to the disappointment of A, and also to take the benefits given to him by the will. Equity, however, in such circumstances, introduces the principle that a man shall not accept and reject the same instrument, and B is not allowed to take the full benefit given him by the will unless he is prepared to carry into effect the whole of the testator's dispositions. He is accordingly put to his election to take either under the instrument or against it. If he elects to take under the will he is bound, and may be ordered, to convey his own property to A; if he elects to take against the will and to keep his own property, and so disappoints A, then he cannot take any benefits under the will without compensating A out of such benefits to the extent of the value of the property of which A is disappointed."

We were also referred to certain passages in JARMAN ON WILLS (8th Edn.), Vol. 1, pp. 545, 546. On p. 545 the learned author says:

"The doctrine of election may be thus stated: That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights."

Then on p. 546 there is a passage particularly relied on by the respondent defendants in this case:

"It must, however, be understood that the obligation attaches on whoever at the testator's death is true owner of the property wrongfully disposed of, and to whom also a benefit is given by the will. This is the point of time to be regarded. And it matters not from whom, or by what previous Acts or devolutions, such owner's title was derived."

We were referred also to certain passages in *Cooper v. Cooper* (1) ((1874), L.R. 7 H.L. 53). LORD CARRNS, L.C., said (*ibid.*, at p. 67): H

"The rule, as was said during the argument at the Bar, does not proceed either upon an expressed intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will."

Then LORD HATHERLEY said this (*ibid.*, at p. 70):

"My Lords, the fallacy of that is quite obvious. The condition, or rather obligation (which is the expression I prefer, regard being had to the dispute as to condition involving forfeiture), the equitable duty which the law imposes on a person claiming under an instrument, of giving full effect to it, as far as it would be otherwise ineffective, except through his concurrence,

A is simply this,—the law inquires on the death of the testator, when the will comes into operation, what is his intention, as expressed on the whole will, with reference to the disposition of that which he considers to be his property; and it being found clearly and distinctly (for it must be clearly and distinctly found) that he has expressed his intention of disposing of what belongs to another—when once that is ascertained completely, there is nothing else which the law implies, with regard to his intention, beyond the ordinary intent implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed, and, among other things, that he intends to dispose of property as to which he has so expressed an intention, though it really does not belong to him. When once that intention is ascertained there is nothing else remaining to be done, with reference to election, than to see who is in possession and who is the real owner of the property; and if you find him, who is the real owner of the property at the same time taking a benefit under the will which has erroneously endeavoured to dispose of his property, then he must give effect to that intention, though founded in error, and give it full effect by either abandoning all his interest under the will, or making compensation to the extent of the value of the disappointed intention of the testator.”

In the last of the passages from *Cooper v. Cooper* (1) to which I need refer, LORD MONCREIFF said this (*ibid.*, at p. 78):

“ Then, my Lords, beyond that there seems to be no question of intention raised. Every testator intends that his will shall take full effect, and anything that prevents the will from being wholly effectual of course frustrates the intention of the testator to that extent. I cannot concur in the view that was very ably and ingeniously argued, that when it is said it is a question of intention, the meaning is, that the testator must have intended that the legatee, if he challenge or defeat any part of the will, shall be put to his election. That is clearly not so, because that would exclude from the operation of the principle every case in which a testator supposed that he had full power over the property which he professed and attempted to convey. That is contrary to all the authorities. It is quite fixed, I think, that it is wholly immaterial whether the testator thought that he had the power to convey the property, or knowing that he had not the power, usurped it. The rule in regard to election is in either case precisely the same.”

I would add a reference to *Re Harris, Leacroft v. Harris* (2) ([1909] 2 Ch. 206). The facts of that case were widely different from those in the present appeal, but I cite it for this passage bearing on the question whether, in a case of this kind, for the purpose of determining a claim that there is a case for election, it is not permissible to look at the facts and circumstances existing at the date of the will. The passage is (*ibid.*, at p. 217):

“ The more reasonable time to take for the purpose of a test would, it seems to me, be immediately before the date of her will, and if in the present case she had acquired the property in question immediately before the date of the will, it would undoubtedly have passed by her will.”

As appears from these authorities, the essentials of election are that there should be an intention on the part of the testator or testatrix to dispose of certain property; secondly, that the property should not in fact be the testator's or testatrix' own property; and, thirdly, that a benefit should be given by the will to the true owner of the property.

The reasoning on which the judgment of UPJOHN, J. ([1956] 3 All E.R. at p. 530) proceeded to the conclusion that a case for election did arise is of this nature. First, the will speaks from the death of the testatrix under the provisions of the Wills Act, 1837, s. 24. Secondly, by the express terms of her will, looked at as at the date of her death, the testatrix did dispose of property, that is to say

No. 78, Albion Road, Hounslow. Thirdly, at the date of the testatrix' death A
78, Albion Road was not her property, for she had disposed of it in favour of
Mrs. Wright in the way I have stated. Finally, a benefit was given to the true
owner of the property under the will, that is to say Mrs. Wright, in the shape of
her interest in the residuary estate. On this line of reasoning the learned judge
concluded that a case for election was made out.

However, none of the authorities to which I have referred deals with the B
special features of this case, that at the date of the will 78, Albion Road was the
testatrix' property; that the will contained a plain, specific, devise of that
property for sale and division among the settled and named individuals as the
testatrix' own property; that between the date of the will and the date of the
death the testatrix entered into the agreement for valuable consideration with C
respect to 78, Albion Road, of which specific performance was ordered by,
DANCKWERTS, J.'s order of Oct. 2, 1953, the effect of which was that at the time
of her death the testatrix was a bare trustee of the property for Mrs. Wright,
and consequently that by the time of the death of the testatrix the gift of 78,
Albion Road contained in the will had been adeemed.

The nature and effect of ademption is thus described in JARMAN ON WILLS (8th D
Edn.), Vol. 2, pp. 1136 and 1137. On p. 1136 it is said:

"The word ademption (from the Latin *adimere*) implies that the legacy
has been taken away. Thus there are two kinds of ademption: the one
where the testator gives a specific chattel or fund, and the legacy fails
because the chattel or fund has ceased to be part of the testator's assets;
the other, where the testator gives a general legacy, and the legacy is held E
not to be payable because the intended bounty has already been satisfied
by the testator: that is, there is an implied revocation of the gift of the
legacy."

Then, lower down on p. 1136, it says:

"LORD ROMILLY in *Lord Chichester v. Coventry* (3) ((1867), L.R. 2 H.L. 71, F
at p. 90) has thus explained the distinction between ademption and satis-
faction: 'In ademption the former benefit is given by a will which is a
revocable instrument, and which the testator can alter as he pleases, and
consequently, when he gives benefits by deed subsequently to the will, he may,
either by express words or by implication of law, substitute a second gift for
the former, which he has the power of altering at his pleasure. Consequently, G
in this case the law uses the word ademption because the bequest or devise
contained in the will is thereby adeemed; that is, taken out of the will'."

The result in the present case appears to me to be that at the date of the
testatrix' death her will contained no effective gift to anyone of 78, Albion Road,
and that the gift of the property which the will did contain was ineffective, not
because the property did not belong to the testatrix at the time when she made H
her will, but because the gift of it as her own property which the will did contain
was, in effect, revoked by ademption, by reason of the disposition of the pro-
perty in favour of Mrs. Wright made by the testatrix between the date of her
will and the date of her death. Thus no intention to make any testamentary
disposition of 78, Albion Road can be imputed to the testatrix at the time of her
death on the strength of the gift of it expressed in the will, because that gift, I
the only testamentary gift of it she ever made, was by that time adeemed, and
therefore wholly inoperative, by reason of the subsequent disposition *inter vivos*
in favour of Mrs. Wright; and it follows that the first of the three conditions
necessary to raise a case of election was not fulfilled.

I can see no justification for resuscitating a testamentary gift of property
which has been adeemed by a disposition *inter vivos* and treating it as a fresh
testamentary gift of property belonging to the person in whose favour the
disposition *inter vivos* was made. The true position in such a case is, as it seems

A to me, that the testamentary disposition has clean gone, and the person in whose favour the disposition of the property *inter vivos* is made simply takes it under that disposition without any question of his or her thereby taking against the will, and thus being disqualified from receiving any benefit under the will.

The learned judge's conclusion to the contrary is, as I have already indicated, based largely, if not entirely, on s. 24 of the Wills Act, 1837, because in the B concluding paragraph of his judgment he says this ([1956] 3 All E.R. at p. 530):

"I return to the principle which I need not restate. Here we have a will which, by virtue of s. 24 of the Wills Act, 1837, speaks of the property comprised in it at the death. By that will the testatrix has expressed the clearest possible intention to dispose of No. 78, Albion Road. Accordingly, C applying the principle, if the sister, Mrs. Wright, desires to accept a benefit in respect of some quite different property under that will, she must be prepared to adopt the whole contents of the instrument, conform to all its provisions, and renounce every right inconsistent with them. In my judgment, the speech of LORD HATHERLEY which I have already quoted, D makes it quite clear that the question whether the will or other act or disposition comes first, does not matter in the least degree. Since the Wills Act, 1837, one has only to find the disposition of the property of another who receives other benefits under the will. Accordingly, I must declare that the defendant, Elsie Mary Wright, is bound to elect between the property, No. 78, Albion Road, and the residue of the estate and did so elect by obtaining judgment in the action."

E I find it impossible to accept the proposition that the question whether a case of election has been raised is to be resolved solely and exclusively by reading the will of the testator or testatrix simply with reference to the facts as they existed at the date of the death, or, rather, I should say, simply by reference to the facts indicated merely by a reading of the will as at the date of death. I further find it impossible to accept the proposition that, where it is material to ascertain F whether a gift has been adeemed, s. 24 of the Wills Act, 1837, precludes investigation of the circumstances obtaining at the date of the will containing the gift in question, or of any matters which have occurred between the date of the will and the date of the death of the testator or testatrix, bearing on the question whether the gift has been adeemed or not. If that were so, I find it difficult to see how any case of ademption could ever be made out. The essence of ademption G surely is that there should have been a gift by will of property belonging to the testator or testatrix at the date of the will, followed by some dealing *inter vivos* with the property inconsistent with the testamentary gift.

I think that *Re Gibson, Mathews v. Foulsham* (4) ((1866), L.R. 2 Eq. 669), makes it sufficiently plain that s. 24 of the Wills Act, 1837, has no such effect.

H The argument for the respondent defendants in the present case that where election is in question it is only permissible to look at the terms of the will as at the death of the testator or testatrix, and to see whether it contains a purported gift of property belonging at the date of the death to some other person and confers a benefit on that other person, without regard to the circumstances in which the gift was made or to any dealings with the subject-matter of the gift between the date of the will and the date of the death, might, if pressed to its I logical conclusion, produce extraordinary and wholly inequitable results. Suppose in the present case that the testatrix, after making her will leaving 78, Albion Road on trust for sale and division, had sold the property to Mrs. Wright for its full value in cash but had not altered her will so as expressly to revoke the devise. Counsel for the respondent defendants admitted that, according to his argument, it must follow that Mrs. Wright would even then be put to her election either to keep the house, for which she had paid full value, and be excluded from participation in the residuary estate, including the purchase money by which she had herself increased it, or to surrender the house

and be content with her fractional proportion of the residue, swollen by the value of the house and the purchase money she herself had paid for it. I would be sorry to think that what is supposed to be an equitable principle could operate to produce such an inequitable result.

For the reasons which I have endeavoured to state I would allow this appeal.

ROMER, L.J.: I agree. In the events which happened it appears to me that this is in substance a case of the ademption of a specific devise. The testatrix owned No. 78, Albion Road, Hounslow, when she made her will, and was consequently able to dispose of it, which in fact she did. By the time she died, however, she had parted with the whole beneficial interest in the property to Mrs. Wright. There was, therefore, no beneficial interest on which the gift in the will could operate, and it was for all material purposes as though the gift had been struck out of the will. That being so, it is impossible to attribute to the testatrix at her death an intention at that time, as distinct from the time when she made her will, to give the property to the seven beneficiaries, for to her own knowledge it was no longer hers to give. The importance of that point is that an intention to give the property must be shown to exist at the death before any question of election enters into the picture at all. That, I think, is shown by the authorities, an example of which is the decision of PARKER, J., in *Re Harris* (2) ([1909] 2 Ch. 206), to which my Lord has already referred. As the ademption of the subject-matter of the devise of necessity displaced any possibility of such an intention existing at the time of the testatrix' death, I am of opinion that Mrs. Wright was free from any obligation to elect.

In the course of his argument counsel for the respondent defendants said that, if you find three elements in conjunction, the principle or doctrine of election automatically applies. They are, first, that a testator has expressed an intention in his will to dispose of certain property; secondly, that in fact that property at or immediately after the testator's death belongs to another; and, thirdly, that the will confers benefits on the owner of that property. Counsel's submission was that, if those three elements are present, the principle applies; and that the testator's intention in relation to the property at his death can only be ascertained from the language of the will, and that in the present case the language of the testatrix' will, that is to say Mrs. Edwards' will, shows a clear intention to dispose of No. 78, Albion Road. Counsel says that no events which occurred between the date of the will and the date of the death can be looked to for the purpose of seeing whether the principle of election applies or not, or as to what the testatrix' intention with regard to devising the property was when she died. In support of that contention he relied on the observations of LORD HATHERLEY in *Cooper v. Cooper* (1) ((1874), L.R. 7 H.L. 53, at p. 70), which were cited by UPJOHN, J., in his judgment ([1956] 3 All E.R. at p. 528) and which have been read by my Lord in the course of his judgment.

I cannot accept that submission, and I do not think that LORD HATHERLEY's observations were at all directed to cases such as the present. The circumstances of *Cooper v. Cooper* (1) were different in one vital respect from the present, namely, that at the date of the will the ordinary elements of election were present, whereas in the present case the testatrix has disposed of the property to Mrs. Wright for value after the date of the will, and the property had accordingly disappeared and ceased to form any part of the testatrix' assets at the date of her death.

However, in applying the law as to ademption the court of necessity has to look, and does look, to events which have taken place subsequent to the will. So, also, in applying the law relating to double portions; if the court finds that a portion to a child has been given inter vivos after the will it will treat that gift as a satisfaction, either in whole or in part, of a portion given by the will.

So, similarly, in my opinion, when the question is whether the principle of election should be applied or not. This principle has not the inflexible rigidity

A of a rule of law. The purpose of the rule is stated in the passage from JARMAN ON WILLS (8th Edn.), Vol. 1, pp. 545, 546, to which my Lord has already referred, and I will only read again one portion of it. Mr. JARMAN says:

B "If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him [these are, I think, the important words] for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights."

C On the defendant respondents' argument in the present case the principle would apply even though there were no disappointed legatees to compensate. That is sufficiently shown by the hypothesis, to which my Lord referred in the course of his judgment, namely, that if Mrs. Wright had in fact paid to the testatrix £2,000 (which was the value of this house) for the house just before the testatrix' death, that money would have taken the place of the house, and therefore there would have been no diminution in the value of the assets which D were to be shared by the legatees. Nevertheless, on the defendant respondents' argument, Mrs. Wright would still have been bound to elect, with the result that the other legatees would have had their shares greatly increased in amount at Mrs. Wright's expense.

E For my part, I have no doubt but that the court would not, in such a case as that, apply the equitable doctrine of election to bring about such an inequitable result. If that be right, it follows that the principle will not be invariably applied merely because the three elements to which counsel for the respondent defendants referred are present; and it should not be applied here, in my judgment, where Mrs. Wright is shown to have given valuable consideration for the house. I agree that the appeal should be allowed.

F **SELLERS, L.J.:** I agree that the appeal should be allowed.

On the facts of this case it would seem to me to be inequitable that election, an equitable doctrine, should be imposed on Mrs. Wright. No case has been cited where a testator has made a gift of property under his will, which at the time it was his to give, and later disposed of the property for value to a beneficiary under the will:—a beneficiary in part in respect of the property in question and in part G in respect of additional benefits. If no other answer could be given, the application of the doctrine in such circumstances would call for further consideration as a matter of equity. I agree with the observations that ROMER, L.J., has just made in that regard. However, in the events which happened after the making of the will, the gift of the property in question was adeemed and has in effect gone from the will, and no question of election arises. At the date of her death it H cannot be said that the testatrix manifested an intention to leave 78, Albion Road by her will. She had, in effect, sold it in her lifetime.

I entirely agree with my Lords' reasons in their judgments.

Appeal allowed. Order varied by substituting for declaration contained therein the declaration sought by the notice of appeal.*

Solicitors: *Wylie Patterson & Herring*, agents for *Charles Robinson & Son*, Hounslow (for Mrs. Wright, the appellant defendant); *Anthony Gane & Co.*, Richmond (for the respondents, the executor, the plaintiff, and the other residuary legatees, the respondent defendants).

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

* The terms of this declaration are set out at p. 496, letter G, ante.

PRACTICE NOTE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Alimony—Service—Husband's address—Disclosure of address from government records.

Divorce—Maintenance of wife—Service—Husband's address—Disclosure of address from government records.

Registrar's Circular dated June 6, 1957, is as follows:—

Arrangements have been made* whereby the address of a husband, if contained in social security records held centrally by government departments, may be disclosed to the court for the assistance of a wife seeking to obtain or enforce an order for alimony or maintenance for herself or the children.

Requests for such information will be made officially by the registrar or district registrar, who must be satisfied that the wife has made every reasonable effort to find her husband's whereabouts by other means. She should, for example, have asked his close relatives: but she should not be required to incur the expense of employing inquiry agents.

The request, in addition to stating (or enclosing) the information mentioned below should certify either that

(a) an order is in existence but cannot be enforced because the husband cannot be traced; or

(b) the wife has filed or issued a notice, petition or originating summons containing an application for maintenance which cannot be served because the husband cannot be traced.

[The expression "maintenance" should be used for all forms of periodical payment.]

The department most likely to be able to assist is the Ministry of Pensions and National Insurance, whose records are the most comprehensive and complete. The possibility of identifying one man amongst so many will depend on the particulars given. An address will not be supplied by the Ministry unless it is satisfied from the particulars given that the record of the man has been reliably identified.

* The procedure was the subject of an announcement in the House of Commons by the Home Secretary (see Hansard, June 6, 1957, col. 122 (written answers)). The following summary shows the matters material for practitioners. The Home Secretary stated that while the government department concerned would make every effort to trace the record of a missing man, the address would not be supplied unless the department were satisfied from the particulars furnished that the record of the man had been reliably identified. In the case of proceedings in a magistrates' court in England or Wales under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, the Guardianship of Infants Acts, 1886 to 1925, or the Bastardy Laws Amendment Acts, 1872 and 1873, the address would be supplied to the clerk of the court on his application, but would not be given by the department direct to the woman or her solicitor. The clerk would have to certify that, among other things, he was satisfied that the woman had made every reasonable effort to discover the man's whereabouts by other means. The address would be given to the clerk only on the understanding that it would be used solely for the purposes of the proceedings and would not be disclosed to the woman or anyone else except in the normal course of the proceedings. Where the proceedings were in the High Court to obtain or enforce a maintenance order, information would be supplied to the registrar of the court on his application, and he would communicate it to the wife's solicitor or to the woman herself if she were acting without a solicitor. The information would be given on the understanding that it would be used solely for the purposes of the proceedings and that every reasonable effort had been made to trace the man by other means. Statutory authority was not necessary to permit disclosure and the new procedure would operate at once.

A The petitioner's solicitor should therefore be asked to supply as much as possible of the following information about the husband:

- (i) National Insurance number
- (ii) Surname
- (iii) Christian (or fore-) names in full
- (iv) Date of birth (or, if not known, approximate age)

B (v) Last known address with date when living there
(vi) Any other known address(es) with dates
(vii) If the man is a war pensioner, his war pension number and service particulars (if known)

Inquiries should be sent by the registrar to:—

The Liaison Officer,

Records Branch,

Ministry of Pensions & National Insurance,
Newcastle-on-Tyne.

C
D Records held by other departments are less likely to be of use, either because of their limited scope or because individual records cannot readily be identified. If, however, the circumstances suggest that the address may be known to another department, application may be made to it by the registrar, all relevant particulars available being given.

When the department is able to supply the address of the husband to the registrar, it will be passed on by him to the wife's solicitor (or, in proper cases, if she is acting in person to the wife herself) on an undertaking to use it only for the purpose of the proceedings.

E Nothing in this circular affects the service of petitions which do not contain any applications for maintenance, etc. The existing arrangements, whereby the Ministry of Pensions and National Insurance will at the request of the solicitor forward a letter by ordinary post to a party's last known address, remain in force in such cases.

F
B. LONG,
Senior Registrar.

Divorce Registry,
Somerset House,
Strand, London, W.C.2.

Re A.E.G. UNIT TRUST (MANAGERS), LTD.'S DEED.
MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. v.
THE COMPANY.

[CHANCERY DIVISION (Wynn-Parry, J.), May 22, 29, 1957.]

Accumulation—Unit trust—Whether statutory restriction on accumulation applied—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 164 (1).

By a deed creating a unit trust scheme provision was made for the distribution of funds to unit holders at the discretion of the managers of the unit trust, who were to compute how much was available for distribution and to determine the amount (if any) to be distributed. It was also provided that the balance (if any) of the sums available for distribution but not distributed should be added to capital by the trustee and should thereupon cease to be available for distribution. The trustee of the deed applied to the court for determination of the question whether, having regard to the Law of Property Act, 1925, s. 164, the trustee was bound to accumulate under this deed the amount available for distribution at the end of each accounting period so far as the same exceeded the amount determined by the managers to be distributed.

Held: the trustee was bound to accumulate in accordance with the deed because s. 164 of the Act of 1925 did not apply for the following reasons:—

(i) the terms of s. 164 (1)* were not apt in relation to the deed since a purchaser of units in such a scheme was not a grantor or settlor within para. (a), para. (b) and para. (c) of that sub-section and para. (d) could have no application; moreover the deed was not within the mischief which s. 164 was designed to prevent.

Bassil v. Lister ((1851), 9 Hare, 177) applied.

(ii) although the deed contained express provision for the termination or modification of the trust, yet if at any time all the holders of units required the trust to be terminated or altered effect would have to be given to their requirements; and equally if all certificate holders required that the balance available for distribution should not be added to capital, effect would have to be given to that requirement.

Wharton v. Masterman ([1895] A.C. 186) applied.

[For the Law of Property Act, 1925, s. 164, see 20 HALSBURY'S STATUTES (2nd Edn.) 771.]

Cases referred to:

- (1) *Bassil v. Lister*, (1851), 9 Hare, 177; 20 L.J.Ch. 641; 17 L.T.O.S. 263; 68 E.R. 464; 37 Digest 143, 694.
- (2) *Wharton v. Masterman*, [1895] A.C. 186; 64 L.J.Ch. 369; 72 L.T. 431; 37 Digest 146, 721.

* Section 164 (1) of the Law of Property Act, 1925, provides as follows:—

"(1) No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely:—

- (a) the life of the grantor or settlor; or
- (b) a term of twenty-one years from the death of the grantor, settlor or testator; or
- (c) the duration of the minority or respective minorities of any person or persons living or en ventre sa mère at the death of the grantor, settlor or testator; or
- (d) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated.

"In every case where any accumulation is directed otherwise than as aforesaid, the direction shall (save as hereinafter mentioned) be void; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed."

A **Adjourned Summons.**

This originating summons was taken out by the Midland Bank Executor and Trustee Co., Ltd., as trustee of a deed dated Feb. 22, 1957, establishing a unit trust, for the determination of the question, among others (being question numbered 1 (1)) whether on the true construction of the deed and having regard to s. 164 of the Law of Property Act, 1925, the trustee was bound to accumulate under

B cl. 21 of the deed the amount available for distribution at the end of each accounting period if and so far as the same should exceed the amount determined by the managers of the unit trust to be distributed in respect of such accounting period.

Clause 21 of the deed provided:

C "On Feb. 25, 1958, and on Feb. 25 in every year following until the termination of the trust the trustee shall distribute among the holders rateably in accordance with the number of units represented by the certificates held by them on the immediately preceding accounting date the amount (if any) to be distributed by holders (as determined in accordance with sub-cl. (D) of cl. 20 hereof) in respect of the previous accounting period ending on such accounting date. As at each accounting date the amount of cash required to effect such distribution shall be transferred to a special account to be entitled 'Distribution Account' and the amount at credit of the Distribution Account shall not for any of the purposes of this deed be treated as part of the deposited property but shall be held by the trustee upon trust to distribute the same as herein provided. The balance (if any) of the amount available for distribution shall be added to capital and shall thereupon cease to be available for distribution."

E Sub-clause (D) of cl. 20 provided:

"Forthwith after the amount available for distribution shall have been computed the managers shall determine the amount (if any) to be distributed which shall be such amount not exceeding the amount available for distribution as the managers shall in their absolute discretion determine."

F *E. J. A. Freeman* for the plaintiff, Midland Bank Executor and Trustee Co., Ltd.

K. J. T. Elphinstone for the first defendant, A.E.G. Unit Trust (Managers), Ltd.

G *J. L. Arnold* for the second defendant, A. S. Tomlin, a holder of units issued in accordance with the provisions of the deed.

Cur. adv. vult.

May 29. **WYNN-PARRY, J.**, read the following judgment: This summons raises an interesting question of law, in regard to the trust deed mentioned in the title to the originating summons, to which deed I will refer as the trust deed, the object of which is to constitute a unit trust, an expression now well known and understood.

H The question arises in this way: By cl. 20 (D) of the trust deed it is provided:

I "Forthwith after the amount available for distribution shall have been computed the managers shall determine the amount (if any) to be distributed which shall be such amount not exceeding the amount available for distribution as the managers shall in their absolute discretion determine."

By cl. 21 it is provided that if it is determined to distribute less than the amount available for distribution, then,

"The balance (if any) of the amount available for distribution shall be added to capital and shall thereupon cease to be available for distribution."

In view of that last provision the question then arises whether or not s. 164 of the Law of Property Act, 1925, applies. If it does not, then cadit quaestio.

I will deal first with the question whether or not s. 164 of the Law of Property Act, 1925, applies. This involves the construction both of the section and of the deed, and also a consideration of the mischief which the section is designed to meet. The section opens with the words, "No person may by any instrument or otherwise settle or dispose of any property . . ." In my view the word "settle" has no application in this case. It is argued that in the transaction by which a person becomes a certificate holder a disposition of property is involved. No doubt in one sense a disposition of property is involved because money or money's worth is paid over; but it is not every disposition to which the section applies. It only applies to such dispositions as, reading the section as a whole, can reasonably be said to fall within its ambit. The ambit is qualified by the words which follow the opening words which I have read, namely,

"in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than any one of the following, namely:—"

and then follows the statement of the four periods.

Let me test the matter by reference to the first period, "(a) the life of the grantor or settlor". In my view neither of those words is apt to describe a person who desires to become a holder of units in the trust. What such a person does is to make an investment by acquiring an interest in the trust in the form of one or more units, that investment being paid for in cash or money's worth. The word, "grantor", well understood as it is by the court and by conveyancers, is quite inapt to describe a person who is making an investment. Paragraphs (b) and (c) of sub-s. (1) of the section are for the same reasons equally inapplicable to the transaction of investment, and on its wording para. (d) can have no application.

Again let me test the matter by considering whether the trust deed falls within the mischief which the section is designed to prevent. The section is the present successor to the Thellusson Act (39 & 40 Geo. 3 c. 98). The origin of that statute was discussed by TURNER, V.-C., in *Bassil v. Lister* (1) ((1851), 9 Hare, 177 at p. 181):

"With reference to the origin of the statute, we are fortunately in no difficulty. The law, as it stood before the statute, having put no restriction upon the accumulation of property, so long as the vesting could be suspended, Mr. Thellusson had by his will directed his personal property to be invested in land, and the rents and profits of the land to be purchased and of his real estate to be accumulated during the lives of all his descendants who should be living at the time of his death; and then limited the accumulated property in favour of certain of his descendants who might be then living; and, this disposition being upheld by the courts, it was deemed necessary by the legislature to interpose for the purpose of restricting such dispositions for the future: we have here, therefore, the key to the statute. It had its origin in dispositions for the accumulation of rents and profits qua rents and profits, and not in dispositions having any reference whatever to any bargains or contracts entered into for other purposes than the mere purpose of accumulation."

Later he said (*ibid.*, at p. 183):

"The enactment is that no person shall settle or dispose of real or personal estate so and in such manner as that the rents, profits, income or produce shall be accumulated beyond the prescribed periods; and these are words which admit of a clear, plain, common-sense interpretation, as referring to the accumulation of rents, profits and income qua rents, profits and income. Why is the court to put a strained construction upon them, and cut down the undoubted right which existed before the statute, beyond what the language of the statute, in its ordinary interpretation, imports? It is said

A that the court ought to do so, because the spirit and intent of the statute was to prevent accumulations and the suspension of the beneficial enjoyment; but this argument appears to me to beg the question; for it assumes that what the petitioner here calls an accumulation, suspending the beneficial enjoyment, was an accumulation intended to be prevented by the statute."

B Finally I would refer to the last part of his judgment (*ibid.*, at p. 184):

C "The case before us is but one instance of the difficulties to which such a construction would lead. If it be supported, what is to become of partnership agreements for long terms of years, where certain sums are to be drawn out annually and the remaining profits are to accumulate and be divided at the end of the terms? What is to be done with policies of insurance on the lives of debtors? And how is the case put by Mr. Hobhouse, of a settlement of policies of insurance, with stock transferred in trust to pay premiums out of the dividends, to be dealt with? The absence of any provision in the Act for these and many other such cases which might be put leads strongly to the conclusion that such cases were not intended to fall within the Act; and, having regard both to the origin of the enactments and the spirit of the Act, I am of opinion that the case of the petitioner wholly fails, and that this petition of re-hearing must be dismissed . . ."

D It was argued by counsel for the second defendant that the true test to apply was to see whether the right conferred was a right to a fixed or ascertainable money payment or whether it was a right to a true participation in the fund. In the first case he said s. 164 of the Law of Property Act, 1925, would not apply; E in the second case it would apply, because in the second case the mischief which the section was designed to avoid, namely, a growing of the fund in which unit holders would be interested, was present. I cannot accept that test. With all respect it involves an over-simplification of the matter, and the argument which it is necessary to put forward to support it appears to me to be virtually F that which TURNER, V.-C., rejected in *Bassil v. Lister* (1). My first conclusion, therefore, is that s. 164 of the Law of Property Act, 1925, does not apply at all to this case.

G This would be sufficient to dispose of the matter, but I do not desire to rest my judgment solely on the ground which I have just stated. There is a further ground on which I rely, which can be put in this way: the basic trust is to be found in cl. 12 of the trust deed, which provides:

"The trustee shall stand possessed of the deposited property upon trust for the certificate holders according and subject to the provisions of this deed and any moneys forming part of the deposited property shall from time to time be invested at the direction of the managers in accordance with the provisions herein contained."

H It is true that there are express provisions setting out circumstances in which the trust will come or be brought to an end (see cl. 38); and there are express provisions for modification of the trust deed by resolution of a specified majority of the certificate holders at meetings convened for the purpose. But it cannot be doubted that, if at any time the whole of the certificate holders required the trust I to be terminated or altered in a specific respect, effect would have to be given to their requirements. Equally, if in any given year all the certificate holders required that the balance of the amount available for distribution should not be added to capital as contemplated, effect would have to be given to their requirement. The court would not enforce that provision against their unanimous wish, with the result again that s. 164 of the Law of Property Act, 1925, has no application (*Wharton v. Masterman* (2), [1895] A.C. 186).

It was argued that, as the remuneration of the managers is to be calculated by reference to the value of the trust (see cl. 29A of the trust deed), it would not

be open to the certificate holders acting unanimously to require that in a given year effect should not be given to the direction to add the balance available for distribution to capital. In my view there is no force in this suggestion, and I only mention it to show that I have not failed to take it into consideration. A

Lastly, if it is assumed that s. 164 does apply and that the effect of its application is to make void the provision at the end of cl. 21 for adding to capital the balance of the amount available for distribution, the result, as counsel for the second defendant pointed out, is very curious. In that case the latter part of s. 164 (1) would come into operation. It reads: B

“ and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.” C

Now the persons who would have been entitled to the balance are, having regard to cl. 12 of the trust deed, the certificate holders themselves; but, the section having exhausted itself, they would be entitled to make an arrangement under which the amount in question should be added to capital and thus give effect to the provision which, on the hypothesis on which I have proceeded, the section makes void. This appears to me to afford further support for the conclusion to which I have come, namely, that the section does not apply at all. D

I will make a declaration in accordance with para. 1 (1) of the originating summons.

Declaration accordingly.

Solicitors: *Coward, Chance & Co.* (for the plaintiff); *Linklaters & Paines* (for the defendants). E

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

PATTERSON AND OTHERS v. ELLIS AND ANOTHER. F

[COURT OF APPEAL (Lord Goddard, C.J., and Devlin, J.), May 27, 1957.]

County Court—Transfer of action from county court to High Court—Action founded on contract or tort—Whether some important question of law and fact likely to arise—County Courts Act, 1934 (24 & 25 Geo. 5 c. 53), s. 44 (2) (b), as substituted by the County Courts Act, 1955 (4 & 5 Eliz. 2 c. 8), s. 1 (4), Sch. 1, Part 1, para. 3. G

On an application by a defendant in an action in a county court for the action to be transferred to the High Court under s. 44* of the County Courts Act, 1934 (as substituted by the County Courts Act, 1955, s. 1 (4) and Sch. 1, Part 1, para. 3), the county court judge may certify, under s. 44 (2) (b), that in his opinion some important question of law or fact is likely to arise if he thinks that the case raises difficult questions of law or fact between the parties, even if no question of importance to persons other than the parties is involved. H

Appeal allowed.

[For the County Courts Act, 1934, s. 44, as substituted by the County Courts Act, 1955, s. 1 (4) and Sch. 1, Part 1, para. 3, see 35 HALSBURY'S STATUTES (2nd Edn.) 38.] I

Interlocutory Appeal.

The defendants, Richard Ellis and Belmont Garage, Ltd., appealed from an order of His Honour JUDGE GORDON CLARK, made in Epsom County Court on May 1, 1957, whereby he refused an application by the defendants for the action to be transferred to the High Court under s. 44 of the County Courts Act,

* The terms of the section, as substituted, are printed at p. 511, letters G to I, post.

A 1934, as substituted by the County Courts Act, 1955, s. 1 (4) and Sch. 1, Part 1, para. 3.

B The plaintiffs were the sole directors of and shareholders in a limited liability company which they had formed in 1956 to carry on the business of coach-builders formerly carried on by the plaintiffs as partners. In the action the plaintiffs claimed (a) against the first defendant and the defendant company, damages for fraudulent misrepresentation by the first defendant whereby the plaintiffs were induced to enter into an agreement in writing with the second defendant; and (b) against the defendant company, damages for breach of an implied covenant in the agreement that the defendant company had a good title to grant to the plaintiffs a tenancy of the land the subject of the agreement for a term of seven years. The plaintiffs alleged that, by reason of the fraudulent misrepresentation and breach of covenant, damage had been suffered by the company of which they were the shareholders and directors, and that the damage suffered by the company was the damage suffered by the plaintiffs, and they claimed against the defendants, jointly and severally, damages limited to £400. The defendants gave notice, pursuant to s. 44 (1) of the County Courts Act, 1934, that they objected to the action being tried in the county court, and D applied to the judge to certify that important questions of law and fact were likely to arise in the action and to transfer the action to the High Court, pursuant to s. 44 (2), on the defendants giving security as required by s. 44 (2) (a). In the affidavit in support of the application, the defendants' solicitor stated that the defendants would deny the plaintiffs' allegations, and he set out a number of important questions of fact and law which would arise. The county court E judge dismissed the application on the ground that the words "important question" in s. 44 (2) (b) of the Act of 1934, as substituted, meant a question important to people other than the parties, and that he could not find that any point arising in the case was important in that sense, although the case was one of difficulty and of obvious importance to the parties.

F *L. K. E. Boreham* for the defendants.
K. R. Bagnall for the plaintiffs.

LORD GODDARD, C.J.: This is an appeal from a decision of His Honour JUDGE GORDON CLARK, before whom an application was made to remove an action based on fraudulent misrepresentation from the Epsom County Court into the High Court. The application was made under s. 44 of the County Courts G Act, 1934, as amended by the County Courts Act, 1955, s. 1 (4) and Sch. 1, Part 1, para. 3. Section 44 (1), as amended, provides:

"Where there is commenced in a county court any action founded on contract or on tort wherein the plaintiff claims a sum exceeding £40, the defendant may . . . give notice that he objects to the action being tried in the court."

H Section 44 (2), as amended, reads:

"Where such a notice is given, the judge shall order that the action be transferred to the High Court, if—(a) the defendant (unless exempted by s. 20 of the Crown Proceedings Act, 1947) gives security approved by the registrar for the amount claimed and the costs of trial in the High Court, not exceeding in the aggregate the sum of £450; and (b) the judge certifies that in his opinion some important question of law or fact is likely to arise."

I I need not go through all the pleadings in the case for the purposes of this application. The particulars of claim which are filed seem to show that the action is one of considerable complexity. It relates to title to land, to the construction of a curious provision in a lease or agreement, to questions of damage, and to the

question whether the damage, if any, is suffered by the plaintiffs or by a company in which they are shareholders. The learned judge refused the application, and, in his reasons for so doing, said:

"This is a case of difficulty and of obvious importance to the parties, and one which I would gladly transfer the burden of to another court if I could properly do so. But I accept [the plaintiffs'] argument that 'important' must mean of some importance to people other than the parties—i.e., a point of fact including a number of outside interests . . .";

I think that he means "a point of fact affecting a number of outside interests",

" . . . or a point of law which will affect other cases. I cannot find that any point arising here is important in that sense."

I think that the learned judge meant to say that he must find either that there was some point of law which would affect other cases, or else that, on the facts, the case was something in the nature of a test case. That is putting too narrow a construction on the section. No doubt, a judge may properly consider whether "outside interests" are affected, but, if he thinks that the case raises difficult questions of law or fact between the parties, he may certify that important questions of law or fact are likely to arise: I do not think that he has to say that questions of law or fact which would affect other parties are likely to arise. The learned judge was probably influenced by the argument which was addressed to him based on the Criminal Appeal Act, 1907, s. 1 (6), which provides that, if a decision of the Court of Criminal Appeal involves "a point of law of exceptional public importance", the Attorney-General may give his fiat for the case to be taken to the House of Lords. I do not think that that is the governing question here. The county court judge has merely to decide whether the issues which are raised in the case are difficult, and whether an important question of law or fact is likely to arise. I think that there is an important question in the present case—a question sufficiently important to justify the removal of an obviously very difficult and complicated case to the High Court. For these reasons, I think that we should allow the appeal.

DEVLIN, J.: I agree.

Appeal allowed. Action transferred to the Chancery Division of the High Court.

Solicitors: *W. H. Matthews & Co.* (for the defendants); *Bowles & Co.*, Epsom (for the plaintiffs).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A R. v. BEYNON.

[CARDIFF ASSIZES (Byrne, J.), April 3, 1957.]

Criminal Law—Trial—Plea—Fitness to plead—Issue raised by the prosecution—Whether defence entitled to require the general issue to be tried before issue of fitness to plead—Criminal Lunatics Act, 1800 (39 & 40 Geo. 3 c. 94), s. 2.

Before the defendant, who was indicted for murder, had entered a plea on being arraigned, the Crown raised the question of his fitness to plead and applied for this issue to be tried as a preliminary issue. The defence submitted that this issue should not be tried as a preliminary issue on the application of the Crown if, as in this case, the defence desired the general issue to be tried first, the provisions of s. 2 of the Criminal Lunatics Act, 1800, not being mandatory.

Held: the question of the defendant's fitness to plead must be tried as a preliminary issue, because an insane person could not be tried and, on the court's attention being drawn to the fact that there was this preliminary issue, the court was bound to try it.

R. v. Roberts ([1953] 2 All E.R. 340) not followed.

[As to the trial of an issue whether the defendant is fit to plead, see 10 HALSBURY'S LAWS (3rd Edn.) 402, 403, paras. 729, 730.

For the Criminal Lunatics Act, 1800, s. 2, see 5 HALSBURY'S STATUTES (2nd Edn.) 593.]

Cases referred to:

- (1) *R. v. Roberts*, [1953] 2 All E.R. 340; [1954] 2 Q.B. 329; 117 J.P. 341; 14 Digest (Repl.) 285, 2611.
- (2) *R. v. Dashwood*, [1942] 2 All E.R. 586; [1943] K.B. 1; 112 L.J.K.B. 257; 28 Cr. App. Rep. 167; 14 Digest (Repl.) 627, 6336.
- (3) *R. v. Dyson*, (1831), 1 Lew. C.C. 64; 7 C. & P. 305, n.; 173 E.R. 135; 14 Digest (Repl.) 278, 2471.
- (4) *R. v. Pritchard*, (1836), 7 C. & P. 303; 173 E.R. 135; 14 Digest (Repl.) 278, 2472.
- (5) *R. v. Berry*, (1876), 1 Q.B.D. 447; 45 L.J.M.C. 123; 34 L.T. 590; 40 J.P. 484; 14 Digest (Repl.) 278, 2476.
- (6) *R. v. Rivett*, (1950), 34 Cr. App. Rep. 87; 14 Digest (Repl.) 69, 313.

G Trial on Indictment.

The defendant, Henry Beynon, was charged, before BYRNE, J., and a jury, with murder. Before his plea was taken, counsel for the Crown applied for the question whether the defendant was fit to plead to be tried as a preliminary issue. Counsel for the defence contended that this question could not be tried as a preliminary issue on the application of the Crown if the defence desired the general issue to be tried first, as it did in the present case.

Elwyn Jones, Q.C., and *Alun Davies* for the Crown.

N. G. L. Richards, Q.C., and *D. B. Isaac* for the defendant.

Elwyn Jones, Q.C., for the Crown: There is a preliminary issue as to the defendant's fitness to plead, and I propose to call evidence directed to that issue.

N. G. L. Richards, Q.C., for the defendant: It is not open to the Crown to ask for that issue to be tried as a preliminary issue, if, as in this case, the defence desires the general issue to be tried first. The authority on this matter is *R. v. Roberts* (1) ([1953] 2 All E.R. 340), which is cited in the note to 10 HALSBURY'S LAWS OF ENGLAND (3rd Edn.) 402, para. 729, where it is stated:

"The defence is entitled to ask that this issue [whether the defendant is fit to plead or not] be postponed until after the trial of the general issue, so that the accused is not deprived of the possibility of being acquitted."

The only distinction between *R. v. Roberts* (1) and the present case is that the defendant in the former case was a deaf mute, and that distinction is immaterial since the earlier authorities which were cited in *R. v. Roberts* (1) show that a deaf mute is included in the term "insane" for the purposes of s. 2 of the Criminal Lunatics Act, 1800. [After reading the judgment of DEVLIN, J., in *R. v. Roberts* (1) and the relevant words of s. 2 of the Act of 1800, counsel continued:] Section 2 is not mandatory but is merely dealing with procedure, and, as a matter of natural justice, the defence should be allowed, if it so desires, to have the general issue tried first. If a defendant were found unfit to plead and later regained sanity, he would be liable to be tried, and in the meanwhile the defence witnesses might have died or disappeared, while the Crown, on the other hand, could make use of the depositions made by its witnesses if they had died before the trial. Moreover, there is no appeal to the Court of Criminal Appeal or to the Court of Crown Cases Reserved on a verdict of unfitness to plead, as it is neither a felony nor a misdemeanour.

Elwyn Jones, Q.C., in reply: The issue of fitness to plead can be properly raised by the Crown, by the defence or by the judge himself (*R. v. Dashwood* (2), [1942] 2 All E.R. 586, per HUMPHREYS, J., at p. 587). Quite apart from the statutory effect of the Criminal Lunatics Act, 1800, there is abundant authority to support the proposition that an accused person cannot be tried if he is unfit to plead. The Act of 1800 is in keeping with the common law as stated in *HALE'S PLEAS OF THE CROWN*, Vol. 1, p. 34, in a passage referred to by PARKE, J., in *R. v. Dyson* (3) ((1831), 1 *Low. C.C.* 64), which was approved by ALDERSON, B., in *R. v. Pritchard* (4) ((1836), 7 *C. & P.* 303). *R. v. Roberts* (1) ([1953] 2 All E.R. 340) is distinguishable in that DEVLIN, J., was dealing with an accused person who was mute by the visitation of God and the learned judge had no occasion to consider the Act of 1800, and, therefore, his judgment is not binding on the court in the present case. [Counsel also quoted passages from the judgments of KELLY, C.B., and LUSH, J., in *R. v. Berry* (5) (1876), 1 *Q.B.D.* 447, at pp. 450, 451].

N. G. L. Richards, Q.C.: The cases cited by counsel for the Crown merely lay down the procedure which may be followed, and none of them deal with the point whether the defence may elect to have the general issue tried first. The Act of 1800 was the basis of the argument in *R. v. Roberts* (1) and that case, which was rightly decided, is not distinguishable from the present case.

BYRNE, J.: Before the plea was taken in this case, counsel for the Crown drew my attention to the fact that there was a preliminary issue to try, namely, whether the defendant is insane so that he cannot be tried on this indictment. Counsel for the defendant thereupon objected to the empanelling of a jury to try that issue and he put his argument in this way. He said that, unless the law compelled the court to deal with the issue of insanity, then natural justice required that the general issue should be tried. He said that he desired the general issue to be tried and, therefore, objected to the trial of the preliminary issue.

Counsel referred to *R. v. Roberts* (1) ([1953] 2 All E.R. 340) as authority for the proposition that the general issue could be tried before the issue of insanity. That was a case which was tried, I think, in this very court by DEVLIN, J., where a man charged with murder was tried, first, on the issue whether he was mute of malice or mute by the visitation of God, and, it being found that he was mute by the visitation of God, the question then arose whether there should be a trial of the preliminary issue whether he was insane so that he could not be tried. On objection being raised by the defence to that course and on the defence applying for the general issue to be tried, the learned judge ultimately came to the conclusion that the general issue should be tried first. His attention, I feel, was not drawn to one or two matters to which my attention has been drawn by counsel for the Crown, but I would say, first, that, in the light of my experience

A both at the Bar and on the Bench, it sounds to me a novel proposition that the preliminary issue should not be tried.

As I have always understood the law and as I have always seen it administered, if the court is aware of the fact that there is a preliminary issue whether the person who is charged before the court on an indictment is insane so that he is unfit to be tried, it is the duty of the court to see that that issue is tried, even though no application is made by the prosecution or by the defence. I find that that view of the law is fortified by a judgment delivered by HUMPHREYS, J., in *R. v. Dashwood* (2) ([1942] 2 All E.R. 586). In that case he was giving the judgment of the Court of Criminal Appeal, which was composed of himself, HILBERY and TUCKER, JJ. It is only necessary to refer to one passage in the judgment for my present purpose. In that passage HUMPHREYS, J., said (*ibid.*, at p. 587):

C "It is a cardinal principle of our law that no man can be tried for a crime unless he is in a position to defend himself, and that includes his being in a mental condition to defend himself, and that matter was present to the minds of his counsel when this man pleaded not guilty. It was open to them at that time, if they had so desired, indeed it was their duty if they so thought, to insist that the question of the prisoner's ability to plead be put to the jury. It should be known that the court acts in such a case upon any information conveyed to it from any quarter. It may come from the defendant himself, or his advisers, or from the prosecution, or from an independent person, such as the medical officer of the prison where the prisoner has been confined."

E That appears to me to be the plainest possible statement of the way in which this matter has always been dealt with by the courts.

F There is another case, *R. v. Rivett* (6) ((1950), 34 Cr. App. Rep. 87), in which LORD GODDARD, C.J., gave the judgment of the court. In that case, on arraignment, the preliminary issue had been tried, at the Suffolk Assizes, on the application of counsel for the prosecution, and the jury had found that the appellant was fit to plead. The trial could not take place at the Suffolk Assizes owing to lack of time, and was adjourned to the Norfolk Assizes. At the Norfolk Assizes, counsel for the defence applied for the preliminary issue to be re-tried, and the learned judge acceded to that request. It was re-tried, and again the jury found that the appellant was fit to plead. What was said in the Court of Criminal Appeal is, in my view, important, although it is *obiter*. The court consisted of LORD GODDARD, C.J., HUMPHREYS and SELLERS, JJ. LORD GODDARD, C.J., in giving the judgment of the court, said (34 Cr. App. Rep. at p. 90):

H "It is now necessary to refer to what happened at the trial, which, at any rate in one respect, was somewhat unusual. Counsel for the prosecution informed the judge when the prisoner was brought up at the Suffolk Assizes that he was instructed that there was a question as to the prisoner's fitness to plead; this was a perfectly correct course for the prosecution to take, and a jury was accordingly sworn to try that issue."

I Apart from *R. v. Roberts* (1), I know of no case which says that that is not the proper course to take. But authority for the course which the prosecution invite me to take, namely, to direct the trial of the preliminary issue, goes back to the days of HALE, and I am very much indebted to counsel for the Crown for providing me with an extract from HALE'S PLEAS OF THE CROWN, Vol. 1, p. 34, which reads:

"If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrensy, but be remitted to prison until that incapacity be removed. The reason is, because he cannot advisedly plead to the indictment."

The next authority which, I think, is of importance in considering this matter is *R. v. Berry* (5) ((1876), 1 Q.B.D. 447). In the judgment of KELLY, C.B., this passage occurs (*ibid.*, at p. 451):

"Further, I believe it to have been the law from the earliest times, that if it is found at the trial of a prisoner that he cannot understand the proceedings, the judge ought to discharge the jury and put an end to the trial, or order a verdict of not guilty."

Then he went on:

"The jury here have expressly found the prisoner incapable of understanding, and it needs no argument to show that, under such circumstances, he ought not to be convicted."

LUSH, J., said (*ibid.*):

"I am of the same opinion. If it appears at any time during the trial that the prisoner is of non-sane mind, the proper course is to stop the trial and direct him to be detained during the Queen's pleasure. On that I base my judgment. Such course was adopted in the present case. I understand the finding of the jury, that the prisoner was not capable of understanding, and, as a fact, had not understood, the nature of the proceedings, to mean that the prisoner has not sufficient intellect to understand the nature of the proceedings."

That case was tried in 1876, but, prior to that, in the year 1800, the Criminal Lunatics Act, 1800, had been passed. Counsel for the defence invites me to take the view that that Act is not mandatory. It is true that the Act does not say that a jury shall be empanelled and that the issue shall be tried whether a person is insane so that he cannot be tried, but, as I see it, it is a statute which can be said to be declaratory of the common law; certainly it is in conformity with the opinion expressed in *HALE'S PLEAS OF THE CROWN*. Section 2 of the Criminal Lunatics Act, 1800, provides:

"... if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impannelled for that purpose, so that such person cannot be tried upon such indictment . . . it shall be lawful for the court before whom any such person shall be brought to be arraigned or tried as aforesaid to direct such finding to be recorded . . ."

It is not without interest, I think, to observe that the section goes on:

"... if any person charged with any offence shall be brought before any court to be discharged for want of prosecution, and such person shall appear to be insane, it shall be lawful for such court to order a jury to be impannelled to try the sanity of such person; and if the jury so impannelled shall find such person to be insane, it shall be lawful for such court to order such person to be kept in strict custody, in such place and in such manner as to such court shall seem fit . . ."

It appears to me that the law has always been that an insane person cannot be tried, and, although it is with the most profound regret that I find myself in disagreement with *DEVLIN, J.*, nevertheless I cannot avoid it, and the conclusion at which I have arrived is that, on my attention being drawn to the fact that there is a preliminary issue, that issue is one which the court is obliged to try. That is based on the fact, not only that there is provision for such procedure by the Criminal Lunatics Act, 1800, but that there is authority for that procedure going back as far as *HALE*. For those reasons this objection fails and I order a jury to be empanelled to try the preliminary issue.

Solicitors: *Director of Public Prosecutions; Andrew, Thompson & Partners, Swansea* (for the defendant).

[Reported by SEYS LLEWELLYN, ESQ., Barrister-at-Law.]

Re PINWOOD ESTATE, FARNBOROUGH.
NEW IDEAL HOMESTEADS, LTD. v. LEVACK.

[CHANCERY DIVISION (Wynn-Parry, J.), May 28, 29, 1957.]

Real Property—Restrictive covenant—Building scheme—Purchasers mutually release covenants and enter into superseding covenants—Whether building scheme terminated—Joint restrictive covenant by tenants in common in deed of 1899—Whether covenant effective to give rise to equitable restriction binding successors in title.

A vendor laid out his land in lots for development, and conveyed the lots to four purchasers, imposing restrictions on user in circumstances which made the restrictions binding as a building scheme. Certain lots, including the lot of which the respondent now owned part, were conveyed to two of the purchasers as tenants in common in fee simple. Shortly after the lots had been conveyed the purchasers entered into a deed, dated Dec. 21, 1899, to which they were all parties and in which the two purchasers of lots bought by them as tenants in common joined as parties of the fourth part, one of the two being also separately a party to the deed. By the deed the purchasers released and discharged "each other and their respective heirs and assigns and the freehold hereditaments and premises to which the same relate from the restrictive stipulations" in the said conveyances. In consideration of this release each of the parties to the deed of 1899 covenanted thereby "for himself or herself his or her heirs and assigns with each other party . . . and every two and three of them his her or their heirs and assigns and with intent to bind the land to which the restrictive stipulations contained in the schedule . . . relate into whosoever hands the same may come . . . to observe perform fulfil and keep the restrictive stipulations contained in the schedule" thereto "so far as the same relate to the . . . premises . . . belonging to the respective covenantors". The vendor was not a party to the deed of 1899 and the deed was not expressed to be supplemental to the prior conveyances. The applicant, a successor in title of the purchasers who had bought as tenants in common and of another purchaser, applied for a declaration that the covenants in the deed of 1899 were not enforceable against the applicant's land. The respondent, who was a successor in title of the purchasers who had bought as tenants in common, contended that she was entitled to enforce the restrictive covenants contained in the deed of 1899 against the applicant. It was conceded that the deed of 1899 contained no words annexing the benefit of the covenants to the land, and that there was not a complete chain of assignments of the benefit of the covenants from the respondent's predecessors in title to the respondent.

Held: the covenants were not now enforceable against the applicant's land because (i) the deed of Dec. 21, 1899, discharged the parties from the restrictive stipulations previously binding and brought the building scheme (using that term in the sense defined in *Elliston v. Reacher*, [1908] 2 Ch. 374) to an end, and (ii) the benefit of the covenants in the deed of Dec. 21, 1899, had not been annexed to the respondent's land and had not been assigned to her, the intention of the parties to the deed to be mutually bound not being sufficient of itself to annex the benefit of the covenants to the land.

Whatman v. Gibson ((1838), 9 Sim. 196) explained.

Miles v. Easter ([1933] Ch. 611) considered.

Per CURIAM: the covenant in the deed of 1899 entered into by the two purchasers of lots as tenants in common was a joint covenant, notwithstanding that they held their lots as tenants in common, and, therefore, following the reasoning of LUXMOORE, J., in *Ridley v. Lee* ([1935] Ch. at p. 603) the deed of 1899 was void (see p. 522, letter A, post).

[**Editorial Note.** The deed of Dec. 21, 1899, was not expressed to be supplemental to the prior conveyances imposing restrictions effective as a building scheme and, if it had been, there might have been ground for treating the deed as merely modifying an existing building scheme (see p. 520, letter D, post). A

As to building schemes, see 14 HALSBURY'S LAWS (3rd Edn.) 565-568, paras. 1053-1057; and as to power of court to make a declaration that land is not affected by restrictive covenants, see *ibid.*, 571, para. 1062. B

As to the three classes of restrictive covenants, see 14 HALSBURY'S LAWS (3rd Edn.) 561, para. 1046; cf., p. 520, letter I, to p. 521, letter C, post.

For the Law of Property Act, 1925, s. 84 (2), see 20 HALSBURY'S STATUTES (2nd Edn.) 607.]

Cases referred to:

- (1) *Elliston v. Reacher*, [1908] 2 Ch. 374; *affd.* C.A., [1908] 2 Ch. 665; 78 L.J.Ch. 87; 99 L.T. 701; 40 Digest 309, 2646. C
- (2) *Whatman v. Gibson*, (1838), 9 Sim. 196; 7 L.J.Ch. 160; 59 E.R. 333; 40 Digest 323, 2731.
- (3) *Osborne v. Bradley*, [1903] 2 Ch. 446; 73 L.J.Ch. 49; 89 L.T. 11; 40 Digest 329, 2780.
- (4) *Re Union of London & Smith's Bank, Ltd.'s Conveyance*, *Miles v. Easter*, [1933] Ch. 611; 102 L.J.Ch. 241; 149 L.T. 82; Digest Supp. D
- (5) *Renals v. Cowlishaw*, (1878), 9 Ch.D. 125; *affd.* C.A., (1879), 11 Ch.D. 866; 48 L.J.Ch. 830; 41 L.T. 116; 40 Digest 316, 2686.
- (6) *Ridley v. Lee*, [1935] Ch. 591; 104 L.J.Ch. 304; 153 L.T. 437; Digest Supp.

Adjourned Summons. E

By originating summons, the applicant, New Ideal Homesteads, Ltd., the owner of part of the Pinewood Estate, sought a declaration under the Law of Property Act, 1925, s. 84 (2), that its land was not affected by certain restrictive covenants contained in an indenture dated Dec. 21, 1899 (hereinafter called "the deed of 1899"). At the time of the conveyances next mentioned the Pinewood Estate, which was then the subject of a building scheme, was owned by the Capital & Counties Bank, Ltd., who had laid it out for disposal in twenty-three lots. The bank conveyed the land by four indentures, one dated Dec. 20, 1899, and three dated Dec. 19, 1899. In each of these conveyances the lots conveyed were made subject to the observance and performance of certain restrictive stipulations contained in the schedule, which were the restrictions constituting the building scheme. Lot 1 was conveyed to Mrs. Bull by the conveyance dated Dec. 20, 1899. Lots 2-10 were conveyed by one of the conveyances dated Dec. 19, 1899, to Mr. Perryman. Lots 11-16, 20-23, were conveyed to Mr. Bull by a third conveyance. Lots 17-19 were conveyed by the fourth conveyance to Mr. Perryman and Mr. Foster as tenants in common in fee simple. The deed of 1899 was made between Mrs. Bull of the first part, Mr. Bull of the second part, Mr. Perryman of the third part and "the said Charles Wilbraham Perryman and William Edward Foster of . . . of the fourth part" and recited, among other recitals, that lots 17-19 had been conveyed unto and to the use of Mr. Perryman and Mr. Foster as tenants in common in fee simple subject to the observance and performance of certain restrictive stipulations contained in the schedule to the said conveyance to them. The recital of agreement for release and the terms of the release and discharge from the restrictive stipulations of the building scheme and the terms of the superseding covenant to observe restrictions referred to in the deed of 1899 are set out in the judgment at p. 519, letter H, to p. 520, letter B, post. G H I

The applicant was the owner of lots 11-18, the northerly part of lot 19, lot 20 except for the south-westerly corner and lots 21-23. The respondent was the owner of the southerly part of lot 19, together with other land on the south of that lot. There was no complete chain of assignments of the benefit of the restrictive stipulations referred to in the deed of 1899 to the respondent. The

A respondent contended that she was entitled to the benefit of the restrictive stipulations which the parties to the deed of 1899 had thereby covenanted to observe.

G. H. Newsom, Q.C., and *W. S. Wigglesworth* for the applicant, *New Ideal Homesteads, Ltd.*

Harold Christie, Q.C., and *H. Hillaby* for the respondent, *Mrs. Levack*.

B **WYNN-PARRY, J.:** There is no doubt that the applicant is bound by the terms of the deed of 1899, so far as the burden of the covenants therein contained is concerned. The question which I have to determine is whether the respondent or anybody else is entitled to enforce those covenants.

I propose first to consider whether there is in existence what is conveniently known as a building scheme affecting this area of land clearly ascertained;

C because if there is an existing building scheme fulfilling the conditions laid down by *PARKER, J.*, in *Elliston v. Reacher* (1) ([1908] 2 Ch. 374), the covenants attach, and the respondent and the other persons interested will have the benefit of the covenants in the deed.

It is rightly conceded that immediately prior to the execution of this deed on Dec. 21, 1899, there was such a building scheme. There was a common vendor,

D the Capital & Counties Bank, Ltd., which was dealing with land which had been laid out, for the purpose of development in lots, and the bank sold the lots to the persons who were parties to the deed of 1899. It is also clear that in the conveyances to these parties the bank imposed certain restrictions, with the terms of which I am not concerned. The purchasers from the bank were apparently not satisfied with the restrictions which had been imposed on them respectively

E by the bank, and therefore they entered into the deed of 1899 for the purpose of bringing into existence a new set of restrictions.

The question arises (and this, of course, is a question of construction) what was the effect of what they did? Was it merely, as has been contended by the respondent, to alter the terms of the building scheme so far as regards the restrictions, or was the effect, as is contended for on behalf of the applicant,

F to destroy the building scheme and put in its place this document as constituting the entirety of the rights of the parties against each other?

In the first place it is to be observed that the bank is not a party to the deed. The bank, it is agreed, had conveyed to the four parties to the deed of 1899, all the land in the neighbourhood in which it had been interested. No doubt it was therefore thought there was no need to make the bank a party. The document

G recites the interests of the respective parties* and says that the land conveyed to them was conveyed on the basis of it being subject to the observance and performance of certain restrictive stipulations contained in the schedules to the respective documents by which their shares in the land were conveyed to them. Then there appears this recital:

H “And whereas the parties hereto have agreed to release each other from the said restrictive stipulations which are scheduled to the four several hereinbefore recited indentures of conveyance and in consideration of such release to enter into the covenant hereinafter contained for the observance and performance of the restrictive stipulations contained in the schedule to these presents it being intended that the restrictive stipulations contained in the schedule to these presents shall supersede the aforesaid restrictive

I stipulations which are scheduled to the four several hereinbefore recited indentures of conveyance.”

In the operative part that intention was carried out in this language:

“Now this indenture witnesseth that in consideration of the premises the parties to these presents do hereby mutually release and discharge each other and their respective heirs and assigns and the freehold hereditaments

* The recital of the interests of Mr. Perryman and Mr. Foster as tenants in common is stated at p. 518, letter H, ante.

and premises to which the same relate from the restrictive stipulations which are scheduled to the four hereinbefore recited indentures of conveyance and in consideration thereof each of the parties to these presents doth hereby covenant for himself or herself his or her heirs and assigns with each other party hereto and every two and three of them his her or their heirs and assigns and with intent to bind the land to which the restrictive stipulations contained in the schedule to these presents relate into whosoever hands the same may come . . . to observe perform fulfil and keep the restrictive stipulations contained in the schedule to these presents so far as the same relate to the hereditaments and premises of and belonging to the respective covenantors."

Let me comment on that language: In the first place, both in the recital and in the operative part the word "release" is used, and, indeed, in the operative part the phrase "release and discharge" is used; so that what was done—and there can be no doubt about this—was that the pre-existing set of restrictive stipulations was abolished, and the parties and each of them were discharged therefrom. Then with deliberate intent there was brought into existence a number of new restrictive stipulations which were set out in the schedule to the deed, to the language of which I need not refer.

As was pointed out by counsel for the applicant, if this document had been expressed to be supplemental to the four pre-existing documents there might have been some ground for the argument that this document should be treated merely as a modification of an existing scheme, but it was not so expressed to be supplemental. In view of the language which is used, it is a document which, to my mind, wipes out the past so far as the restrictions as to user are concerned and which brings into existence as between these four parties for all purposes a new set of restrictive stipulations. The parties, by the language which they have used, must be taken to have determined that for the future their rights as between each other would depend on and be found only in this deed of Dec. 21, 1899. I therefore conclude that there is no building scheme, within the meaning of that phrase as used in *Elliston v. Reacher* (1) ([1908] 2 Ch. 374), in existence, and that therefore the respondent cannot assert with success that she can obtain the benefit of the restrictive stipulations by virtue of this document.

What, then, is her position? It is admitted by counsel for the applicant that she could claim the benefit of the restrictive covenants if it could be shown either that the benefit had been annexed by proper words of annexation or that there was a complete chain of assignments of the benefit of the covenants; but it is conceded on behalf of the respondent that there are no words of annexation, and it is conceded that the chain is not complete. In those circumstances, the respondent says that she is entitled to the benefit of the restrictive provisions because it is a deed which shows clearly by its language an intention that the parties should be mutually bound by the restrictions and that that element of mutuality is enough to carry the benefit of the restrictive stipulations. That means that she is endeavouring to set up a further method by which the benefit of the restrictive stipulations can be transferred. She relies on *Whatman v. Gibson* (2) ((1838), 9 Sim. 196); but on examination it will be found that in that case there was a common vendor, and I think that that decision can be supported on the basis that, notwithstanding the fact that it was decided so long ago, it really contains the essential elements which PARKER, J., required in *Elliston v. Reacher* (1). Therefore, I do not think that it affords the respondent any support.

The real question is: Is there a fourth class at all? The first class is the *Elliston v. Reacher* (1) type of case; the second consists of cases where there are proper words of annexation; the third consists of cases where there is a continuous chain of express assignments. But is there a fourth class?

A In *Osborne v. Bradley* (3) ([1903] 2 Ch. 446) FARWELL, J., said (*ibid.*, at p. 450):

“This is an action on a covenant in a deed made between the plaintiff, Mr. Osborne, and Mr. Bavin. Mr. Bradley, the defendant, was a purchaser from Bavin. The conveyance was made expressly subject to the covenants contained in the conveyance from Osborne to Bavin. It is a conveyance in fee. Negative covenants in conveyances in fee restricting the right of the purchaser to use the land purchased may for the purposes of a case like the present be considered as falling under three classes: (i) where the covenant is entered into simply for the vendor's own benefit; (ii) where the covenant is for the benefit of the vendor in his capacity of owner of a particular property; and (iii) where the covenant is for the benefit of the vendor, in so far as he reserves unsold property, and also for the benefit of other purchasers, as part of what is called a building scheme.”

I am not concerned with the first class, and the third class is obviously the *Elliston v. Reacher* (1) type of case. Counsel for the applicant submitted, and I think he was right, that the second class stated by FARWELL, J., is really to be sub-divided into two classes, namely, annexation and continuous chain of assignment. That, I think, emerges from *Re Union of London & Smith's Bank, Ltd.'s Conveyance, Miles v. Easter* (4) ([1933] Ch. 611). The judgment of the Court of Appeal was delivered by ROMER, L.J., who said (*ibid.*, at p. 627):

“That the plaintiff is bound by the covenants in question is not disputed, in view of the fact that he purchased his lands with notice of them. What is in dispute is the question whether the defendants are entitled to the benefit of such covenants. Now the defendants are not the original covenantees, and it therefore becomes necessary to ascertain what person other than the original covenantor is entitled to the benefit of a restrictive covenant affecting land. This question was put to himself by HALL, V.-C., in *Renals v. Cowlishaw* (5) ((1878), 9 Ch.D. 125), and the answer was given in a judgment so well known that it is unnecessary to refer to it at length. It is a judgment that has received the approval both of this court and of the House of Lords, and has always been regarded as a correct statement of the law upon the subject. Stated shortly it laid down this: that, apart from what are usually referred to as building scheme cases (and this is not a case of that sort), a purchaser from the original covenantor of land retained by him when he executed the conveyance containing the covenant will be entitled to the benefit of the covenant if the conveyance shows that the covenant was intended to enure for the benefit of that particular land. It follows that, if what is being acquired by the purchaser was only part of the land shown by the conveyance as being intended to be benefited, it must also be shown that the benefit was intended to enure to each portion of that land. In such cases the benefit of the restrictive covenant will pass to the purchaser without being mentioned. It runs with the land. In all other cases the purchaser will not acquire the benefit of the covenant unless that benefit be expressly assigned to him—or, to use the words of the vice-chancellor (9 Ch.D. at p. 130), ‘it must appear that the benefit of the covenant was part of the subject-matter of the purchase’.”

I In my view, that passage establishes the other two classes. But I can find no authority, certainly none was cited to me, which establishes the fourth class suggested. In my opinion, therefore, it is not open either to the respondent or to anybody else on this line of reasoning to rely on these restrictive covenants.

That is enough to dispose of the whole matter, but there was a further point developed by counsel for the applicant with which I should deal. He submitted that on the true construction of the deed of 1899 the proper conclusion was that the covenant by Perryman and Foster [two of the purchasers from the original common vendor] was a joint covenant, notwithstanding that they held the lots

in which they were both interested (i.e., lots 17 to 19)* as tenants in common; and that in view of the fact that Perryman was also a separate covenantor and in view of the reasoning of LUXMOORE, J., in *Ridley v. Lee* (6) ([1935] Ch. 591 at p. 603), the whole covenant is void. I think for myself that, particularly having regard to the fact that Perryman and Foster are grouped as one party in the statement of the parties to the deed, the covenant is a joint covenant, and had it been necessary for me to decide this point I should have regarded myself bound by the reasoning of LUXMOORE, J., in *Ridley v. Lee* (6) (*ibid.*, at p. 603) and would have held that the deed was void.

In the result, I propose to make a declaration in accordance with para. 1 of the summons.

[After discussion on the question of costs, HIS LORDSHIP directed that the applicant should pay the costs of both parties up to the adjournment into court as between solicitor and client, and that each party should pay their own costs of the hearing in court.]

Order accordingly.

Solicitors: *J. Eaton & Co.* (for the applicant); *Alec Woolf & Turk*, agents for *Turk, Krish & Barstow*, Farnham (for the respondent).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

Re COCKBURN (*deceased*). COCKBURN v. LEWIS AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), June 4, 1957.]

Executor and Administrator—Trustee—Appointment of new trustees by administrators with the will annexed.

Trust and Trustee—Appointment of new trustees—Appointment by administrators with the will annexed, the administration being completed.

Where there has been a grant of administration with the will annexed, the administrators, after clearing the estate and completing the administration, are entitled to appoint under s. 36 of the Trustee Act, 1925, new trustees of the will who can exercise all the powers conferred by the will on the trustees thereof for the time being.

Re Ponder ([1921] 2 Ch. 59) applied.

[**Editorial Note.** In comparing this case with the passage in the judgment of the Court of Appeal in *Harvell v. Foster* ([1954] 2 All E.R. at p. 745, letters E-H) it will be noted that the facts in the present case show not only the payment of debts, testamentary expenses and death duties, but also a provisional appropriation to meet an annuity and a proposed appropriation by way of distribution of a testator's estate part of which will remain subject to continuing trusts.

As to a personal representative becoming a trustee, see 16 HALSBURY'S LAWS (3rd Edn.) 142-144, paras. 225, 226.]

Cases referred to:

- (1) *Re Ponder, Ponder v. Ponder*, [1921] 2 Ch. 59; 90 L.J.Ch. 426; 125 L.T. 568; 23 Digest 26, 2.
- (2) *Harvell v. Foster*, [1954] 2 All E.R. 736; [1954] 2 Q.B. 367; 3rd Digest Supp.

Adjourned Summons.

By originating summons dated Jan. 24, 1957, the plaintiff, who was one of the two administrators of the estate of the testator Sir James Stanhope Cockburn, deceased, and was also beneficially interested under the trusts of the will, applied for the determination of the following questions: (i) whether the plaintiff and the first defendant, Claude John Ledston Lewis, the other administrator of the

* See p. 518, letter G, ante.

- A testator's estate, were trustees for the purposes of the will and at liberty to exercise the powers and discretions thereby conferred on the trustees for the time being of the will; (ii) that, if question (i) should be answered in the negative, certain named persons or other fit and proper persons might be appointed trustees of the will; and (iii) that, if necessary or expedient, a proper scheme of appropriation might be approved by the court for the division of the testator's
- B residuary estate into shares in pursuance of the will.

- By his will the testator appointed three executors and trustees thereof and declared that references to his trustees should include them and the survivors or survivor of them or other the trustees or trustee for the time being of his will, except where this construction was precluded by the context. He gave his property in the parish of Kings Capel in the County of Hereford, including his
- C home Pennoxstone Court, to his trustees on trust, subject to a life interest to his widow, that the property should form part of his residuary estate. He devised and bequeathed his residuary estate to his trustees on trust for sale and conversion, with power to postpone sale or conversion, and directed his trustees out of the moneys arising from conversion to pay his funeral and testamentary expenses and debts and death duties, and to stand possessed of the residue of
- D the moneys in trust for Alison Ethel Cockburn and the plaintiff, James Francis Cockburn, in equal shares; provided that if either of them should have died in the testator's lifetime leaving issue living at his death who being male should attain the age of twenty-one years or being female should attain that age or marry, such issue should take per stirpes, and if more than one equally between them, the share in the testator's residuary estate which such deceased person would
- E have taken had he or she survived the testator and attained a vested interest. The testator directed that the share given in trust for the plaintiff should be retained and invested by the trustees and that the income should be paid to the plaintiff during his life, and that after his death the trustees should stand possessed of the capital and future income thereof in trust for the plaintiff's children at twenty-one years or, if female, at marriage. The testator further
- F provided that if the trusts of the shares of his residuary estate should fail or determine his trustees should, after the death of his wife, stand possessed of the capital and income thereof in trust as to two-thirds thereof for the fifth defendant and as to the remaining one-third for the sixth defendant absolutely. The testator declared that his trustees might, in extension of the power of appropriation conferred on personal representatives by s. 41 of the Administration of Estates
- G Act, 1925, at any time or times at their discretion appropriate any part of his residuary estate as therein mentioned. The testator did not nominate by his will any person for the purpose of appointing new trustees thereof. By a codicil dated Apr. 5, 1932, the testator directed his trustees to pay to Constance Isabel Wilden an annuity of £50 yearly until she married; the said annuitant had not married at the time of the hearing of the summons and was then of the age of
- H fifty-five years. Alison Ethel Cockburn died on Dec. 30, 1944, leaving surviving her two children, the second and third defendants, who were born on July 9, 1934, and June 8, 1936. The testator died on Apr. 1, 1947. Two of the executors and trustees named in his will predeceased him and the third renounced probate and never acted in the trusts of the will. The testator's widow died on Sept. 20, 1953. The plaintiff married on July 16, 1955, and had one son, the fourth de-
- I fendant, who was born on July 13, 1956.

On July 24, 1947, letters of administration to the testator's estate with the will annexed were granted to the plaintiff and the first defendant. By the time of the commencement of these proceedings the administrators had paid and discharged the funeral and testamentary expenses, and the testator's debts and the death duties on his estate. They had paid moneys and transferred certain stocks to the second defendant, a daughter of Alison Ethel Cockburn, in part satisfaction of the one quarter share of the testator's residuary estate to which

the second defendant became entitled on attaining twenty-one, and they had retained undivided £2,000 2½% consols to provide for the annuity payable to Constance Isabel Wilden. The testator's estate comprised stocks and landed property, and the plaintiff proposed that these should be appropriated to and among the beneficiaries, including himself, and that independent trustees of the will should be appointed. All defendants, other than the first defendant, were persons beneficially interested under the trust of the testator's will.

E. I. Goulding for the plaintiff.

V. G. H. Hallett for the first, fifth and sixth defendants.

G. M. Parbury for the second and third defendants.

J. L. Arnold for the fourth defendant (an infant).

DANCKWERTS, J., referred briefly to the testator's will and codicil, to the circumstances leading to the grant of administration, and to the death of the testator's widow and continued: The questions which I am asked to decide are whether the administrators of the estate, having cleared the estate and completed the administration in the ordinary way, are in a position, the testator having been dead for about ten years, to appoint new trustees of the will, and whether those new trustees, when so appointed by the administrators, will be able to exercise the powers which are conferred by the will on the trustees for the time being of the will. I feel no doubt about the matter at all. Whether persons are executors or administrators, once they have completed the administration in due course, they become trustees holding for the beneficiaries, either on an intestacy or under the terms of the will, and are bound to carry out the duties of trustees, although in the case of administrators they cannot be compelled to go on indefinitely acting as trustees and are entitled to appoint new trustees in their place and thus clear themselves from duties which were not expressly conferred on them under the terms of the testator's will and which they were not bound to accept.

It seems to me that, if the administrators do not appoint the new trustees to proceed to execute the trusts of the will they will become trustees in the full sense. Further, it seems to me that they have the power, conferred by s. 36 of the Trustee Act, 1925, to appoint new trustees of the will to act in their place. That seems to me to have been clearly established by the decision of SARGANT, J., in *Re Ponder, Ponder v. Ponder* (1) ([1921] 2 Ch. 59). My attention was called to the observations made in *Harvell v. Foster* (2) ([1954] 2 All E.R. 736)*, which are obiter so far as they cast any doubt on the decision of SARGANT, J., and which, with all respect, I should have thought were not justified. The point in *Harvell v. Foster* (2) was a very different one. It was whether a personal representative who had not duly completed his duties as personal representative was under any liability in his capacity of administrator, to the persons who were interested in the estate. I should have thought that there was no doubt that the answer was that, if he did not duly perform his duties, he was. That, however, does not seem to me to have anything to do with the question whether a personal representative, who has completed his duties in a proper way, is or is not in a position to appoint new trustees. It has been recognised for a great number of years that, and I feel no doubt that, a personal representative in that position can appoint new trustees. I, therefore, declare in the present case that the plaintiff and the first defendant are in a position to appoint trustees of the testator's will who will be in a position to exercise the powers and discretions conferred on the trustees of the will by the terms of the will and codicil.

Declaration accordingly.

Solicitors: *Fladgate & Co.* (for all parties except the second and third defendants); *Frere, Cholmeley & Nicholson* (for the second and third defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

* See [1954] 2 All E.R. at p. 745.

A EASTERN DISTRIBUTORS, LTD. v. GOLDRING (MURPHY
Third Party).

[COURT OF APPEAL (Lord Goddard, C.J., Romer, L.J., and Devlin, J.), May 28, 29, June 6, 1957.]

- B *Sale of Goods—Transfer of title—Owner giving seller documents enabling seller to represent himself as owner—Sale in excess of seller's actual authority—Title of purchaser as against subsequent bona fide purchaser for value from former owner—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 21 (1), s. 25 (1).*
- Hire-Purchase—Agreement—Agreement signed by hirer in blank—Unenforceable against hirer—Recovery of possession against third party—Hire-Purchase Act, 1938 (1 & 2 Geo. 6 c. 53), s. 2 (2), s. 17.
- C *Estoppel—Estoppel in pais—Estoppel by conduct—Sale of motor car—Documents given by owner to agent enabling agent to represent himself as owner—Sale by agent in excess of authority—Subsequently sale by owner—Title to motor car.*
- D M. owned a Bedford van. He wished to buy a Chrysler car from C., who was a motor dealer, but M. had not enough money to pay the deposit on hire-purchase of the car. At C.'s instance M. authorised C. to sell the van to a hire-purchase finance company, to obtain an agreement by the company to sell it to M. on hire-purchase terms and to apply the proceeds of the sale to the company in paying the deposits on the hire-purchases of both the van and the Chrysler car. C.'s authority to sell the van was limited to effecting both transactions, the sale and hire-purchase of the van and the hire-purchase of the Chrysler car together. Thus C. had no authority to effect one transaction without the other. M. signed in blank four hire-purchase documents, viz., a proposal form and a memorandum of hire-purchase agreement in respect of each vehicle, and gave them to C., leaving him to complete them. The sales note included in the proposal form relating to the van contained a printed paragraph by which the dealer, i.e., C., certified that the vehicle was his absolute property. Without having obtained any further authority from M., C. sold the van to the plaintiffs as his own and the plaintiffs accepted M.'s hire-purchase proposal in regard to the van as a genuine hire-purchase transaction and in due course sent M. a counterpart of the agreement relating to the van. The hire-purchase transaction regarding the Chrysler car was not implemented and C. told M. subsequently that the whole of the transaction was cancelled. Shortly afterwards M. sold the Bedford van, which he believed to be his own property, to the defendant who bought it in good faith and without knowledge of M.'s dealing with the van. M. made no payments under the hire-purchase agreement.
- H The plaintiffs terminated the agreement and claimed the van or its value from the defendant.
- Held: the plaintiffs were entitled to recover the van from the defendant for the following reasons—
- (i) although C. had no actual authority to sell the van to the plaintiffs, M., by providing C. with documents which enabled him to represent himself to the plaintiffs as entitled to sell the van to them, had clothed C. with apparent authority to sell the van, and was precluded (within s. 21 (1) of the Sale of Goods Act, 1893) from denying C.'s authority to sell; the plaintiffs, therefore, acquired the title to the van which M. himself had, and M. was left with no title to the van that he could pass to the defendant on the subsequent sale (see p. 532, letter E, post).
- I *Fuentes v. Montis* ((1868), L.R. 3 C.P. 268) considered.
- Dictum of LORD ELLENBOROUGH, C.J., in *Pickering v. Busk* ((1812), 15 East, at p. 42) applied.

(ii) although the hire-purchase agreement, having been signed in blank by M., was not "made and signed by the hirer" as required by s. 2 (2) (a) of the Hire-Purchase Act, 1938, and the plaintiffs were accordingly not "entitled to enforce" it, yet neither s. 2 (2) nor s. 17 of that Act took away from them their rights as owners against the defendant or any person other than the hirer (see p. 532, letter I, to p. 533, letter A, and p. 533, letter H, post).

(iii) section 25 (1) of the Sale of Goods Act, 1893, did not render valid and effective the sale to the defendant because, if that section were to apply, it would be necessary that the seller (whom the court assumed to be M. and not C. for the purposes of s. 25) should have remained in possession as seller; and although the hire-purchase agreement was by the terms of s. 2 (2) of the Hire-Purchase Act, 1938, unenforceable, yet it was not thereby rendered void but was effective to change M.'s possession from possession in his character as seller to possession as bailee (see p. 534, letters B to D, post).

Staffs. Motor Guarantee, Ltd. v. British Wagon Co., Ltd. ([1934] 2 K.B. 305) followed.

Appeals dismissed.

[**Editorial Note.** The principle of the common law, applicable in mercantile transactions, that, where an agent is clothed with apparent authority to sell goods and sells them, the purchaser acquires title to the goods, is an exception to the general rule *nemo dat quod non habet*. The exception is based on mercantile convenience and it is probably not right to classify it as part of the law of estoppel (see p. 529, letters H and I, and p. 532, letter B, post).

As to unauthorised dispositions by apparent owners being binding on principals, see 1 HALSBURY'S LAWS (3rd Edn.) 212, para. 485; and for cases on the subject, see 1 DIGEST 373-380, 803-844.

As to agency by estoppel, see 15 HALSBURY'S LAWS (3rd Edn.) 237-239, paras. 441, 443, 444; and for cases on the subject, see 21 DIGEST 359-362, 1391-1403.

For the Sale of Goods Act, 1893, s. 25, see 22 HALSBURY'S STATUTES (2nd Edn.) 1002.

For the Hire-Purchase Act, 1938, s. 2 and s. 17, see 22 HALSBURY'S STATUTES (2nd Edn.) 1021, 1031.

For the Factors Act, 1889, see 1 HALSBURY'S STATUTES (2nd Edn.) 29.]

Cases referred to:

- (1) *Simm v. Anglo-American Telegraph Co., Anglo-American Télégraph Co. v. Spurling*, (1879), 5 Q.B.D. 188; 49 L.J.Q.B. 392; 42 L.T. 37; 44 J.P. 280; 21 Digest 298, 1071.
- (2) *Downs v. Cooper*, (1841), 2 Q.B. 256; 11 L.J.Q.B. 2; 114 E.R. 100; 21 Digest 290, 1031.
- (3) *Pickering v. Busk*, (1812), 15 East, 38; 104 E.R. 758; 1 Digest 308, 315.
- (4) *Fuentes v. Montis*, (1868), L.R. 3 C.P. 268; *affd.* Ex.Ch., L.R. 4 C.P. 93; 38 L.J.C.P. 95; 19 L.T. 364; 1 Digest 336, 500.
- (5) *Martini v. Coles*, (1813), 1 M. & S. 140; 105 E.R. 53; 1 Digest 342, 542.
- (6) *Boyson v. Coles*, (1817), 6 M. & S. 14; 105 E.R. 1148; 1 Digest 342, 546.
- (7) *Vickers v. Hertz*, (1871), L.R. 2 Sc. & Div. 113; 1 Digest 331, 468.
- (8) *Johnson v. Crédit Lyonnais Co., Johnson v. Blumenthal*, (1877), 3 C.P.D. 32; 47 L.J.Q.B. 241; 37 L.T. 657; 42 J.P. 548; 1 Digest 332, 476.
- (9) *Lowther v. Harris*, [1927] 1 K.B. 393; 96 L.J.K.B. 170; 136 L.T. 377; Digest Supp.
- (10) *Staffs. Motor Guarantee, Ltd. v. British Wagon Co., Ltd.*, [1934] 2 K.B. 305; 103 L.J.K.B. 613; 151 L.T. 396; Digest Supp.
- (11) *Taylor v. Great Eastern Ry. Co.*, [1901] 1 K.B. 774; 70 L.J.K.B. 499; 84 L.T. 770; 39 Digest 398, 347.

A Appeals.

These were appeals by the defendant and the third party from judgments of His Honour JUDGE GRANVILLE SMITH at St. Albans County Court, given on Jan. 31, 1957, whereby he ordered that the defendant should deliver to the plaintiffs a Bedford van or pay to the plaintiffs the sum of £180 with costs, and that the defendant should recover from the third party the sum of £180 and his costs of the action and should be indemnified by the third party against the costs payable by the defendant to the plaintiffs.

B By their particulars of claim the plaintiffs pleaded that on May 19, 1955, they as owners of a Bedford van entered into a hire-purchase agreement relating to that vehicle with one Sean J. Murphy as the hirer. Murphy failed to comply with the terms of the agreement, which enabled them to put an end to the hire agreement. **C** Murphy had sold the van or parted with possession to the defendant. The plaintiffs claimed from the defendant the return of the van or £180, its value, and damages for its detention, alternatively damages for conversion. The defendant by his particulars of defence put the plaintiffs to proof, and contended that the agreement was in fact a bill of sale which was void for want of registration. The defendant joined Murphy as third party. **D** Murphy pleaded that one Coker (who had purported to sell the van to the plaintiffs) had no authority to sell the van and that the hire-purchase agreement was never valid or effective. He further pleaded that the requirements of s. 2 of the Hire-Purchase Act, 1938, were not complied with, and that the agreement was a bill of sale and void for non-registration. Murphy joined Coker as fourth party, but Coker did not appear.

E The proposal form, signed by Murphy in blank and completed in relation to the Bedford van, contained a printed certificate, which was to be signed by the dealer and was signed by Coker, certifying, among other things, that the vehicle as described in the sales note was the absolute property of the dealer.

F. M. Drake for the defendant.

F *J. R. Phillips* for the third party.

C. L. Hawser for the plaintiffs.

Cur. adv. vult.

June 6. **LORD GODDARD, C.J.:** DEVLIN, J., will give the judgment of the court.

G **DEVLIN, J.:** In 1955 the third party, Murphy, was in business which he describes as that of a mobile greengrocer, and he owned a Bedford utility van which he used in the business and which is the subject-matter of this action. He wanted to buy a Chrysler car from a motor dealer called Coker, but he had no money to pay for it—not even enough for a deposit under a hire-purchase contract. So Coker suggested that he should raise the deposit on the security of the Bedford van by means of a hire-purchase contract on it. **H** If the money was simply borrowed on the security of the van, the necessary instrument would be a bill of sale and would have to be registered as such. There is, however, nothing to prevent the owner of a vehicle from selling it to a hire-purchase company, pocketing the price and paying it back by instalments; and provided the sale is a genuine one and not a sham, effect will be given to it as a hire-purchase contract. **I** Murphy would then be in a position to buy the Chrysler on hire-purchase terms, using the price of the Bedford to cover the deposit. Coker was in touch with the plaintiffs, who are a hire-purchase company. The simplest way of carrying out the scheme, so far as it affected the Bedford, would have been for Murphy to have dealt direct with the plaintiffs. But Coker—perhaps because he wanted the deposit for the Chrysler to go straight to him or possibly for some other reason—suggested a different arrangement, and Murphy acquiesced in it. This was, that Coker should pretend to the plaintiffs that he was selling to Murphy the Bedford as well as the Chrysler.

This involved also the pretence that Murphy had paid the deposit on both vehicles. Coker would then collect from the plaintiffs the balance of the price of both cars, which would in effect be the money for which he was selling the Chrysler to Murphy, and by paying off the instalments on both cars Murphy would pay the price of the Chrysler. In order to accomplish this plan, Murphy on May 5, 1955, signed in blank four hire-purchase documents—namely, the proposal forms and the memoranda of agreement for the Chrysler and the Bedford respectively. He left these for Coker to fill in. He signed also on the same day a delivery note stating that he had taken delivery of the Bedford. What happened afterwards is uncertain. Coker, whom the learned judge has found not to be fraudulent, was not available to give evidence. The records of the plaintiffs were in confusion owing to a change of ownership. The judge has found that the proposal for the Chrysler did not go through. Nevertheless, Coker proceeded with the proposal for the Bedford. He did this without Murphy's authority, for the essence of the scheme was that the Bedford transaction was only ancillary to the purchase of the Chrysler. The judge has found that the plaintiffs accepted the Bedford proposal as a genuine hire-purchase transaction and dealt with it accordingly. On May 10, 1955, the plaintiffs bought the Bedford from Coker, as recorded in a sales note, for £180 less an initial payment of £60. The memorandum of hire-purchase agreement was completed on May 19, and the counterpart signed by the plaintiffs was sent to Murphy the same day. Coker let Murphy have the Chrysler for a time, but then it was taken away and Coker appears to have told Murphy that the whole transaction was cancelled. Murphy says that he regarded himself as the lawful owner of the Bedford. He advertised his greengrocery business for sale and on June 24, 1955, he sold it, including the Bedford, to the defendant for £200. It is not disputed that the defendant bought in good faith and without any knowledge of Murphy's dealings with the Bedford.

Murphy paid no instalments under the hire-purchase contract. On Aug. 22, 1955, the plaintiffs notified him that they would take possession of the Bedford. Later they ascertained that the defendant had it and in January, 1956, they claimed it from him. He refused to give it up and they issued proceedings against him in the St. Albans County Court claiming the vehicle or £180 as its value. He joined Murphy as third party. On Jan. 31, 1957, judgment was given for the plaintiffs against the defendant and for the defendant against the third party. The defendant says that his judgment against the third party is worthless, and the plaintiffs have not even bothered to sue him. So the case raises the familiar question of which of two innocent parties, the plaintiffs or the defendant, shall suffer for the misconduct of a third; and it is necessary to determine which of the two is in law entitled to the Bedford van.

The plaintiffs depend for their title on the transaction with Coker. If Coker had sold the van on behalf of Murphy and with his authority, that would dispose of the matter. So it would if Murphy had actually transferred the property to Coker so as to give him something which he could sell in his own name. But in fact Murphy never transferred the van to Coker; and although he gave a general authorisation to Coker to act in the way in which he did, he put, as the learned judge has found, a specific limitation on Coker's authority and one which indeed followed from the nature of the transaction contemplated: this was that the two proposals should go forward together. Coker, the judge has found, had no authority to deal with the Bedford separately from the Chrysler. So the plaintiffs cannot claim that they bought the van from the owner or from one who has his actual authority to sell. Equally it is clear that as against Murphy the plaintiffs acquired a good title to the Bedford. Coker represented that the van was his, and Murphy was privy to that representation being made; so neither can be heard to say that Coker had not a good title to transfer to the plaintiffs. Or, if the matter be looked at as one of principal and agent, the

- A plaintiffs, being ignorant of the limitation placed on Coker's authority, are not affected by it. The defendant's case is that, although estoppel will prevent both Coker and Murphy from asserting that the property in the Bedford van did not pass to the plaintiffs, it does not prevent anyone else from so doing. The defendant, as an outside party quite ignorant of what Murphy and Coker had done, is, it is submitted, entitled to rely on the reality of the transaction; and in reality the property never passed from Murphy. The judge finds that Murphy intended to sell the van to Coker if the double transaction had gone through, but that he never in fact did so. The real position is, therefore, that Murphy never sold to Coker and Coker had no title to pass to the plaintiffs. It is well established that an estoppel cannot affect the reality of the transaction. In *Simm v. Anglo-American Telegraph Co.* (1) ((1879), 5 Q.B.D. 188), C BRETT, L.J., puts the principle as follows (*ibid.*, at p. 206):

"... it seems to me that an estoppel gives no title to that which is the subject-matter of estoppel. The estoppel assumes that the reality is contrary to that which the person is estopped from denying, and the estoppel has no effect at all upon the reality of the circumstances."

- D If this is the true principle to be applied in this case, then the plaintiffs never in truth and in fact acquired any title to the Bedford van; and the only question would be whether the defendant, because he acquired the van from Murphy, was bound by the estoppel which prevents Murphy from pleading the truth of the matter. An estoppel affects others besides the representor. The way it has always been put is that the estoppel binds the representor and his privies. E But it is not easy to determine exactly who for this purpose is a privy. There can be no doubt that although the representation was actually made by Coker, Murphy on the facts of this case was privy to the making and is bound by it; see *Downs v. Cooper* (2) ((1841), 2 Q.B. 256). It would also appear that anyone whose title is obtained from the representor as a volunteer is a privy for this purpose. But it is very doubtful whether a purchaser for value without notice is bound by the estoppel. The point is fully discussed in EWART ON ESTOPPEL (1900) at p. 196 to p. 208, and the author concludes that a purchaser for value without notice is not bound.

- This part of the doctrine of estoppel has been worked out by courts of equity and chiefly in relation to the sale of land. There is no trace of its application to contracts for the sale of goods. There are many cases of sale of goods where G an agent has been held out or represented to have an authority to sell which he has not in fact got and the solution of the difficulty so created might no doubt have been found by the application of the doctrine of estoppel, but in fact the courts of common law approached the problem of the unauthorised sale from a different angle. They began with the principle that no one could pass a better title than that which he had: *nemo dat quod non habet*. To this H general principle they admitted a number of exceptions, simply on the ground of mercantile convenience. The best known exceptions relate to transfers of currency and negotiable instruments. Sales in market overt afford another example. In these cases, as is well known, a transferee may acquire a better title than that of his transferor. In the same way, and for the same reason of mercantile convenience, the courts of common law allowed a good title to a I buyer who bought in good faith from a man who had apparently been given by the true owner the right to dispose of the goods. Such a buyer did not merely acquire a title by estoppel, based on the implied representation by the owner that there was a right of disposition and vulnerable at the suit of anyone who was not bound by that representation. He acquired in the same way as the transferee of a negotiable instrument or the buyer in market overt a good title against all the world.

The doctrine of apparent authority was most clearly laid down by LORD ELLENBOROUGH, C.J., in *Pickering v. Busk* (3) ((1812), 15 East, 38 at p. 43).

As we have said, he based it, not on estoppel, but on mercantile convenience: A

"Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker: and if a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not."

The case in which this principle was then most commonly applied was that of a factor, the nature of whose position was to be taken as giving him an implied authority to sell goods entrusted to him; he was able to pass a good title to a buyer even if, by reason of a special limitation put by the principal on his powers, he had no actual authority to do so. But the courts held that, although a factor must be taken to have general authority to sell, it could not be assumed that he had the same authority to pledge; and consequently that, unless he was specially held out as having authority to pledge, he could not, without actual authority, create a valid pledge. It was this ruling which gave rise to the Factors Acts, the first of which was passed in 1823.

All this is expounded by WILLES, J., in *Fuentes v. Montis* (4) ((1868), L.R. 3 C.P. 268 at p. 276) where he refers to

"... the class of questions which relate to how far a person who is not the real owner of goods, but who appears to the world, or rather to those who deal with him, as owner, and who deal with him on the faith of his apparent ownership, should be allowed to confer upon a third person a greater title than he himself has."

He then refers to transfers of currency and negotiable instruments and sales in market overt and continues as follows (*ibid.*, at p. 277):

"A third case in which a man may convey a better title to goods than he himself had, and one which is more apposite to the present, is, where an agent who carries on a public business deals with the goods in the ordinary course of it, though he has received secret instructions from his principal to deal with them contrary to the ordinary course of that trade. In that case he has what has been sometimes called an apparent authority, or, as my brother BYLES more accurately calls it, an ostensible authority, to deal in such a way with the goods as agents ordinarily deal with them; and, if he deals with them in the ordinary way of the trade, he binds his principal. These instances, however, are exceptional to the rule that no man can give a better title to goods than he has himself, and that the real owner is not bound except to the extent of an interest which he has parted with or an authority which he has given. Now, the result of that state of the law with respect to agents employed to sell, led to the course of legislation which is known by the general description of the Factors Acts; because it was held by the courts of law that the case of a pledge of goods by a factor intrusted with the possession of goods, and authorised to sell them, fell within the general rule to which the instances above enumerated are exceptions, and that it did not fall within the exceptions by reason of a pledge being an ordinary and accustomed transaction to be entered into by a person intrusted as agent to sell, or perhaps more properly by reason of the courts of law having treated a pledge as being out of the scope of an authority to sell."

A There has been a series of Factors Acts, and the principle of them has been extended also to sellers who are left in possession of goods after the property in them has passed and buyers who have obtained possession before the property has passed. These situations are covered by s. 8 and s. 9 of the Factors Act, 1889, and also by s. 25 of the Sale of Goods Act, 1893. The legislation which now governs the position of factors, or "mercantile agents", is the Factors Act, 1889, s. 2. There can be no doubt that these sections are based on and supplement the common law, and the language which they employ, which in this respect has been the same from the first, is not the language of estoppel. The Factors Act, 1889, s. 2, for example, says that a sale, pledge or other disposition which is within its terms "shall . . . be as valid as if he were expressly authorised by the owner of the goods to make the same."

C The Factors Act, 1889, and the example given by WILLES, J., in *Fuentes v. Montis* (4) apply to an agent who is entrusted with goods. No doubt cases in which the only evidence of apparent authority is the possession of goods must now be treated as being governed by the Factors Act, 1889, which in this respect codifies as well as amplifies the common law; and it does not apply in this case since Coker was not put into possession of the van. But there are other cases on pledges. Because the factor was not held out merely by virtue of his position as having apparent authority to pledge, the doctrine of apparent authority did not apply at common law if nothing more than possession could be shown. It was otherwise if there was other evidence of holding out. Thus, in *Martini v. Coles* (5) ((1813), 1 M. & S. 140), BAYLEY, J., said (*ibid.*, at p. 150):

"A factor has authority to sell, but not to pledge; and therefore a person who takes a pawn of a factor takes it at his peril. If the principal does any thing to induce the person to believe the factor really the principal, that would be a different case."

F Similarly, in *Boyson v. Coles* (6) ((1817), 6 M. & S. 14), the headnote reads:

"A factor cannot pledge, unless the owner of the goods arm him with such indicia of property as to enable him to deal with it as his own . . ."

ABBOTT, J., in particular, said (*ibid.*, at p. 27):

G "... possession alone is not a sufficient emblem of authority to entitle a factor to pledge, so as to enable the pawnee to hold the goods against the real owner. In the present case, it does not appear that the defendant was misled by any act or document with which the plaintiffs were concerned, other than such as regarded possession . . ."

H In many cases since then this common law principle has been considered concurrently with the Factors Acts; for example, *Vickers v. Hertz* (7) ((1871), L.R. 2 Sc. & Div. 113); *Johnson v. Crédit Lyonnais Co.* (8) ((1877), 3 C.P.D. 32); *Lowther v. Harris* (9) ([1927] 1 K.B. 393). The apparent ownership or authority has generally taken the form of arming the agent with some indicia which made it appear that he was either the owner or had the right to sell. In our judgment the principle applies to any form of representation or holding out of apparent ownership or the right to sell. It is embodied in s. 21 (1) of the Sale of Goods Act, 1893, which provides:

"... where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

This section expresses the old principle that apparent authority to sell is an exception to the maxim *nemo dat quod non habet*; and it is plain from the wording that if the owner of the goods is precluded from denying authority, the buyer will in fact acquire a better title than the seller. A

We doubt whether this principle, which is sometimes referred to—e.g., by WRIGHT, J., in *Lowther v. Harris* (9)—as common law estoppel, ought really to be regarded as part of the law of estoppel. At any rate it differs from what is sometimes called “equitable estoppel” in this vital respect, that the effect of its application is to transfer a real title and not merely a metaphorical title by estoppel. It is unnecessary to determine in this case whether it covers the exercise of every sort of apparent authority in relation to the sale of goods or whether it is confined to apparent authority to sell. In *Simm v. Anglo-American Telegraph Co.* (1) both BRETT, L.J., and COTTON, L.J., in the course of their judgments referred by way of analogy to the sale of goods. COTTON, L.J. (5 Q.B.D. at p. 216) seems to consider that a good title might be given to goods if the seller was in relation to an act of appropriation estopped from denying that the property had passed. It looks from BRETT, L.J.’s judgment (*ibid.*, at p. 207) as if he might have taken a different view. But that case was not in fact concerned with the transfer of title or with authority to transfer. It related to a transfer of shares which had been attempted by a forged instrument and the question was whether the company which had registered the transferee as the owner of the shares and issued a certificate accordingly was estopped from denying his title. It is sufficient to say that, whatever the limits of the doctrine, it clearly applies to the facts of this case. Coker was armed by Murphy with documents which enabled him to represent to the plaintiffs that he was the owner of the Bedford van and had the right to sell it. The result is that Murphy is, in the words of the Sale of Goods Act, 1893, s. 21 (1), precluded from denying Coker’s authority to sell, and consequently the plaintiffs acquired the title to the goods which Murphy himself had and Murphy had no title left to pass to the defendant. B C D E

Two other defences have been raised to the plaintiffs’ claim. The first is an application of s. 25 (1) of the Sale of Goods Act, 1893, to which we have already referred and which reads as follows: F

“Where a person having sold goods continues or is in possession of the goods . . . the delivery or transfer by that person . . . of the goods . . . to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.” G

This plea seeks in effect to turn the tables on the plaintiffs; treating them as the owners of the goods, it is said that by leaving Murphy in possession of the van they enabled him to make an effective sale to the defendant. An inquiry into this defence shows that it involves a consideration of the Hire-Purchase Act, 1938, and it is convenient to consider first of all the remaining defence which is based more directly on the provisions of that Act. Section 2 of the Act lays down certain requirements which have to be complied with, and provides that if they are not, the hire-purchase company will not be entitled to enforce the agreement or any right to recover the goods from the hirer. One of these requirements (by s. 2 (2) (a)) is that H I

“a note or memorandum of the agreement is made and signed by the hirer and by or on behalf of all other parties to the agreement.”

It is contended that this requirement was not complied with because the form was signed by Murphy in blank. It is submitted that what has to be signed is not a bit of blank paper, but something which is at the time of the signature

A a note or memorandum of the agreement. It is pointed out that, whereas the other parties to the agreement are expressly allowed to sign by an agent, the hirer is not; and a fortiori, therefore, could not authorise an agent to fill in the agreement for him. In our judgment this submission is right. The wording of the Act suggests that the note or memorandum must be made before it is signed; and a consideration of the object of the Act supports the literal construction, for the object of the provision must be that the hirer should know and understand what he is agreeing to. The hire-purchase agreement is, therefore, unenforceable as between the plaintiffs and Murphy. But the plaintiffs' rights against the defendant do not depend on the hire-purchase agreement. They depend on the fact that they are the owners of the goods and thus entitled to possession of them; they acquired that ownership from the sales agreement with Coker and not under the hire-purchase agreement.

C The defendant relies, not on unenforceability, but on those sections of the Hire-Purchase Act, 1938, that deal with recovery of possession. These consist of the provision we have quoted from s. 2 (2) that the owner shall not be entitled to enforce "any right to recover the goods from the hirer"; and also s. 17, which provides:

D "If, whilst by virtue of this Act the enforcement by an owner of a right to recover possession of goods from a hirer is subject to any restriction, the hirer refuses to give up possession of the goods to the owner, the hirer shall not, by reason only of the refusal, be liable to the owner for conversion of the goods."

E These provisions contemplate that the hirer may enjoy the possession of the property without having to pay for it. No doubt, as counsel for Murphy submitted, it is the intention of the Act of 1938 that a hire-purchase company shall be penalised for failing to see that a proper memorandum is made. But is it the intention that a hirer who discovers a flaw in the agreement should be able to turn his property into cash and pocket the cash without handing any of it over to the hire-purchase company? The only way of finding out how far the Act intends to go is to consider the words that it uses, giving full weight to each and bearing in mind that rights of property are not to be taken away except expressly or by clear implication. Section 2 (2) provides that the owner is deprived of "any right to recover the goods *from the hirer*". It does not say that he is deprived of his right to recover the goods from anyone else, and in our judgment is not to be construed as meaning that. Section 2 (2) deals only with the right to recover. It does not deal with damages for detinue or conversion; and if it stood alone, it might well be that the owner, while he could not recover the goods from the hirer, could exercise his right to possession to the extent of obtaining damages for detinue or for conversion. Section 17 covers a possible claim of this sort. The hirer is not to be liable for conversion by reason only of his refusal to give up possession. This suggests that he would be liable for conversion if some other reason for liability could be asserted as, for example, his parting with possession to a third party. Whether this is so or not, it is clear that neither s. 2 nor s. 17 takes away from the owner any rights which he has against persons other than the hirer. It follows, therefore, that the defence under the Hire-Purchase Act, 1938, fails.

I We turn back to consider the position under the Sale of Goods Act, 1893, s. 25. It can certainly be argued that for the purposes of this section Murphy was the seller of the van; and undoubtedly he continued in possession of it after the sale. It is true that he was not the seller in truth; but then in truth there was no sale. But he was the person who, because he could not dispute the sale, was divested of his title which in fact passed to the plaintiffs. Does this make him the seller for the purposes of s. 25? The title passed because as owner he was, in the words of s. 21 (1), "by his conduct precluded from denying the

seller's authority". But that means that for the purposes of s. 21 Coker is the seller; and it may be said that he ought, therefore, to be treated as the seller for the purposes of s. 25. This argument raises difficult considerations, and we prefer to deal with the point in another way and on the assumption that Murphy was the seller within the meaning of s. 25. It has been held that s. 25 does not apply unless the seller remains in possession as seller. In particular, s. 25 does not apply to a person who, having sold a vehicle to a hire-purchase company, buys it back under a hire-purchase agreement; see *Staffs. Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (10) ([1934] 2 K.B. 305). This is because the character of the possession has changed. On the assumption that Murphy must be deemed through Coker to have sold the Bedford van to the plaintiffs and then entered into a hire-purchase agreement with them, this authority seems to fit the case. Although the possession never passed physically away from Murphy, his character was changed from that of seller to bailee and the section would not apply. But in *Staffs. Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (10) there was a valid hire-purchase agreement. How is the present case affected by the fact that the hire-purchase agreement is unenforceable? If the Act said that it was to be void, then of course the character of Murphy's possession could not be altered by it. But the Act says merely that it is to be unenforceable. This must mean that it is effective to alter the rights of the parties, but that the altered rights cannot be enforced. This construction of the word is similar to that which has been given to the term "not enforceable by action" in s. 4 of the Sale of Goods Act, 1893; see *Taylor v. Great Eastern Ry. Co.* (11) ([1901] 1 K.B. 774, per BIGHAM, J.). On this ground the case under s. 25 fails.

We, therefore, dismiss the appeal and affirm the judgment. It is very hard on the defendant, who is clearly in a small way of business and appears to have bought the vehicle out of his Post Office savings. But his fate is, unfortunately, a common one where hire-purchase agreements are concerned, and is now one of the regular ways in which unsuspecting buyers are deceived by what they take to be ownership. It is a little ironic that the hire-purchase company should succeed in this case by reliance on the protection which the common law gives to those who deal with apparent owners, but which unhappily is not available to the defendant in this case.

Appeals dismissed.

Solicitors: *Giffen, Couch & Gilmore*, agents for *Giffen & Couch*, St. Albans (for the defendant); *A. Russell Jones & Co.*, Hatfield (for the third party); *Carr, Sandelson & Co.* (for the plaintiffs).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

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NOKES v. NOKES.

[COURT OF APPEAL (Hodson, Parker and Ormerod, L.JJ.), June 3, 1957.]

Divorce—Estoppel—Paternity of child—Order for maintenance of child—Application to vary order on ground that child was not child of marriage—Registrar not competent to determine issue of paternity—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 26 (1)—Matrimonial Causes Rules, 1950 (S.I. 1950 No. 1940), r. 27, r. 29 (1).

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The parties were married in 1950 and a child, M.V., was born on Oct. 15, 1950. In May, 1952, the wife obtained a separation order against the husband; she was granted the custody of the child and the husband was ordered to pay maintenance for herself and for the child. In 1954 the wife filed a petition for divorce; she recited the order of May, 1952, but did not include a prayer for the custody of or maintenance for the child. Within two months of the decree absolute the wife gave notice of application for an order (under s. 26 (1) of the Matrimonial Causes Act, 1950) that the husband pay maintenance for herself and for M.V. "the child of the marriage". The husband in his affidavit of means offered to continue payments "in respect of my daughter [M.V.]". In May, 1955, the registrar ordered the husband to pay M.V. "the child of the marriage" maintenance at the rate of 27s. 6d. per week. Subsequently the husband applied to vary the order of May, 1955, and disputed paternity of the child, whereupon an issue was ordered to be tried as to the paternity of the child. By the Matrimonial Causes Rules, 1950, r. 29 (1): "Unless otherwise directed, all causes or issues shall be tried by a judge alone".

Held: since a registrar had not jurisdiction to decide the issue of the paternity of a child, the registrar's order of May, 1955, for the maintenance of the child did not estop the husband from disputing the paternity of the child.

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Lindsay v. Lindsay ([1934] P. 162) distinguished.

Decision of BARNARD, J. ([1957] 1 All E.R. 490) reversed.

[**Editorial Note.** The Matrimonial Causes Rules, 1950, r. 27 and r. 29 (1), are now re-embodied in the Matrimonial Causes Rules, 1957, r. 27 and r. 29 (1).]

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As to estoppel in matrimonial causes, see 12 HALSBURY'S LAWS (3rd Edn.) 294, para. 581 and 15 HALSBURY'S LAWS (3rd Edn.) 184, para. 356, note (r); and for cases on the subject, see 27 DIGEST (Repl.) 375, 376, 3089-3098.

As to trial of an issue, see 12 HALSBURY'S LAWS (3rd Edn.) 370, para. 805, note (e).

For the Matrimonial Causes Act, 1950, s. 26 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 413.

H

For the Matrimonial Causes Rules, 1950, r. 27, r. 29 (1), see 10 HALSBURY'S STATUTORY INSTRUMENTS 210, 211.]

Cases referred to:

(1) *Langmead v. Maple*, (1865), 18 C.B.N.S. 255; 12 L.T. 143; 144 E.R. 441; 21 Digest 208, 492.

I

(2) *Lindsay v. Lindsay*, [1934] P. 162; 103 L.J.P. 100; 151 L.T. 283; 27 Digest (Repl.) 614, 5746.

Appeal.

This was an appeal by the husband from an order of BARNARD, J., dated Jan. 24, 1957, and reported [1957] 1 All E.R. 490. The parties were married in August, 1950, and a child, Marion Violet, was born on Oct. 15, 1950. On Aug. 31, 1951, the Southend justices dismissed the wife's complaint that the husband had been guilty of persistent cruelty towards her and had deserted her.

On Jan. 8, 1952, the Tower Bridge magistrate dismissed a complaint by the wife that the husband had been guilty of persistent cruelty to her; the magistrate, however, made an order under the Guardianship of Infants Acts, 1886 and 1925, granting the custody of the child to the wife and ordering the husband to pay the wife maintenance for the child. On May 16, 1952, the Southend justices found that the husband had been guilty of persistent cruelty to the wife, ordered that she be no longer bound to cohabit with him, granted custody of the child to the wife and ordered the husband to pay to the wife £1 a week as maintenance for herself and £1 a week as maintenance for the child. Subsequently this order was revoked by the justices on the wife's application in connexion with her petition for divorce. A B

In May, 1954, the wife presented a petition for divorce on the ground of the husband's cruelty. In para. 2 she stated: "that there is issue of the said marriage now living one child . . . born on Oct. 15, 1950". The wife did not include in the petition a prayer either for a custody order or for maintenance. The petition was heard undefended on Oct. 29, 1954, and a decree nisi granted which was made absolute on Dec. 13, 1954. In January, 1955, the wife re-married and became Mrs. Nicholson. In February, 1955, the wife gave notice of application for an order that the husband be ordered to pay C D

"such sum or sums by way of maintenance for herself and for Marion Violet the child of the marriage as may be just."

The husband filed an affidavit of his means in which he stated:

"I object to paying my ex-wife any maintenance as she is now re-married but I offer to continue my payment of £1 per week in respect of my daughter Marion Violet." E

The wife in her affidavit in reply stated: "I have the custody of the child of the marriage, Marion Violet, born on Oct. 15, 1950." On May 13, 1955, Mr. Registrar TOWNLEY MILLERS ordered the husband to pay to the wife maintenance for herself during their joint lives at the rate of 1s. per annum F

"and to Marion Violet Nokes the child of the marriage between the [wife] and the [husband] maintenance until further order at the rate of 27s. 6d. per week."

On Nov. 22, 1955, the husband gave notice of application to vary the order of May 13, 1955. On Jan. 17, 1956, Mr. Registrar TOWNLEY MILLERS dismissed the husband's application, and the husband appealed. On Feb. 14, 1956, DAVIES, J., on the hearing of the husband's appeal, ordered that an issue be tried as to the paternity of the child, Marion Violet. BARNARD, J., held that the question of paternity was res judicata by virtue of the registrar's order of May 13, 1955, and that the husband was estopped from alleging that the child was not a child of the marriage; he decided the issue in favour of the wife and the husband appealed. H G

B. J. M. MacKenna, Q.C., and *F. M. Drake* for the appellant husband.
J. B. Elton for the respondent wife.

HODSON, L.J.: This is an appeal from an order of BARNARD, J., dated Jan. 24, 1957, which arose in this way. DAVIES, J., had before him an appeal from an order of Mr. Registrar TOWNLEY MILLERS on which the question arose whether a child of the wife was in fact a child of the marriage, and he directed an issue to be tried. That was the issue that came before BARNARD, J. The original issue which was settled, recited that the husband did not admit the paternity of the child born of the mother on Oct. 15, 1950; recited an order for maintenance of the child at the rate of £1 7s. 6d. a week, payable by virtue of the order of May 13, 1955, the dismissal of the husband's summons to vary the order and his appeal against that dismissal. The issue was directed to be tried. The husband I

A by his statement of claim pleaded his marriage on Aug. 5, 1950, and a decree nisi dissolving that marriage on Oct. 29, 1954, made absolute on Dec. 13, 1954. He went on to plead that he knew at the time of his marriage that his wife was pregnant; that she gave birth to this child shortly after the marriage, on Oct. 15, 1950; that the birth was registered in a manner so as to show him as the father of the child. His case was that the wife was quite frank with him on the matter, and the marriage, according to him, was entered into on the footing that he would treat the child as his own. It was also part of his case that he had a letter which he was able to produce in which the wife freely admitted that the child was not a child of whom he was the father. In defence to the plea, the wife relied, and in the end relied solely, on a plea of estoppel; she said that the husband ought not to be allowed to say that he was not the father of the child, in view of the fact that on May 13, 1955, the learned registrar had ordered the husband to pay maintenance, and that order could only have been made on the footing that the child was a child of the marriage. Moreover, she pleaded that the order was made after an affidavit sworn by the husband in which he offered to continue his payment of 20s. a week in respect of (to use his actual words) "my daughter Marion Violet". That order was never appealed from.

D [HIS LORDSHIP briefly reviewed the sequence of maintenance orders and continued:] The registrar's order of May 13, 1955, involves to my mind a declaration by the registrar that the child in question was a child of the marriage, and the first point taken by counsel for the husband is that the registrar had no jurisdiction to make such an order, and accordingly there can be no estoppel. That statement was made in accordance with well-recognised principles governing *res judicata*. I take the principle from the judgment of WILLES, J., in *Langmead v. Maple* (1) ((1865), 18 C.B.N.S. 255 at p. 270):

"I apprehend that if the same matter or cause of action has already been finally adjudicated on between the parties by a court of competent jurisdiction, the plaintiff has lost his right to put it in suit either before that or any other court."

F I need not continue the passage because I propose to confine my judgment to this point.

The question of custody and legitimation of children is a matter which is dealt with by the judges and is not dealt with by the registrars. That has been the established practice over a period of years and the matter is, I think, substantially covered by the rules. The Matrimonial Causes Act, 1950, s. 26 (1), provides:

G "In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings . . ."

H If this child was not a child of the marriage of these persons, there was no jurisdiction to make an order for maintenance. Rule 27 of the Matrimonial Causes Rules, 1950, which was the relevant rule*, provided:

I "An application for directions for the separate trial of any issue or, except in a case to which r. 14 (2) applies [where there has been an appearance under protest] of any question as to the jurisdiction of the court shall be made to a judge."

And r. 29 (1) provided†:

"Unless otherwise directed, all causes or issues shall be tried by a judge alone."

* See, now, r. 27 of the Matrimonial Causes Rules, 1957.

† See, now, r. 29 of the Matrimonial Causes Rules, 1957.

The issue whether or not this child was a child of the marriage has never been determined by a judge, although the order of DAVIES, J., was that it should be so determined. If it can be said that by the form of the order which Mr. Registrar TOWNLEY MILLERS made he was determining the issue as to the paternity of this child and determining that the child was a child of the petitioner and respondent in the present case, then in my judgment there is no doubt that the registrar had no jurisdiction so to do. The judge in his judgment, after referring to the general law of estoppel, did purport to follow a decision of SIR BOYD MERRIMAN, P., in *Lindsay v. Lindsay* (2) ([1934] P. 162), but that was a very different case. In that case a petition for divorce included a prayer for custody and an order was made, at the same time as the decree nisi, giving to the wife, the petitioner in that case, the custody of the child. That was tantamount to a declaration by the judge that that child was a child of the marriage. When one compares the petition in the present case, one sees that although the fact of the birth of the child was recited, there was no prayer for custody in the petition, and neither at the hearing nor indeed at any time was there a declaration that the child was a child of the marriage, no order for custody being made in favour of the mother or any other person. *Lindsay v. Lindsay* (2), therefore, is clearly distinguishable and in a vital matter, because SIR BOYD MERRIMAN, P., was clearly founding himself on the fact that a judge's order had been made dealing with the very question with which he was concerned. That situation does not arise in the present case, and the consequence is that in my judgment this appeal should be allowed.

In order to avoid further litigation, I understand that counsel for the wife, having considered the matter, is prepared to submit to the dismissal of the claim for maintenance in respect of this child, retaining his right to apply, if he can, for maintenance for the wife to be allotted to her taking into consideration the circumstance that the husband married the mother-to-be of the child knowing all the facts and making the child in all but blood, apart from any question of adoption, a member of his own family. In my opinion, the appeal should be allowed.

PARKER, L.J.: I have come to the same conclusion. Before the jurisdiction of the court can be excluded on the ground of *res judicata*, a number of conditions must be fulfilled. The first and foremost, and, indeed, the only condition necessary to refer to in the present case, is that the same matter must have come into question already and been decided by a court of competent jurisdiction. Accordingly, the real question here is whether the registrar was a court of competent jurisdiction to decide this issue of paternity. For my part, I think that if one reads s. 26 (1) of the Matrimonial Causes Act, 1950, alone, it would appear that a registrar has jurisdiction to decide the question of fact which alone will enable him to exercise the powers under that sub-section, namely, whether the child is a child of the marriage. Pausing there, therefore, there would be jurisdiction in the registrar and if he wrongly found the facts, the matter could be corrected on appeal. The matter does not rest there, because r. 27 and r. 29 (1) of the Matrimonial Causes Rules, 1950, provided that if any question were raised as to the jurisdiction of the court, application for a separate trial of an issue should be made to the judge and the judge should determine that issue. That indeed was the procedure adopted in the present case by DAVIES, J. It seems to me quite clear from those rules that the issue of paternity is one for the judge and not for the registrar.

BARNARD, J., treated himself as bound by the decision of SIR BOYD MERRIMAN, P., in *Lindsay v. Lindsay* (2) ([1934] P. 162). BARNARD, J., said this ([1957] 1 All E.R. at p. 493):

"The present case seems to me to be completely covered by the President's decision in *Lindsay v. Lindsay* (2). In *Lindsay v. Lindsay* (2) there was a

A substantive order for custody which the court would not have had jurisdiction to make unless the parents of the child were the parents whose marriage was the subject of the decree."

It seems to me, however, that there is a very real difference between that and the present case; in *Lindsay v. Lindsay* (2) the order relied on, namely, the order for custody and the decree nisi, was clearly made by a court of competent jurisdiction, whereas in the present case, if I am right, the registrar had no jurisdiction to determine the issue. On that ground I would allow this appeal.

ORMEROD, L.J.: I agree and there is nothing I wish to add.

Appeal allowed.

Solicitors: *Ashley, Tee & Sons* (for the husband); *Drysdale, Lamb & Jackson* (for the wife).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re 34, BRUTON STREET, WESTMINSTER.

[COURT OF APPEAL (Jenkins, Romer and Sellers, L.JJ.), May 6, 7, June 3, 1957.]

War Damage—Cost of works—Making good war damage—Front wall of house damaged by enemy action—Party walls reinstated as part of work of reinstating front wall—Work executed to conform with London Building Acts—Whether cost of reinstating party walls to be included in cost of works payment—War Damage Act, 1943 (6 & 7 Geo. 6 c. 21), s. 8 (2).

An old house, which was one of a continuous row of buildings and had, so it seemed, been neither well built nor well maintained, was so damaged by enemy action that the front wall required to be rebuilt. The flank walls of the house did not suffer war damage. In 1948 dangerous structure notices in respect of the house were served by the county council under the London Building Acts (Amendment) Act, 1939, and the work of rebuilding was carried out under the supervision of the district surveyor and according to his requirements. These requirements involved most of the flank wall on one side and about seven feet in depth of the other flank wall being pulled down and rebuilt. The owners claimed the whole cost of all the work (£7,800) as a cost of works payment from the War Damage Commission. The commission allowed a cost of works payment (£3,600) computed on the basis that the front wall could have been reinstated by bonding back to both flank walls to a depth of eighteen inches. For the purposes of appeal by the owners the commission's findings of fact were set out by them in a Case Stated* on the true construction of which, as determined by the court, the commission found as a fact that rebuilding the front wall and bonding it back to a depth of eighteen inches into the flank walls would have been a sound practical rebuilding operation and would have left the house in at least as good a condition as that in which it was before the war damage occurred. The owners were legally bound, however, under the London Building Acts (Amendment) Act, 1939, to comply with the requirements of the district surveyor. On the question whether the cost of works payment, which by s. 8 (2) of the War Damage Act, 1943†, was "the proper cost of the works executed for the making good" of the war damage, should include the cost of all the work on the flank walls required by the district surveyor,

Held: only the cost of rebuilding the front wall and eighteen inches of the flank walls should be included in the cost of works payment, because

* Paragraph 10 of the Case Stated, which is the paragraph principally relevant, is set out at p. 541, letter C, post.

† Section 8 (2) of the War Damage Act, 1943, is set out at p. 542, letter H, post.

the additional cost of complying with the requirements of the district surveyor was not part of the proper cost of work executed for the making good of the war damage, notwithstanding that it was illegal for the owners to reinstate the front wall without complying with the surveyor's requirements.

Re-Jamaica Street, Stepney, Nos. 36, 38, 40 & 42 ([1947] 1 All E.R. 754), distinguished.

Per CURIAM: in making good war damage it may be necessary, in order to gain access to the damage or to effect properly the reinstatement, to demolish or damage and to rebuild or repair or shore up or temporarily strengthen, alter, divert, or otherwise interfere with part of the premises undamaged by the enemy. The proper cost of work so necessitated would be part of the cost of the works executed for the making good of the war damage (see p. 543, letter E, post).

Decision of VAISEY, J. ([1956] 3 All E.R. 656) reversed.

[**Editorial Note.** The different conclusion reached by the Court of Appeal derives from their interpretation of the Case Stated, which they read as finding that in fact the front wall could adequately be reinstated in practice without doing all the work to the flank walls that was required by the district surveyor. The decision illustrates the distinction that although work which may be a physically necessary preliminary in the making good of war damage should be included in computing a cost of works payment, yet the mere fact that it is legally necessary to execute, in conjunction with the making good of war damage, other work of repair, does not render the cost of that other work proper to be included in the cost of works payment.

For the War Damage Act, 1943, s. 8 (2), see 26 HALSBURY'S STATUTES (2nd Edn.) 478.]

Cases referred to:

- (1) *Re Jamaica Street, Stepney, Nos. 36, 38, 40 & 42*, [1947] 1 All E.R. 754; [1947] Ch. 409; [1947] L.J.R. 1344; 177 L.T. 645; 2nd Digest Supp.
- (2) *Re Halton Terrace, Sevenoaks, Nos. 6 & 8*, (Jan. 22, 1953), unreported.

Appeal.

The War Damage Commission appealed from a decision of VAISEY, J., dated Oct. 31, 1956, and reported [1956] 3 All E.R. 656, allowing an appeal under the War Damage Act, 1943, s. 32 (3), by the owners of a war damaged house against a determination of the War Damage Commission excluding from the cost of works payment in respect of the house certain costs of rebuilding or repairing flank walls which had not suffered war damage. In the Case Stated by the commission the following facts were found.

The house, No. 34, Bruton Street, London, was owned by Massey Estates, Ltd., in fee simple. It was part of a continuous row of buildings and consisted of a basement, ground floor, and four upper floors. It had a back addition of five storeys and was estimated to be about two hundred years old. The front wall of the house was not bonded to the flank or party wall abutting on No. 35, Bruton Street, above a point at about the middle of the third storey. Many years before the last war, tie rods had been installed passing from the front to the rear of the building at second, third and fourth floor levels and tying to the front wall of the house. The first floor had been used as offices or for commercial purposes and the top three floors were let as residential flats. Notifications of war damage were sent to the commission in October, 1940, March, 1941, and August, 1944. On Apr. 21, 1948, the London County Council served a dangerous structure notice under the London Building Acts (Amendment) Act, 1939*, in respect of the front elevation of the house. A further dangerous structure notice was served by the London County Council on Sept. 4, 1948, in respect of

* I.e., under Part 7 of that Act (15 HALSBURY'S STATUTES (2nd Edn.) 1237).

A the rear elevation of the house, the chimney breasts on the flank wall abutting on No. 35, Bruton Street, and certain other matters. There were various meetings between the parties interested in the property, representatives of the commission and the district surveyor. At such meetings the commission attempted to agree the extent of the war damage and the persons interested in the house were concerned also to ascertain the requirements of the district surveyor

B as regards the repair or rebuilding of the property. On Dec. 7, 1950, and subsequently on Mar. 13, 1951, claims for cost of works payments in respect of the house were sent to the commission. After correspondence and communications the commission formally determined the claims for cost of works payment by the owners at a total amount of £3,667 17s. The commission's finding was stated in para. 10 in the Case Stated as follows:

C "In the commission's view it would have been physically possible to rebuild the front wall of the premises together with a short return at each end, tying in to the original flank walls, without rebuilding the flank walls to the extent to which they have been rebuilt by the [owners]. If the work had been carried out in this way the physical condition of the property would certainly have been no worse than it was before the war damage occurred. The commission recognise that the age and condition of the flank and back walls (which was not in the view of the commission due to war damage) was such as to occasion the requirements imposed by the district surveyor but they have taken the view that the cost of conforming with such requirements does not form part of the proper cost payable by the commission as a payment of cost of works."

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E The owners had claimed as a cost of works payment the whole cost of all work done, including the work done to comply with the requirements of the district surveyor under the dangerous structure notices. The aggregate amount claimed was £7,800. The work done involved the demolition and rebuilding of the front wall, practically the whole length of the party wall between Nos. 34 & 35 and about seven feet in depth of the front of the party wall between Nos. 34 & 33.

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*Michael Rowe, Q.C., and Denys B. Buckley for the War Damage Commission.
R. E. Megarry, Q.C., and D. G. H. Frank for the owners.*

Cur. adv. vult.

June 3. **SELLERS, L.J.**, read the following judgment of the court: The premises No. 34 Bruton Street, Westminster, London, form part of a terrace or continuous row of buildings and are flanked by buildings on each side. The premises are about two hundred years old and were apparently neither well built nor well maintained. During the war years, in 1940, 1941 and 1944, they received war damage, and the respondents to the appeal, Massey Estates, Ltd. (hereinafter called "the owners"), are admittedly entitled to receive payment from the War Damage Commission, the appellants, of the amount due in respect of that damage when properly assessed in accordance with the War Damage Act, 1943. The extent of the war damage was originally a matter of controversy; but by the time the matter came before VAISEY, J., it had been established, and it was beyond further dispute, that the front wall of No. 34, Bruton Street, was so damaged by enemy action that it had to be wholly demolished and rebuilt, but that the party walls flanking No. 34 on each side had not been damaged by enemy action. When demolition of the front wall took place it was found that the two flanking walls, although not subjected to war damage, were not in a satisfactory condition. Previously, on Sept. 4, 1948, the London County Council had served a dangerous structure notice on the owner or occupier of No. 34, Bruton Street, including an order

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"to take down repair or otherwise secure the chimney breasts on the walls abutting on No. 35 Bruton Street where loose cracked rotten or defective."

There were two chimney breasts on the flank wall in question as shown on the plan attached to the Case Stated. The owners, in circumstances and for reasons which have to be investigated, in fact demolished and rebuilt the front wall, practically the whole length of the party wall on the side of No. 35 and about seven feet from the front of the party wall on the side of No. 33. The owners claim the cost of all this work, a sum of £7,800. The commission has allowed and contends that it is liable for £3,600 and no more, this being the cost of reinstating the front wall on the basis that it could have been suitably bonded back to both party walls to an average depth of eighteen inches with consequential plaster, joinery and decoration work.

The owners appealed to VAISEY, J., from the commission's decision, alleging that the proper cost of rebuilding the party walls was as a matter of law to be included in the proper cost of the works executed for the making good of war damage within the meaning of s. 8 of the War Damage Act, 1943.

The Act, by s. 32, and the rules, by R.S.C., Ord. 55c, r. 4, provide that where a party is aggrieved by a determination of the commission he may appeal on any question of law to the High Court, and that in such circumstances the commission shall state a Case setting forth the facts on which their determination was based.

The manner in which the Case has been stated* has not, we think, clearly complied with that requirement, and the failure to do so has, as we see it, caused much of the difficulty and uncertainty which has arisen. The commission should avoid in future confusion such as has arisen here in stating a Case for the opinion of the court.

Before dealing with the commission's findings of fact we will refer to the sections of the War Damage Act, 1943, which call for consideration.

Section 1 provides that payments by the commission shall be made in respect of war damage to land occurring during the risk period. Section 2 defines "war damage" as follows:

"damage occurring (whether accidentally or not) as the direct result of action taken by the enemy, or action taken in combating the enemy or in repelling an imagined attack by the enemy."

Of the two kinds of payment specified by s. 6† it is agreed that the owners were entitled to receive a payment of cost of works, being a payment of an amount determined by reference to the cost of works executed for making good the damage, as provided by s. 8 of the Act. The relevant parts of s. 8 are:

"(1) Subject to the provisions of this Part of this Act, the amount of a payment of cost of works shall be computed as provided by sub-ss. (2) to (4) of this section.

"(2) If the war damage is made good by reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage, the amount of the payment shall be an amount equal to the proper cost of the works executed for the making good thereof: Provided that if the reinstatement of any part of the hereditament could have been omitted without detracting from the value of the hereditament, or the omission thereof would have increased its value, the amount of the payment shall be reduced to what it would have been if that part had not been reinstated.

"In this Part of this Act the expression 'the permissible amount' means, in relation to a payment of cost of works, the amount that is payable by virtue of this sub-section or that would have been payable if this sub-section had had effect in relation to the payment.

"(3) If the war damage is made good by works which include alterations or additions to the hereditament, the amount of the payment shall be an

* Relevant matter from the Case Stated is set out at pp. 540, 541, ante.

† Section 6 provides for either "cost of works" or "value" payments being made.

A amount equal to so much of the proper cost of the works executed for the making good of the damage as falls within the permissible amount."

B What therefore has to be ascertained in this case is the amount which is equal to the proper cost of the works executed for the making good of the hereditament in the form in which it existed immediately before the occurrence of the damage. "Proper cost" is defined in s. 123 and means, shortly, reasonable cost in respect of materials and labour.

C All the war damage that had to be made good, as far as this case is concerned, was the front wall of the premises. What were the works executed for making good the front wall? The proper cost of these works became "the permissible amount" payable. If, in the course of doing the work of making good, there are alterations in the form in which the war damage area existed before the occurrence of the damage, or if there are additions made to the hereditament, then s. 8 (3) stipulates that the amount of the payment shall be an amount equal to so much of the proper cost of the works executed for the making good of the damage as falls within the permissible amount. The owners are not entitled to any greater payment than the proper cost of the works executed for the making good of the war damage. They are, however, entitled to have the benefit, if such it be, of new for old without any apportionment or deduction, unless, it may be, there are exceptional circumstances (*Re 36, 38, 40 & 42, Jamaica Street, Stepney* (1), [1947] 1 All E.R. 754).

E Further, we think that it must be recognised that in making good war damage it may be necessary, in order to gain access to the damage or to effect properly the reinstatement, to demolish or damage and to rebuild or repair or shore up or temporarily strengthen, alter, divert or otherwise interfere with part of the premises undamaged by the enemy. The proper cost of work so necessitated would be part of the cost of the works executed for the making good of the war damage. The essential factor would be in each case that the works executed were necessary for reinstating the hereditament in the form in which it existed immediately before the occurrence of the damage. This would be subject to the proviso to s. 8 (2) with regard to unnecessary reinstatement, that is omissions which would not detract from the value of the hereditament. On the other hand, if the war damage is made good in a different form from that which existed before, by alteration or addition, whether by the desire of the owner or requirements of building bye-laws, the amount of the payment in respect thereof will be no more than "the permissible amount". For example, to take counsel for the commission's illustration, if a wall damaged by enemy action had been of four and a half inch brick and the local authority's building laws required it to be nine inches thick when rebuilt, the commission's liability would be for the cost of constructing a four and a half inch brick wall and no more.

H Paragraph 10 of the Case Stated as stated by the commission* finds that it would have been physically possible to rebuild the front wall without rebuilding the flank walls to the extent to which they have been rebuilt, and that if the work had been carried out with only a short return (eighteen inches) on the flank walls the physical condition of the property would have been no worse than it was before the war damage occurred.

I VAISEY, J., put a special interpretation on the words "physically possible" in para. 10 of the Case, which led him to read the first sentence of the paragraph ([1956] 3 All E.R. at p. 658):

"... as indicating that what is there suggested as physically possible was not possible as a practical proposition, or, in other words, it was in a true sense impossible."

* Paragraph 10 is printed at p. 541, letter C, ante.

We do not think that meaning can properly be attributed to the words "physically possible" in this context. In particular we do not see how it can be reconciled with the second sentence of para. 10, where the commission go on to find that

"if the work had been carried out in this way, the physical condition of the property would certainly have been no worse than it was before the war damage occurred."

The first two sentences of para. 10 taken together appear to us to amount to a reasonably clear finding that it would have been physically possible to carry out the work described in the first sentence in the sense that it would have been a sound practical rebuilding operation leading to a safe and practical reconstruction judged by ordinary standards in the building trade. VAISEY, J., regarded the second sentence as ([1956] 3 All E.R. at p. 659) "raising the kind of point which was discussed and decided in *Re 36, 38, 40 & 42, Jamaica Street, Stepney* (1) ([1947] 1 All E.R. 754) . . .". With respect, we cannot agree. *Re Jamaica Street* (1), as we understand it, decided that, where walls already in a bad condition had suffered war damage so that they had to be rebuilt, the whole of the cost of the rebuilding must be provided by the commission without any allowance for the fact that the new walls were better than the old ones had been before the damage occurred. In the present case the flank walls suffered no war damage, and there can therefore be no ground for throwing on the commission the cost of rebuilding them to an extent exceeding what was necessary for the purpose of reinstating the war damaged front wall.

VAISEY, J., went on to deal with the third sentence of para. 10, which reads:

"The commission recognise that the age and condition of the flank and back walls (which was not in the view of the commission due to war damage) was such as to occasion the requirements imposed by the district surveyor but they have taken the view that the cost of conforming with such requirements does not form part of the proper cost payable by the commission as a payment of cost of works."

As to the effect of that sentence, the learned judge observed ([1956] 3 All E.R. at p. 659):

"In that sentence the word 'occasion' is, in my judgment, equivalent in meaning to 'justify' or even to 'necessitate'. The law, as I understand it, is that as a general rule any preparatory remedial work which has to be done before the war damage can be made good is work for which the proper cost can be claimed as part of the war damage itself."

That may be so where there is remedial work which has to be done before the war damage can be repaired; but in the present case the commission have, as we understand them, found that the remedial work on the flank walls required for the purpose of reinstating the front wall was of the limited character indicated in the first sentence of para. 10 of the Case Stated, and that if these limited measures had been applied in conjunction with the rebuilding of the front wall the physical condition of the property would have been no worse than it was before the war damage occurred.

The Case Stated, in addition to stating the commission's final conclusions of fact, has annexed to it a statutory declaration of Mr. Shiner, who was the district surveyor for the City of Westminster at the times material to this case. His evidence conflicts in some respects with the facts found in the Case; and the annexure of the statutory declaration to the Case appears to have led VAISEY, J., to think that he was invited to treat it as evidence and so to come to the conclusion, fundamental to his decision, that the rebuilding proposed by the commission ([1956] 3 All E.R. at p. 658) "was in a true sense impossible", that is, that the proposed method was not in accord with proper building practice. Had that been the proper conclusion to reach, we would not differ from his decision. It would mean that the front wall could not have been reinstated as a matter of

A practical building without the stability or support of the party walls as in fact reinstated, and the whole of the work for which payment is claimed would have been work executed for making good the war damage to the front wall. In our view, however, the commission did not accept the district surveyor's declaration. They have found the contrary, that the rebuilding of a return flank wall of eighteen inches would be adequate. They are the tribunal of fact in this case, and plainly their finding of fact on this point must be preferred to the view of the district surveyor, which the commission must be taken to have rejected. The district surveyor's evidence is considerably undermined in any case because he retained the opinion that the party wall between No. 34 and No. 35 had itself been damaged by enemy action, which had been determined otherwise between the parties. The declaration shows, we think, that the district surveyor required the work on the flank walls to be executed to the extent carried out; but, notwithstanding that, as it was unnecessary for the reinstatement of the front wall, it was work outside "the permissible amount" payment.

It is clearly not sufficient for a claimant to show that work was done concurrently with the war damage reinstatement. In order to recover the cost of work undertaken it must be work carried out for the making good of the war damage. The rebuilding of the flank walls beyond the eighteen inches accepted by the commission was carried out because of the unsound condition of the flank walls (not war damaged) and because the district surveyor, acting within his powers and applying the relevant bye-laws, so stipulated. The war damage was the occasion which brought the unsound party walls to light and which led to their repair, but it was not the cause of it.

VAISEY, J., referred to an unreported decision of his in 1953, *Re 6 & 8, Halton Terrace, Sevenoaks* (2). In the present judgment VAISEY, J., summarises that case in this way ([1956] 3 All E.R. at p. 659):

"There the premises had suffered some war damage which could be repaired at a cost of £109 7s., but in order to enable such repair to be carried out other repair estimated to cost £306 12s. 6d. had to be effected prior to, or concurrently with, the carrying out of the first mentioned repair. I held in that case that the £306 12s. 6d. as well as the £109 7s. could be recovered as part of the proper cost although, admittedly, the larger sum was laid out in putting right what was not directly and in itself war damage at all. I held that the more expensive work was ancillary to or part of the main but less expensive work and I discussed the signification of the word 'impossible' . . ."

On those findings of fact, which we are not called on to review, we would regard the case as supporting the views we have expressed above; but we do not find it applicable to the present case.

At the end of his judgment VAISEY, J., expressed his conclusion thus ([1956] 3 All E.R. at p. 659):

"The conclusion of the commission as set out in the final sentence of para. 10 of their statement of case is, in my judgment, wrong in point of law. I hold that the cost of complying with the district surveyor's requirements does form part of the proper cost of works executed for the making good of the war damage to No. 34, Bruton Street, and I shall so declare."

We cannot agree that the final sentence of para. 10 of the Case Stated involves any error of law, and it seems to us that the learned judge's decision to the effect that the cost of conforming with the district surveyor's requirements did form part of the proper cost of making good the war damage is inconsistent with the facts found by the commission.

Counsel for the owners contended that, although it might have been physically possible to limit the work in the way indicated in para. 10 of the Case Stated, it would not have been legally possible to do so, because the district surveyor would not allow the work to proceed unless his requirements were carried out.

Therefore, says counsel, the war damage could not have been made good without carrying out the work required by the district surveyor, as he would otherwise have put a stop to all work. Accordingly (so proceeds the argument) the war damage could not be made good without incurring the cost of complying with the surveyor's requirements, and it follows that such cost formed part of the proper cost of the works executed for making good the war damage. A

We cannot accept this argument. If the front wall of a house has suffered war damage which it is physically possible and structurally practicable to make good so as to leave the premises in at least as good a condition as they were before the war damage occurred, without touching the flank walls, which have suffered no war damage, and if the district surveyor acting within his powers insists on the flank walls being pulled down and rebuilt in conjunction with the reinstatement of the front wall, it may well be that it is legally impossible to reinstate the front wall without also doing the work on the flank walls demanded by the surveyor. However, we fail to see how the cost of the work on the flank walls which have suffered no war damage is part of the proper cost of the work executed for the making good of the war damage to the front wall. It is the cost of complying with the surveyor's requirements and has nothing to do with the war damage. The fact that the surveyor forbids the work of reinstating the war damaged front wall to proceed unless his requirements as to the flank walls are met seems to us to be for this purpose irrelevant. B C D

Counsel for the owners advanced a further argument to the effect that the question whether any given work was work for making good war damage depended on the intention or motive of the person executing it. This, if we may say so with all respect, seems to us to be plainly wrong. E

We would allow the appeal, because the commission, on the facts they found, came, in our opinion, to the correct conclusion in law.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Treasury Solicitor* (for the War Damage Commission); *Debenham & Co.* (for the owners).

[Reported by HENRY SUMMERFIELD, Esq., *Barrister-at-Law.*] F

MEYER v. MEYER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Wallington, J.), May 17, 1957.]

Justices—Husband and wife—Maintenance—Ante-dating of order—Divisional Court's finding that wife's complaint proved—Direction to justices to assess maintenance—Ante-dating maintenance order to date of dismissal of complaint or to date of Divisional Court's finding and direction. G

On May 18, 1956, the wife made complaint to the justices that her husband had deserted her and had been guilty of wilful neglect to provide reasonable maintenance for her. On July 23, 1956, the justices dismissed the complaints. On Oct. 18, 1956, the Divisional Court allowed her appeal, and directed the justices to assess the maintenance. On Apr. 18, 1957, the justices assessed the maintenance at £5 a week but refused to ante-date the order. On appeal, H

Held: the justices had power to ante-date the maintenance order and in the circumstances of the present case it should be made to operate from Oct. 18, 1956, the date when the Divisional Court directed the justices to assess the amount of maintenance. I

Starkey v. Starkey ([1954] 1 All E.R. 1036) followed.

Appeal allowed.

[**Editorial Note.** It seems that there may be power to ante-date a maintenance order to the date of the complaint (see p. 549, letter I, post).]

As to ante-dating of an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, see 12 HALSBURY'S LAWS (3rd Edn.) 489, para. 1037, note (q); and for cases on the subject, see 3rd DIGEST Supp.]

A Cases referred to:

- (1) *Starkey v. Starkey*, [1954] 1 All E.R. 1036; [1954] P. 449; 118 J.P. 279; 3rd Digest Supp.
- (2) *McLellan v. McLellan*, [1954] 1 All E.R. 1; [1954] P. 138; 3rd Digest Supp.

B Appeal.

The wife appealed against an order of the Chelsea Domestic Proceedings Court dated Apr. 18, 1957.

The husband spent much time travelling abroad and in his absences the wife received £25 each month as maintenance. In about May, 1955, the wife refused to allow the husband to return home, on the ground that she was justified by his conduct in so doing. In April, 1956, the allowance of £25 a month was stopped by the husband.

On May 18, 1956, the wife made a complaint to the Chelsea court that the husband had deserted her in January, 1955, and that he had been guilty of wilful neglect to provide reasonable maintenance for her. On July 23, 1956, the Chelsea court found that the wife had had no right to leave the husband and both complaints were accordingly dismissed. The wife appealed to the Divisional Court. On Oct. 18, 1956, the Divisional Court (LORD MERRIMAN, P., and COLLINGWOOD, J.) found that the wife had proved her case and that the husband had been guilty of wilful neglect to provide reasonable maintenance for her as from April, 1956. The Divisional Court, therefore, allowed her appeal, ordering that the order of the Chelsea court be varied by substituting for the dismissal of her complaints a finding that both complaints were true, and directed that the Chelsea court assess the amount of maintenance for the wife. The husband appealed to the Court of Appeal but his appeal was dismissed on Feb. 27, 1957. The case then went back to the Chelsea court to determine the amount of maintenance. On Apr. 18, 1957, the Chelsea court assessed the amount of maintenance at £5 a week. The question then arose as to the date from which the order for maintenance should take effect. Counsel for the wife submitted that the order should be ante-dated to April, 1956. The Chelsea justices refused to ante-date the order, stating in their reasons: "We held that any direction as to ante-dating should be given on application to the Divisional Court". The wife now applied to the Divisional Court for a direction to that effect.

C. W. G. Ross-Munro for the wife.
I. S. Warren for the husband.

LORD MERRIMAN, P., stated the facts and continued: The complaint of both offences was made on May 18, 1956. It dated the desertion as January, 1955, but it made no allegation of any particular date in connexion with the wilful neglect to provide reasonable maintenance. Those two complaints came on for hearing on July 23, 1956, when, in effect, the Chelsea court held that the wife had no right to leave the husband, and dismissed the charge of desertion, and, quite rightly as a matter of consequence, dismissed also the charge of wilful neglect to maintain, because, if the wife herself was a deserter, of course she had no title to claim maintenance at all. In that respect, the justices were found to be wrong, and on a hearing which lasted from Oct. 15 to 18, 1956, in this court before COLLINGWOOD, J., and myself, we held that the wife had proved her case. We did not send the case back for a re-hearing. We made our own finding. We said that the wife was fully justified in leaving her husband, that the appeal must be allowed and the order varied by substituting for the dismissal of the wife's complaints a finding that both complaints were true, and we directed the justices, on that basis, to assess the amount of the maintenance.

COLLINGWOOD, J., gave the leading judgment on that occasion, and at the end of it he said something which is evidently the origin of this particular dispute. After saying that we were going to draw the inference that the wife had a reasonable excuse for refusing to accept her husband back again, he said:

“That being so, in my opinion she is entitled to an order on the ground of wilful neglect to provide reasonable maintenance, and desertion, from the time, which if my memory is right, is April, 1956, when the £25 a month allowance was reduced, and I think that the case should be remitted to the justices to determine what that amount should be.”

I delivered a concurring judgment, but did not go specifically into the question of the ante-dating of the order. I do not think that COLLINGWOOD, J., meant to say that that particular date in April, 1956, when the allowance was stopped, was the only possible date from which the order could run, but it is plain that he thought it was a case in which the order should in justice to the wife be ante-dated for, in effect, she had been left penniless from April, 1956. So that date was put before the justices at the Chelsea court when the case came before them on Apr. 18, 1957, but they said that counsel, in putting forward that date on the authority of COLLINGWOOD, J., was unable to cite any authority for their guidance, and they considered that they had no power to direct payment of maintenance as from the date indicated by COLLINGWOOD, J., which was antecedent to the date of the original hearing.

It is true that that date was antecedent not merely to the date of the original hearing but also to the date of the complaint, and, speaking for myself, though it is not necessary to express any final opinion about that, I should be inclined to think that assuming that it is possible to go back to the date of complaint, which I am not sure about, in any case that is a date further back, and counsel for the wife has not sought to argue, as things stand now on the authorities, that any earlier date than the date of the complaint should be chosen. In order to show what variety we have to choose from I must call attention to some other dates. May 18, 1956, was the date when the complaints were made; July 23, 1956, was the date when the Chelsea court dismissed the summonses, wrongly, as we held on Oct. 18, 1956. The hearing before the Court of Appeal did not come on until Feb. 27, 1957, when the appeal was dismissed, and then the matter went back to the Chelsea court. On the question whether we should make any order as to the date from which this assessment of £5 should run, the possible dates are May 18, 1956, when the complaints were made, July 23, 1956, when the case was first heard, Oct. 18, 1956, when we sent it back to be dealt with by the Chelsea court, Feb. 27, 1957, when the Court of Appeal said the same thing, and today, and I feel no doubt in my own mind that we have jurisdiction to order some other date than today for the order to start from, and in my opinion the sole question is, what date should we choose?

It is true that no authority was cited to the Chelsea court, but, in fact, there is authority. Our attention has been called to *Starkey v. Starkey* (1) ([1954] 1 All E.R. 1036). It is clear that in that case the justices had refused to ante-date the order at all. After the dismissal of the husband's appeal to the Court of Appeal, the matter went back to the justices and came on before them on Aug. 18, 1953. They did not yield to counsel for the wife's persuasion that they should make the order, which they assessed at the maximum of £5 a week, operative either from the date of the original dismissal by that petty sessional division on Apr. 23, 1952, or from the date of our order finding the wilful neglect proved (Feb. 11, 1953), but they made the order run from Aug. 18, 1953, the date when they actually finally dealt with it. I said (*ibid.*, at p. 1037):

“The object of this appeal is to invite us to make the order for the payment of maintenance retrospective either to Apr. 23, 1952, being the date of the order of the justices, whereby they dismissed the complaint, or to Feb. 11,

A 1953, being the date on which this court held that the complaint was proved to be true ”.

Those two dates correspond to those in the present case, namely, one the date of their own mistaken dismissal and the other the date of their correction by this court. I do not think that it is necessary to consider going back to the date of the original complaint. Speaking only of the circumstances of this case and without laying down any general rule, in my opinion the two rival dates between which the selection ought to be made are the date when the justices dismissed the complaint, and the date when this court reversed their order. Those are, in the circumstances, I think, the two important dates, and I am not, of course, speaking with any disrespect to the Court of Appeal when I say that really there is no particular reason for taking the date when they upheld our order any more than there is for the date on which we made our order.

I must deal with the argument which has been addressed to us on behalf of the husband. If I have correctly understood it, it is this. It is admitted on the authority of *Starkey v. Starkey* (1) that we have power to go back to either of these two dates; but the argument went a good deal further. It was that the justices made the order of £5 a week on the basis that it would run only from Apr. 18, 1957, when for the first time they quantified the amount although they were directed to do so as long ago as Oct. 18, 1956, and they ought to have done it, as I have already said, on July 23, 1956. It is said that anything which is antecedent to that is something that goes to quantum. If they had known that they had any right to go back, or even contemplated going back, they could only do that by tying what has been described as a millstone round the neck of the man for a period which might be x weeks or x months—it does not matter which—and the order would have been and ought to have been quantified at something less than £5, because there would be this sum for arrears hanging round his neck. If that argument is brought to its logical conclusion, in spite of the decision in *Starkey v. Starkey* (1) it ought to mean that there is no other date than today from which we can date the order. That is the result, in my opinion, and there is no escape from it. I think that the argument involves a confusion between the quantum of the order as such and the steps which may have to be taken to enforce it and any arrears which may accumulate or have accumulated because the order is to run from some date other than today. All that has been said about hardship, if any, can properly be dealt with in either of two ways (and let it be understood that I am not trying to suggest two further moves to prolong this litigation) either on a summons to vary the amount, if that is proper and figures can be produced to justify it, or on enforcement proceedings by the wife, when all questions of outstanding arrears, and the amount of the order, or alternatively committal with suspension on terms that so much is paid off the arrears, and so forth, can be dealt with by those who are best qualified to deal with them. In my opinion, the question of the date from which the order should run has nothing whatever to do with the question of the quantum; if it had, then the order would be made without jurisdiction, because, however short the period of ante-dating something could be added to the quantum of the order, which has been made at the maximum sum at which it can be made*; so if that argument is right any ante-dating would involve an excess of jurisdiction. In my opinion it has got nothing whatever to do with it.

I am satisfied with, and am prepared to follow, the authority of *Starkey v. Starkey* (1). I do not propose to go back to the date of the complaint and summons, but perhaps in passing I ought to say that there is some authority even for that, because KARMINSKI, J., in *McLellan v. McLellan* (2) ([1954] 1 All E.R. 1) in dealing with the corresponding provision under s. 23 of the Matrimonial Causes Act, 1950, whereby we have power to make orders in respect of wilful

* See the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (c), as amended by the Married Women (Maintenance) Act, 1949, s. 1 (1).

neglect to maintain in the High Court, held that he could ante-date the order, and properly should do so in that particular case, to the date of the originating summons on which the proceedings were based. By analogy it might be argued that it would be possible in any given case to go back to the date of the complaint and summons. However, I do not think it necessary to pursue that further. But that case is another authority for the proposition that it is quite proper to ante-date an order of this sort to some earlier date than the actual date on which the decision is finally made. I think myself that in the circumstances of the present case the fairest order would be to make the order run from Oct. 18, 1956, when we sent this case back with directions that the amount should be fixed. I say that for this reason. It was not a perfectly simple case. We had to go into a great deal of detail. We differed from the justices in a case where there was a good deal to be said on both sides, and it was not really until we had assumed the responsibility of making our own finding that the wife was justified in leaving, and therefore that she was entitled to succeed both on desertion and on wilful neglect to maintain, that the question of making any order for any amount at all became effective, and a practical proposition. Although I think that it would be perfectly proper to ante-date this order to July 23, 1956, when the justices dismissed the complaint, on the whole the fair thing is to date it from Oct. 18, 1956, and that is the order that I propose.

WALLINGTON, J.: I agree entirely with the conclusion reached by LORD MERRIMAN, P., and will add only a few words of my own.*

It is true that this court and the Court of Appeal have both held that the justices on July 23, 1956, ought to have found the charges proved; if they had done that they would then have assessed the maintenance and the wife would have been entitled to have it from that day to this. Having regard to the character of the case, and the many matters of difficulty involved in it, I am satisfied that the justices cannot be blamed for not having done that. On the view which they took of the case they were perfectly entitled to dismiss the proceedings, although they were afterwards found to be wrong. On Oct. 18, 1956, this court found that the charges on which the wife relied were proved, and that, in effect, in the circumstances, was the first date on which it could be said finally and without any question, that the wife had made out her charges; therefore, in my opinion, that is the date which it is right to regard as the basis of the husband's liability; it was by the order made on that date that the justices were invited to assess the amount.

Some delay occurred in their doing so because of the appeal to the Court of Appeal, which of course delayed the ascertainment of the rights of each party to this litigation. It tended, possibly, to increase the amount ultimately to be payable by the husband; it certainly had the effect of depriving the wife of the right to recover anything at all by way of maintenance. Now, however, it has been disposed of, and the only question before us arises on the justices' reasons, and their decision at the end of them, in these terms:

"We held that any direction as to ante-dating the order should be given on application to the Divisional Court."

The application before us is for that direction. I share my Lord's hope that this may possibly be an end to this litigation.

In my view, there being a possible choice between today's date and that of Oct. 18, 1956, when the order was made finding the charges proved, I agree that the proper date in this case will be Oct. 18, 1956, when that order was made by this court.

Appeal allowed.

Solicitors: *Holland & Co.* (for the wife); *Summer & Co.* (for the husband).

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

Re A DEBTOR (No. 80 of 1957), *Ex parte* THE DEBTOR v.
WISEBURGH.

[COURT OF APPEAL (Jenkins and Sellers, L.JJ., and Roxburgh, J.), May 28, 29, 1957.]

Bankruptcy—Act of bankruptcy—Non-compliance with bankruptcy notice—Debtor setting up “cross demand” equalling or exceeding the amount of the judgment debt—Claim by debtor against creditor (his wife) for possession of chattels in matrimonial home—Divorce proceedings pending—Whether claim was a cross demand—Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 1 (1) (g)—Married Women’s Property Act, 1882 (45 & 46 Vict. c. 75), s. 17.

On Oct. 29, 1956, the wife obtained judgment against her husband, the debtor, for £636 15s. 4d., on a claim to be indemnified by him against certain household expenses. On Nov. 4, 1955, the wife had presented a petition for divorce and later that month the debtor had taken proceedings by summons in the Divorce Division under s. 17 of the Married Women’s Property Act, 1882*, claiming that chattels, which he valued at £20,000 and which were in the matrimonial home then in the possession of the wife, were his as he had bought them with his own money. The debtor’s claim was disputed by the wife who valued the chattels at £6,000, and claimed that they were her own property on the ground that she had bought some of them and that the rest had been given to her by the debtor and other persons. In the s. 17 proceedings the wife gave an undertaking not to part with the chattels in dispute. On Jan. 10, 1957, she issued a bankruptcy notice founded on the judgment debt. The debtor applied to set aside the bankruptcy notice on the ground that in the circumstances his claim in the s. 17 proceedings, which were still pending, should “satisfy the court that he has a counter-claim set-off or cross demand which equals or exceeds the amount of the judgment debt . . .” within s. 1 (1) (g) of the Bankruptcy Act, 1914†.

Held (JENKINS, L.J., dissenting): an act of bankruptcy by the debtor was not established and the bankruptcy notice should be set aside because

(i) the summons under s. 17 of the Married Women’s Property Act, 1882, constituted a demand and, being set up against the judgment debt, was a cross demand within s. 1 (1) (g) of the Bankruptcy Act, 1914, and

(ii) on the evidence the claim under s. 17 should be regarded as a cross demand which equalled or exceeded the amount of the judgment debt, the claim was a genuine demand and had a reasonable probability of succeeding to an extent necessary to equal the judgment debt.

Dicta of MAUGHAM, L.J., in *Re Bankruptcy Notice* (No. 171 of 1934) ([1934] Ch. at pp. 441, 442) applied.

Appeal allowed.

[As to setting aside a bankruptcy notice by reason of a cross demand, see 2 HALSBURY’S LAWS (3rd Edn.) 282, 283, paras. 525, 526; and for cases on the subject, see 4 DIGEST 104, 105, 937-940.

As to summary proceedings between husband and wife as to property, see 16 HALSBURY’S LAWS (2nd Edn.) 740, para. 1211; and for cases on the subject, see 27 DIGEST (Repl.) 263-265, 2119-2133.

For the Bankruptcy Act, 1914, s. 1 (1) (g), see 2 HALSBURY’S STATUTES (2nd Edn.) 325.

For the Married Women’s Property Act, 1882, s. 17, see 11 HALSBURY’S STATUTES (2nd Edn.) 804.]

* The relevant terms of s. 17 are printed at p. 554, letter F, post.

† Section 1 (1) (g) is printed at p. 552, letter H, post.

Cases referred to:

- (1) *Re G.E.B. (A Debtor)*, [1903] 2 K.B. 340; 72 L.J.K.B. 712; 89 L.T. 245; 4 Digest 104, 938.
- (2) *Re Bankruptcy Notice (No. 171 of 1934)*, [1934] Ch. 431; 103 L.J.Ch. 253; sub nom. *Re Judgment Debtor (No. 171 of 1934)*, 151 L.T. 107; Digest Supp.
- (3) *Tunstall v. Tunstall*, [1953] 2 All E.R. 310; 3rd Digest Supp.
- (4) *Rimmer v. Rimmer*, [1952] 2 All E.R. 863; [1953] 1 Q.B. 63; 3rd Digest Supp.
- (5) *Newgrosh v. Newgrosh*, (June 28, 1950), unreported.
- (6) *Cobb v. Cobb*, [1955] 2 All E.R. 696; 3rd Digest Supp.

Appeal.

The debtor appealed against the order of Mr. Registrar BOWYER, dated Mar. 14, 1957, refusing to set aside a bankruptcy notice issued at the instance of the debtor's wife, the judgment creditor. The facts appear in the judgment of JENKINS, L.J.

A. C. Sparrow for the husband, the debtor.

Arthur Bagnall for the wife, the creditor.

JENKINS, L.J.: The bankruptcy notice which is dated Jan. 10, 1957, was issued at the instance of the debtor's wife, and it was in respect of a judgment debt of £636 15s. 4d., the judgment having been obtained against him by his wife in these circumstances. A firm of grocers, Messrs. Coopers, had been supplying the spouses with groceries and household necessities for the matrimonial establishment. The goods were supplied on credit and a large amount of indebtedness accumulated which the debtor omitted to pay. In these circumstances Messrs. Coopers brought a county court action against the debtor and his wife claiming the amount due to them for goods sold and delivered. For some reason, which has not been explained to us, the county court action was pursued against the wife alone, and she suffered judgment for the amount of Messrs. Coopers' claim. She contended that in as much as these goods were in the nature of household necessities the liability ought properly to fall on the debtor. She brought him in as a third party on the ground that she was entitled to be indemnified by him, and in the result she recovered the judgment on which the bankruptcy notice is founded, the amount of it representing five-sixths of Messrs. Coopers' claim together with costs.

The application to set the bankruptcy notice aside was founded on the terms of s. 1 (1) (g) of the Bankruptcy Act, 1914. By s. 1 (1) of the Act: "A debtor commits an act of bankruptcy in each of the following cases", and then there is the well known enumeration of cases amounting to acts of bankruptcy, case (g), which is non-compliance with a bankruptcy notice, being in these terms:

"If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim set-off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained."

The debtor claims that he has a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt on which the bankruptcy notice is founded. He relies in particular on the words "cross demand" as

A being of wider connotation than either the word "counter-claim" or the word "set-off".

The nature of the cross demand on which the debtor relies is this. There were unfortunate matrimonial differences between these spouses and on Nov. 4, 1955, the wife presented a petition for the dissolution of their marriage. That suit is defended by the debtor. Shortly after the institution of the divorce proceedings B the debtor made an application in the Divorce Division under s. 17 of the Married Women's Property Act, 1882, to have the title of the parties to a quantity of furniture, jewellery and other chattels at the matrimonial home determined by the court. Those proceedings are still pending: and shortly the position is that the debtor claims that substantially the whole of the contents of the matrimonial home, including some jewellery worth altogether, in the debtor's estimation, some £20,000, belong to the debtor. The wife, on the other hand, sets the C value of £6,000 on the chattels in question and claims that they all belong to her. It is difficult to say what the result of those proceedings will be, but the debtor contends that his claim under s. 17 is a cross demand within the meaning of s. 1 (1) (g) of the Bankruptcy Act, 1914; and he says further that it is reasonable to suppose that the result of the proceedings under s. 17 of the Married Women's D Property Act, 1882, must be to establish his title to some part, at all events, of the chattels, and at worst to chattels at least equal to or exceeding in value the amount of the judgment debt. He says that he has, therefore, a cross demand on the strength of which the bankruptcy notice should be set aside.

I next read the passages in the affidavits of the parties which bear on the question of the s. 17 proceedings, and I will begin with the affidavit of the debtor. E He says:

"2. Prior to the commencement of the proceedings referred to in the preceding paragraph [those were the proceedings leading to the judgment obtained against him by his wife and the service of the bankruptcy notice] my wife on Nov. 4, 1955, presented a petition against me for dissolution of the marriage in the High Court of Justice, Probate, Divorce and Admiralty F Division. I am defending those proceedings which although they have been set down for hearing in the defended list have since been taken out, and interlocutory proceedings are pending. Moreover in November 1955 I commenced proceedings in the Divorce Division of this Honourable Court under s. 17 of the Married Women's Property Act, 1882, claiming against G my wife the ownership of the whole of the contents of the flat and certain jewellery all of which was purchased with my own money she having no moneys of her own at the material time and secured an injunction against my wife to restrain her from selling or parting with or in any way dealing with such contents and jewellery. The value of such contents and jewellery is approximately £20,000 and by order of the said Division of this Honourable H Court on Feb. 12, 1956, my wife is required to file an affidavit stating the grounds upon which she claims ownership of the contents and jewellery or any part thereof and to deliver a Scott schedule in respect of such contents and jewellery. 3. Such proceedings were brought by me at a time when I discovered that my wife was attempting to remove and sell approximately £1,500 silver from the flat and in March 1956 she removed from the matrimonial home the entire contents including all my personal property such as I my golf clubs, my library, my wines, my desk, my safe and contents, papers, documents, etc."

To that the wife made answer in her affidavit:

"3. I admit that my husband has instituted proceedings under the Married Women's Property Acts for the property in the marital home including jewellery. The said property is probably worth about £6,000. I say that all such property belongs to me on the ground that I bought some

items and had the rest given to me by my husband and other persons. I do not admit attempting to remove the silver as alleged by my husband. What in fact happened was that I found my husband trying to remove the silver in his car and I only prevented him doing so by holding on to the car. The police had to be called to restrain my husband. I have since had the property removed to my present address. 4. I have been directed to file an affidavit in the proceedings aforesaid as stated by my husband, but it is he who has been directed to prepare a Scott schedule. 5. I submit that my husband's claim to the contents of our home, which as aforesaid is already the subject of proceedings, is not a counter-claim set-off or cross demand."

She went on to say that, as the s. 17 claim would not be tried for a considerable time, it was not equitable that she should in the meantime be deprived of the right to enforce the judgment she has obtained against her husband in respect of the food and provisions supplied.

We were told in the course of the hearing, but it is not actually in evidence, that in the s. 17 proceedings the wife has been put on an undertaking, in effect, not to part with or deal with the disputed chattels pending the decision of the court. Those are all the material facts; there is an acute conflict of evidence between the spouses, as is only too common in these cases, in regard to this matter of the contents of the matrimonial home and of the jewellery. Not only does the husband put the value of this property at £20,000 whereas the wife puts it at £6,000, but there is a direct conflict as to the ownership of the property in question.

I next refer to s. 17 of the Married Women's Property Act, 1882. I notice in passing s. 12, which, it is agreed, has the effect of precluding the husband from bringing any proceedings in tort against his wife in respect of the chattels in dispute. The sidenote to s. 17 says, "Questions between husband and wife as to property to be decided in a summary way" and, so far as material for the present purposes, the section is in these terms:

"In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court of Justice . . . and the judge of the High Court of Justice . . . may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit . . ."

The section is couched in language calculated to give the judge who deals with the matter a discretion as to the nature and form of any order he may make.

The debtor, then, asserts that his claim to the furniture, or at all events to a part of it which is equal to or exceeds in value the amount of the judgment debt, is a counter-claim, set-off or cross demand, in particular a cross demand, within the meaning of s. 1 (1) (g) of the Bankruptcy Act, 1914. In the course of the discussion of this question we were referred to a number of authorities. There were two bankruptcy cases; of these the first in date is *Re G.E.B. (A Debtor)* (1) ([1903] 2 K.B. 340). The effect of that case, as I understand it, was that the question whether there is a counter-claim, set-off or cross demand equal to or exceeding the amount of the judgment debt must be determined at the date of the hearing of the application to set aside the bankruptcy notice. It must be shown that at that point of time the debtor had a valid and subsisting counter-claim, set-off or cross demand.

The next in order of date of the cases to which we were referred was a Court of Appeal case: *Re Bankruptcy Notice (No. 171 of 1934)* (2) ([1934] Ch. 431). The facts of that case were very different from the facts of the present case, but, very briefly, the position seems to have been that the debtor had instituted proceedings in the Chancery Division in which he claimed to be subrogated in

A respect of certain mortgage securities. The creditor was a party to the action, I understand, but no relief was sought against the creditor personally. After that action had been proceeding for some time the creditor brought an action about a different matter against the debtor and recovered judgment, and the question was whether the debtor's claim in the Chancery action to subrogation in respect of certain securities was a counter-claim, set-off or cross demand.

B LORD HANWORTH, M.R., in the course of his judgment discussed the meaning of the words "counter-claim, set-off or cross demand", and came to the conclusion that "cross demand" was a term of wider import than "counter-claim" or "set-off". I begin my citation from his judgment ([1934] Ch. at p. 437). LORD HANWORTH, M.R., said:

C "The question really turns upon whether or not the proceedings, which are now taken and which are reaching an end in the Chancery Division, provide 'a counter-claim set-off or cross demand which equals or exceeds the amount of the judgment debt'. At the conclusion of them it may be that the plaintiff will have established that he is entitled to receive the money, £1,350 and £1,401. But, although that may be ultimately paid to him, is that such a counter-claim, set-off or cross demand, with the D concomitant condition that it equals or exceeds the amount of the judgment debt, that it overtops or cancels out the creditor's right to have the debt in respect of which he has a judgment paid by means of the execution provided under a bankruptcy notice?

E "Now one can deal quite shortly with these three points. It is unnecessary at the present moment to define precisely what is meant by those words. What claims are included in the words 'counter-claim, set-off or cross demand'? With regard to the word 'set-off', that is a word well known and established in its meaning; it is something which provides a defence because the nature and quality of the sum so relied upon are such that it is a sum which is proper to be dealt with as diminishing the claim which is made, and against which the sum so demanded can be set off. With regard to a F counter-claim, that is a creature of the Supreme Court of Judicature Act, 1873. By s. 24, sub-s. (3)*, it was provided that the courts should have the power to hear a counter-claim, a matter which could not until that time have been included in the same action."

G Then LORD HANWORTH, having discussed the meaning of the word "counter-claim", went on to deal with "cross demand" (ibid., at p. 438):

H "I turn, therefore, to what to my mind is the wider word, 'cross demand'. If a cross demand is only to be interpreted as meaning something which could have been introduced into the action by way of counter-claim, it adds nothing to the word 'counter-claim'. 'Cross demand' seems to me to be a word introduced in order to give a wider ambit to the meaning of these claims, something that would not be described, certainly, as a set-off, something that could not have been brought in the action, something that still lies outside a counter-claim, but is of a nature which can be specified and which is of such a nature that it equals or exceeds the amount of the judgment debt. I do not desire to say what 'cross demand' may include, but it is not difficult to say that it does not include a claim of such uncertain I nature as appears in these Chancery proceedings. That claim does not appear to be one which it would be proper to describe as a cross demand; it is a claim of right which may inure ultimately for the benefit of the judgment debtor. Therefore, it appears that there is no sufficient ground for setting aside this bankruptcy notice; the bankruptcy notice stands good and must be complied with."

* Section 24 (3) is now s. 39 of the Supreme Court of Judicature (Consolidation) Act, 1925.

In the result, therefore, LORD HANWORTH, M.R., while expressing the view that a cross demand was a wider matter than a counter-claim or set-off, held that in that case the uncertainty as to the result of the Chancery proceedings was such that whatever benefit the debtor might ultimately derive from them could not be held properly to rank as a cross demand.

ROMER, L.J., said this ([1934] Ch. at p. 439):

"Strictly, of course, a claim or a demand cannot exceed or be equal to or less than the amount of the judgment debt; it is obviously the thing which is claimed or demanded that has to be compared with the amount of the judgment debt. Some things that are claimed or demanded obviously cannot be compared with the amount of the judgment debt. It would be impossible to say that a declaration or an injunction could equal or exceed the amount of a judgment debt, and there are obviously other things which cannot be compared with the amount of a judgment debt. These words seem to me to refer to a case where the judgment debtor is claiming to receive from the judgment creditor something which can properly be said to equal or exceed the amount of the judgment debt."

Those words of ROMER, L.J., seem to me to imply that there may be a cross demand in respect of a chattel as distinct from a sum of money, provided that the chattel is one on which a value can be set so as to make it capable of being compared with the amount of the judgment debt on which the bankruptcy notice is founded. However, he decided against the debtor in that case on the ground, as I understand it, that the claim which the debtor sought to use as a cross demand involved a third party, a cross demand being confined, in his view, under the provisions of s. 1 (1) (g) of the Act of 1914, to a cross demand between the debtor and the creditor.

MAUGHAM, L.J., said ([1934] Ch. at p. 441):

"With regard to the words 'which equals or exceeds the amount of the judgment debt', I agree with ROMER, L.J., that that must mean or refer to a claim against the creditor, either for money, or, at any rate, for money or property of value which equals or exceeds the amount of the judgment debt. For instance, it is possible, although the question does not arise here, if the creditor possessed a bag of diamonds belonging to the debtor of a value exceeding the amount of the judgment debt, this bankruptcy notice would be set aside. That, as I say, may very well be the case. If we are considering the word 'cross demand' in the present case, it has to be a cross demand against the creditor effective at the time of the hearing of the application to set aside the bankruptcy notice, either for an amount equal to or exceeding the amount of the judgment debt or, at any rate, for property of the value which at that moment exceeds the amount of the judgment debt."

Then, on those grounds, he came to the conclusion, like the other members of the court, that no cross demand was made out in that case.

From these authorities on the relevant provision of the Bankruptcy Act, 1914, it appears that a "cross demand" is a term of wide import extending to matters which would not be covered by the expressions "counter-claim" or "set-off", and it appears further that a cross demand may be made in respect of a chattel on which it is possible to set a value.

Then we were referred to a number of cases concerning applications under s. 17 of the Married Women's Property Act, 1882. I first refer to *Tunstall v. Tunstall* (3) ([1953] 2 All E.R. 310) for this statement by LORD GODDARD, C.J. (*ibid.*, at p. 312):

"In the case of chattels, or stocks and shares (which are specially mentioned [in s. 17]) the judge could, no doubt, order that 'that piece of property is to be handed over by the husband' or 'these shares standing at present

A in the husband's name in part or in whole are to be transferred to the wife', and, no doubt, a husband refusing to obey that order could be attached. But I can see nothing in this section which empowers the court to give what is equivalent to a judgment for a sum of money."

B The other cases bearing on s. 17 of the Married Women's Property Act, 1882, to which we were referred were cited on the question how far the making of any order under s. 17 and the terms of any order so made were matters for the discretion of the court. It was agreed in discussion that none of these cases go the length of saying that the judge charged with dealing with such an application can disregard a claim of legal right, but admittedly the cases do show that, in matters concerning property jointly acquired or jointly used, the court may have a wide discretion to deal with it in such manner as will be fair and equitable as
C between the parties, having regard to the whole history as to the acquisition and use of the chattels in question and, indeed, to all the surrounding circumstances of the matrimonial life of the parties.

I do not propose to take up time by citing all of these authorities but I refer to *Rimmer v. Rimmer* (4) ([1952] 2 All E.R. 863), for a quotation from a judgment of BUCKNILL, L.J., which is made by SIR RAYMOND EVERSHED, M.R.
D I begin with the introductory paragraph in the judgment of SIR RAYMOND EVERSHED, M.R. (*ibid.*, at p. 865):

"It is appropriate to remember what the Act calls on the court to do. The relevant part of s. 17 provides: 'In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland . . . [who] may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit . . .'. So the problem posed in the present case is: What is a fit order to make in regard to a sum of £2,117, being the proceeds of sale of a house which was the matrimonial home? I venture to take as my guide or test the observations of BUCKNILL, L.J., in *Newgrosh v. Newgrosh* (5) (June 28, 1950, unreported), where he said: 'That [s. 17] gives the judge a wide power to do what he thinks under the circumstances is fair and just. I do not think it entitles him to make an order which is contrary to any well-established principle of law, but, subject to that, I should have thought that disputes between husband and wife as to who owns property which at one time, at any rate, they have been using in common are disputes which may very well be dealt with by the principle which has been described here as "palm tree justice". I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case'."

Those are all the authorities to which I need refer, and on the facts and the
H authorities the argument of counsel for the debtor was to this effect: this claim in respect of the chattels under s. 17 of the Married Women's Property Act, 1882, is admittedly not a matter which could have been raised by way of counter-claim, set-off or cross demand in the action in which the judgment was obtained. It is likewise common ground that the debtor could not sue his wife in tort in respect of the disputed chattels; but that, says counsel for the debtor, merely
I reinforces the proposition that the claim could not have been raised in the action. So far, therefore, the case is within s. 1 (1) (g).

Counsel for the debtor then relies on the observations of LORD HANWORTH, M.R. (*Re Bankruptcy Notice* (2), [1934] Ch. at p. 437), as to the width of the expression "cross demand". He relies also on the observations (*ibid.*, at pp. 439, 441) of ROMER and MAUGHAM, L.J.J., which show that a chattel capable of being valued may be a proper subject of a cross demand. He says that in instituting the proceedings under the Married Women's Property Act, 1882, the debtor made his cross demand, and that he made it in respect of chattels capable

of being valued. True the debtor had not in his evidence described any of the items comprised in the disputed chattels with any degree of particularity; nevertheless he has put it on his oath that he is entitled to the whole of them; his claim cannot be dismissed as frivolous or fraudulent, and, if he has any claim at all in the matter, in all reasonable probability the value of the chattels to be adjudged his must far exceed the judgment debt of £636. Accordingly, counsel for the debtor says, the debtor should be held to have a cross demand in the shape of his claim to the furniture equal to or exceeding the amount of the judgment debt. A B

Counsel for the wife relied, amongst other submissions, on the wide discretion reposed in the court under s. 17 of the Married Women's Property Act, 1882, and, he said, having regard to that wide discretion, and in the existing state of the evidence, it could not be asserted that the husband would make good his claim to any of the chattels, or to chattels equal to or exceeding in value the amount of the judgment debt. C

In the course of the argument various hypothetical cases were discussed and counsel for the wife admitted that, where a wife was wrongfully in possession of a chattel belonging to the husband, that is to say in possession of a chattel of the husband's and admittedly without any title to it beyond perhaps the initial permission of the husband that she should have it in her possession for some purpose, in the event of the wife serving a bankruptcy notice on the husband it might well be open to the husband to claim that the value of that chattel of which the wife was wrongfully in possession provided him with a cross demand against the amount of the judgment. Counsel for the wife was also, as I understood him, disposed to admit that if a bankruptcy notice was served on the husband, and if it appeared on his application to set it aside that an order had been made on the wife under the Married Women's Property Act, 1882, enjoining her to hand over certain chattels to him and that that order had not been complied with, then the value of the chattels wrongfully held by the wife in defiance of the order of the court might be considered a good cross demand against the judgment debt on which she founded her bankruptcy notice. D E F

We are not here concerned to decide what the position might be in hypothetical cases and hypothetical circumstances. We are concerned with the circumstances of this particular case, and in the circumstances of this particular case, to which I have given the best consideration I can, I am of opinion that the debtor's claim that he has here a cross demand in respect of the furniture is misconceived. I would observe first that admittedly the debtor has no money claim against his wife in respect of the chattels; his right is simply to whatever chattels amongst the chattels in dispute the court hold to be his in proceedings under s. 17 of the Married Women's Property Act, 1882, and orders her to deliver up. Secondly, I would observe that, while the furniture is in the physical possession of the wife, she has been put by the court on an undertaking not to part with it pending a decision in the proceedings under s. 17 of the Married Women's Property Act, 1882. Her position, therefore, although she is a claiming party, partakes somewhat of the position of a stakeholder. Further I would observe that, while the wife no doubt claims these disputed chattels to be hers and will endeavour to make good that claim in the s. 17 proceedings, it cannot be assumed that she will not carry out any order the court may make in relation to the disputed chattels; in other words, the chattels are in medio abiding the order of the court. Further it is plain that in the proceedings under s. 17 the debtor must either fail or succeed; I omit for simplicity the possibility of partial failure or partial success. If he fails he has no cross demand, because the chattels must then be taken not to have been his. If he succeeds then he will get his chattels back and he cannot claim to have, in addition to his chattels, a cross demand for their value as well. If he was able to sue his wife in tort, then on making good his title to the chattels the most he could claim, as I see it, would be damages for G H I

A their wrongful detention, and such a claim would be difficult to substantiate pending proceedings under s. 17 of the Married Women's Property Act, 1882, in which the court having seisin of the matter has given its interlocutory directions as to the custody of the chattels. Even if such a claim were possible it cannot be predicated of it that the amount, if any, which could be recovered under that head would be equal to or would exceed the amount of the judgment debt. However, all that is on the supposition that the debtor could sue his wife in tort which admittedly he is unable to do.

B Accordingly, to my mind, the conclusion of the whole matter is this. Whether the debtor wins or loses the proceedings under s. 17, he has no cross demand in respect of the chattels in respect of which the bankruptcy notice can properly be set aside. For my part, therefore, I am of opinion that the learned registrar came to a right conclusion in this case and I would dismiss this appeal.

C **SELLERS, L.J.:** In the circumstances which my Lord has so fully and clearly stated, the debtor, the husband, can only succeed in setting aside the bankruptcy notice served on him in accordance with s. 1 (1) (g) of the Bankruptcy Act, 1914, and avoid its effect as an act of bankruptcy if he can fulfil one of the requirements of the sub-section. He has sought to satisfy the court that he has a cross demand which equals or exceeds the amount of the judgment debt. He failed to satisfy Mr. Registrar BOWYER, not because of what might be called the merits of the claim, but because, as I understand it, the registrar thought that the facts and circumstances arising here did not establish a cross demand. As that is my Lord's opinion also I take a contrary view with great deference. I feel that the words permit of a wider interpretation and would include the husband's claim in this case, and I must so express my opinion.

E The relevant requirement of s. 1 (1) (g) is, as my Lord has pointed out, that the debtor must satisfy the court that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained. If a cross claim is set up in an action by a defendant to a claim it is set up by way of counter-claim or set-off. If the debtor's claim against the creditor arises afterwards (and presumably before the bankruptcy notice) it would seem to be of necessity a claim which would have to be made by separate action or proceedings, but such a claim is referred to in the sub-section as a counter-claim, set-off or cross demand. Whatever the claim alleged here is, it is conceded that it could not have been set up in the action in which the judgment was obtained. Therefore, the first and vital question is whether it is in its nature a cross demand, to select the most favourable of the expressions used. It is not easy to find a fundamental distinction between cross demand and a cross or counter-claim, but the words are separated by the word "set-off", which has a distinctive character, and may be taken to have a different meaning.

G My Lord has referred to *Re Bankruptcy Notice* (2) ([1934] Ch. 431) and the observations in print made there by the learned members of the Court of Appeal, and I do not cite them afresh. I would make two comments on the case. Its decision has no direct application here because it was a case where there was no claim against the creditor in respect of any personal liability charged against him. I would add for an ulterior purpose a quotation (which is not germane to the direct argument) appearing at the end of MAUGHAM, L.J.'s judgment where he said (*ibid.*, at p. 442):

I "I would only wish to add, following what has been said by the Master of the Rolls, that it does not therefore follow that there will be an adjudication, because, contrary to the position with regard to a receiving order, the court has a judicial discretion under the Act whether it will or will not adjudicate a man bankrupt on a creditor's petition. It may be, as he has pointed out, if the facts are established they will justify the view that this is not a case in which there should be such an order."

The only cross demand which the husband has and seeks to set up is a claim under the Married Women's Property Act, 1882, s. 17. It appears that on Nov. 4, 1955, the wife presented a divorce petition against her husband and some time in the same month the husband took proceedings under s. 17 of the Married Women's Property Act, 1882, which are said to be the cross demand. By the Act of 1882, which declared that a wife was entitled to have property of her own, provision was made for deciding any question which might arise between the husband and wife as to the title or possession of property. In the administration of the Act it would appear that if either spouse establishes clear ownership of any property in dispute the court would adjudicate in favour of that spouse, but where, as so often may arise, in whole or part there may be property in joint ownership or of uncertain origin or acquisition or the subject of alleged but disputed gifts, the court has a wide power to do what is thought just and fair. If a husband has in fact, if and when a matter of this kind is investigated by the court, a title to any property in the possession of his wife, he could prove it in the proceedings and could then obtain an order for possession in respect of it.

I would refer to *Rimmer v. Rimmer* (4) ([1952] 2 All E.R. 863) and *Tunstall v. Tunstall* (3) ([1953] 2 All E.R. 310), to which my Lord has made direct reference; and further to *Cobb v. Cobb* (6) ([1955] 2 All E.R. 696) for one passage from the judgment of ROMER, L.J. (*ibid.*, at p. 700):

"... I know of no power that the court has under s. 17 to vary agreed or established titles to property. It has power to ascertain the respective rights of husband and wife to disputed property and frequently has to do so on very little material; but where, as here, the original rights to property are established by the evidence and those rights have not been varied by subsequent agreement, the court cannot in my opinion under s. 17 vary those rights merely because it thinks that, in the light of subsequent events, the original agreement was unfair."

It was conceded that, if s. 17 proceedings went as far as a decision, there would have been established a demand which could be invoked as a cross demand to defeat a bankruptcy notice under s. 1 (1) (g) of the Bankruptcy Act, 1914. As I imagine, and certainly hope, that wives do not often seek to make their husbands bankrupt, the point here must rarely arise, but I can see no reason why a husband who can satisfy the court that he is likely to succeed in his proceedings and establish that his wife has in fact property of his equalling or exceeding the debt on which her bankruptcy notice has been based should not avail himself of it. Property so withheld might be the only asset with which the debtor could meet the debt by its realisation if he had control of it. The proceedings by summons seem to me to be a demand by the husband for what he alleges to be his own property and, if he sets it up, as he does here, against the judgment, it becomes a cross demand. Unless he is making a demand, I do not follow the purpose of the proceedings. There are no doubt wide powers in the courts to enable them to solve such disputes and the machinery for adjudication is special to meet the peculiar difficulties which may arise in matrimonial affairs, but the nature of the claim and the contentions to rebut it are similar to those in an action or counter-claim. If the proceedings will result in the husband as debtor having a right to property under dispute (and it was conceded that a money claim was not essential and that property of value was sufficient) at least equal to the judgment debt under the notice, it would place him in the same position as if he had a claim for a similar amount in value by ordinary action, or in the words of the sub-section, by "counter-claim or set-off". In both cases it would, in my view, be capable of avoiding a bankruptcy notice.

It is necessary to see whether the husband has shown, sufficiently to satisfy the court, that he has a cross demand which equals or exceeds the amount of the judgment debt. For this purpose I think it should appear probable that he will establish a claim against his wife personally for an amount in value of at

A least the amount of the judgment. If the argument for the wife is that a claim of right and a claim capable of being quantified means more than that, I would reject the argument. The learned registrar has made no finding on the probabilities of success, and there can be no hard and fast rule as to what should or should not satisfy a court on a cross demand. The husband claims the contents of a flat and jewellery assessed by him at £20,000. The wife puts the figure at
B £6,000, and claims that all the property is hers as she bought some items and had the rest given to her by her husband or other persons. She does not otherwise directly refute the husband's allegation that he bought everything in dispute with his own money at a time when his wife had none of her own. Here, too, the wife is said to have removed, and under an order of the court undertaken to retain, the husband's golf clubs, library, wines, desk, safe and its contents. The
C judgment debt is £636 15s. 4d. and, having regard to the goods involved and the respective values alleged and such evidence as there is here, including some delays of which there was some explanation, I would hold that the court should be satisfied that the husband has a cross demand which equals or exceeds the amount of the judgment debt.

I would allow the appeal and set aside the bankruptcy notice.

D
ROXBURGH, J.: On Oct. 29, 1956, the respondent, the wife of the appellant debtor, obtained judgment against him for £636 15s. 4d., and on Jan. 10, 1957, she issued a bankruptcy notice against him. In an affidavit filed on Feb. 19, 1957, he sought to have this notice set aside in the following circumstances. In November, 1955, that is to say long before the judgment against
E him and, therefore, not by way of counter-attack, the debtor had instituted proceedings under s. 17 of the Married Women's Property Act, 1882, claiming against his wife the ownership of the whole of the contents of the marital home and certain jewellery. The summons has not been placed before us, but s. 17 presupposes a question between husband and wife as to the title to or possession of property, and the object of the proceedings, since the property is in the hands
F of the wife, must be to obtain possession of it against her. An order for possession can be made if the court thinks fit. I refer to the passage in *Tunstall v. Tunstall* (3) ([1953] 2 All E.R. 310 at p. 312) which my Lord has already cited.

This summons in my opinion constitutes a cross demand against the wife; indeed, it is the only method available to a husband for making an effective demand in such circumstances. It is true that the court appears to have, under
G s. 17, a wide discretion, considerably curtailed, however, by judicial decisions; but the circumstance that the court may not always be bound to adhere strictly to legal or equitable principles cannot, in my opinion, impair the effective character of the demand. It is true also that the proceedings cannot result in an order for payment of a sum of money, but it was conceded that the cross demand need not be for a sum of money. I thought, until counsel for the wife addressed the
H court, that the real question might be whether the passage in MAUGHAM, L.J.'s judgment in *Re Bankruptcy Notice* (2) ([1934] Ch. 431 at p. 441) was or was not well founded. It is put by him in a somewhat tentative way, and although the passage has already been read, as it is very germane to my argument, I would take leave to read it again:

I "With regard to the words 'which equals or exceeds the amount of the judgment debt', I agree with ROMER, L.J., that that must mean or refer to a claim against the creditor, either for money, or, at any rate, for money or property of value which equals or exceeds the amount of the judgment debt. For instance, it is possible, although the question does not arise here, if the creditor possessed a bag of diamonds belonging to the debtor of a value exceeding the amount of the judgment debt, this bankruptcy notice would be set aside."

It will be observed that MAUGHAM, L.J., puts that passage in a tentative way and I had thought that that was going to be the substantial matter on this appeal, but I understood from counsel for the wife that he did not contest the accuracy of that passage as a proposition of law; for that reason I say no more about it, because it seems to me that what is true of a chattel or a piece of property must also be true of a circumscribed group or bundle of chattels. A

However not every demand will suffice. A demand made in bad faith would not be good enough. The debtor must satisfy the court that he has a genuine demand. There has indeed been considerable delay in pursuing the present demand, but this aspect of the case was never canvassed before the registrar. It is not easy for anybody to compile an inventory of household effects outside his control, and I do not feel that the delay has been such as to throw doubt on the bona fides of the demand which long preceded the judgment debt. B

In my opinion, however, a demand must be more than bona fide; the court must be satisfied that it has a reasonable probability of success. The evidence is thin on both sides, and this aspect of the case also seems not to have been considered before the registrar. My Lord has already read the material passages in the evidence and, therefore, I need not read them again before making a few short observations on them. Taking the wife's approximate valuation of the property at £6,000, which is far below that of the husband and unlikely to be excessive, the husband's demand need only succeed to the extent of about one-tenth to be effective for the present purpose. It is true that the husband has not sworn to any details, but he has sworn that he provided the whole of the purchase money. This may well not be wholly true, but on the wife's own evidence it is not wholly false. If it is said that the husband ought to have condescended to more detail, and I think he should, so ought the wife. There is nothing in her affidavit which suggests to me that the husband's claim is unlikely to succeed to the extent necessary for the present purpose, and his evidence is just enough to satisfy me that there is a reasonable probability that it will. C D E

Therefore, in my opinion, the requirements of s. 1 (1) (g) of the Bankruptcy Act, 1914, have been fulfilled. F

Appeal allowed: bankruptcy notice set aside.

Solicitors: *Kenneth Brown, Baker, Baker* (for the husband, the debtor);
Lewis & Lewis and Gisborne & Co. (for the wife, the creditor).

[*Reported by* HENRY SUMMERFIELD, Esq., *Barrister-at-Law.*]

A
TACZANOWSKA (otherwise ROTH) v. TACZANOWSKI
(KRYSTEK cited).

[COURT OF APPEAL (Hodson, Parker and Ormerod, L.J.J.), May 27, 28, 29, June 6, 1957.]

B *Marriage—Foreign marriage—Validity—Marriage in Italy of Polish nationals domiciled in Poland—Husband a member of the Allied forces in belligerent occupation of Italy—Ceremony performed by Polish army chaplain according to rites of Roman Catholic church—Not valid by lex loci celebrationis or under Polish law then in force, although valid under earlier Polish law—Whether valid at common law—Whether validated as an act of “internal administration” of Polish forces—Whether ceremony performed by chaplain “officiating under the orders of the commanding officer of a British army serving abroad”—Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 22—Allied Forces Act, 1940 (3 & 4 Geo. 6 c. 51), s. 1 (1)—Polish Resettlement Act, 1947 (10 & 11 Geo. 6 c. 19), s. 9.*

D In July, 1946, the petitioner and the respondent went through a ceremony of marriage in Italy. The parties were both Polish nationals and were domiciled in Poland. The respondent was a member of the Polish forces allied with the United Kingdom and, at the date of the ceremony, was serving in the Polish 2nd Corps which was then part of the Allied armed forces in occupation of Italy prior to any peace treaty with Italy. After Feb. 14, 1946, the Polish forces serving abroad were no longer recognised as part of the Polish army by the Polish (“Lublin”) government, which had been recognised as the government of Poland by the British government in July, 1945. The ceremony of marriage was performed according to the rites of the Roman Catholic church by a Roman Catholic priest serving as a Polish army chaplain. The marriage was not valid by Italian law since certain articles of the Italian Civil Code were not read to the parties by the officiating priest, nor was the ceremony registered in the Italian civil register. Italian law would have recognised a ceremony of marriage performed in Italy between two foreigners to be valid if it were performed according to the law of their common nationality, but in 1946 by a decree of the Polish (“Lublin”) government dated Sept. 25, 1945, the only form of marriage valid by Polish law was marriage before a civil registrar and the power of Polish army chaplains to perform valid marriages was revoked. There was no evidence that in 1946 the Allied forces in Italy were in any way subject to the laws of that country. From 1947 the parties had lived in England and claimed to be now domiciled in England. On a petition for nullity on the ground that the ceremony did not comply with the lex loci celebrationis, the respondent contended that the marriage was valid by English law (a) under the Foreign Marriage Act, 1892, s. 22*; (b) because it was an act of “internal administration” within the meaning of the Polish Resettlement Act, 1947, s. 9, and, therefore, validated by s. 9 (8)† of that Act; and (c) because the requirements of Italian law as to the form of the marriage did not apply, as the respondent was a member of a military force in belligerent occupation of Italy.

I **Held:** the principle stated in *Scrimshire v. Scrimshire* ((1752), 2 Hag. Con. 395), that the validity of a marriage depended on the lex loci celebrationis, did not apply in the case of a marriage in an occupied country by a

* The terms of s. 22, as originally enacted, are printed at p. 567, letter C, post, and see footnote thereto.

† The relevant terms of s. 9 (8) are printed at p. 568, letter G, post. The section was repealed by the Statute Law Revision Act, 1953, s. 1, Sch. 1.

member of the occupying forces (dicta of LORD STOWELL in *Ruding v. Smith* (1821), 2 Hag. Con. at p. 380 et seq., applied), and, as the ceremony of marriage between the parties fulfilled all the essentials of a common law marriage, it should be recognised as such, notwithstanding the foreign nationality and domicile of the parties at the date of the ceremony, since the common law conception of marriage knew no distinction of nationality, and, in the circumstances, it was unnecessary to look to the law of the domicile.

Per HODSON, L.J. (PARKER and ORMEROD, L.J.J., concurring): (i) although the application of s. 22 of the Foreign Marriage Act, 1892, was not limited in terms to marriage between parties of whom one at least was a British subject, the ceremony was not valid under that section because, on the evidence, the Polish 2nd Corps was an independent command, and, therefore, the chaplain who performed the ceremony was not "officiating under the orders of the commanding officer of a British army serving abroad", within s. 22 (see p. 568, letter B, post); the fact that the corps was under the operational command of an Allied army was too remote to justify the court in holding that the ceremony was valid under s. 22, even though, by the time of the ceremony, the corps had been disowned by the Polish government (see p. 568, letter C, post).

(ii) the ceremony was not rendered valid by English law by virtue of s. 9 (8) of the Polish Resettlement Act, 1947, as, although marriages by an army chaplain acting under the provisions of Polish law were matters of "internal administration" within s. 9 of the Act of 1947, the powers conferred by the Allied Forces Act, 1940, were powers to be exercised within the United Kingdom (see p. 569, letter A, post).

Decision of KARMINSKI, J. ([1956] 3 All E.R. 457) reversed.

[As to the *lex loci celebrationis* governing the forms and ceremonies of marriage, see 7 HALSBURY'S LAWS (3rd Edn.) 93, para. 168, note (l); and for cases on the subject, see 11 DIGEST (Repl.) 462-464, 953-971.]

As to the validity of a marriage at common law, see 7 HALSBURY'S LAWS (3rd Edn.) 94, para. 170, note (r).

For the Foreign Marriage Act, 1892, s. 22, as originally enacted, see 11 HALSBURY'S STATUTES (2nd Edn.) 795, note.

For the Allied Forces Act, 1940, s. 1, see 22 HALSBURY'S STATUTES (2nd Edn.) 682.

For the Polish Resettlement Act, 1947, s. 9, see 22 HALSBURY'S STATUTES (2nd Edn.) 695.]

Cases referred to:

- (1) *Scrimshire v. Scrimshire*, (1752), 2 Hag. Con. 395; 161 E.R. 782; 11 Digest (Repl.) 462, 955.
- (2) *Middleton v. Janverin*, (1802), 2 Hag. Con. 437; 161 E.R. 797; 11 Digest (Repl.) 462, 957.
- (3) *Berthiaume v. Dastous*, [1930] A.C. 79; 99 L.J.P.C. 66; 142 L.T. 54; 11 Digest (Repl.) 462, 954.
- (4) *Ruding v. Smith*, (1821), 2 Hag. Con. 371; 1 State Tr. N.S. 1054; 161 E.R. 774; 11 Digest (Repl.) 459, 930.
- (5) *Burn v. Farrar*, (1819), 2 Hag. Con. 369; 161 E.R. 773; 11 Digest (Repl.) 466, 995.
- (6) *R. v. Millis*, (1844), 10 Cl. & Fin. 534; 8 E.R. 844; 11 Digest (Repl.) 464, 970.
- (7) *R. v. Brampton*, (1808), 10 East, 282; 103 E.R. 782; 11 Digest (Repl.) 466, 994.
- (8) *Savenis v. Savenis*, [1950] S.A.S.R. 309; 11 Digest (Repl.) 461, 499.
- (9) *Alexander v. Jenkins*, [1892] 1 Q.B. 797; 61 L.J.Q.B. 634; 66 L.T. 391; 56 J.P. 452; 32 Digest 44, 463.

- A (10) *Maclean v. Cristall*, (1849), 7 Notes of Cases, Supp. xvii. Supreme Court of Judicature; 27 Digest (Repl.) 68, 157.
- (11) *Wolfenden v. Wolfenden*, [1945] 2 All E.R. 539; [1946] P. 61; 115 L.J.P. 1; 173 L.T. 301; 27 Digest (Repl.) 68, 465.
- (12) *Penhas (Isaac) v. Tan Soo Eng*, [1953] A.C. 304; 3rd Digest Supp.
- (13) *Pilinski v. Pilinska*, [1955] 1 All E.R. 631; 3rd Digest Supp.
- B (14) *Dalrymple v. Dalrymple*, (1811), 2 Hag. Con. 54; 161 E.R. 665; *on appeal*, (1814), 2 Hag. Con. 137, n.; 22 Digest (Repl.) 618, 7112.

Appeal.

This was an appeal by the husband respondent from a decision of KARMINSKI, J., on Oct. 8, 1956, and reported [1956] 3 All E.R. 457. The wife presented a petition dated June 15, 1955, for a declaration that her marriage which took place on July 16, 1946, in a Roman Catholic church in Italy, was null and void. By his answer the respondent alleged that the marriage was valid and subsisting and prayed for a decree of divorce on the ground of adultery and desertion. On Feb. 21, 1956, it was ordered that the issue of nullity be tried first before the issues of adultery and desertion. KARMINSKI, J., held the marriage was null and void because (i) the Polish Resettlement Act, 1947, did not provide a statutory basis for the validity of the marriage as the ceremony was performed in Italy; (ii) the Foreign Marriage Act, 1892, s. 22, did not apply, as neither the petitioner nor the respondent was a British subject; and (iii) although a marriage in common law form of a member of the armed forces occupying a foreign state would be recognised by the court when the marriage by the *lex loci celebrationis* was impossible or objectionable to the conscience, and although this principle extended to the marriage of a foreigner, in the present case the celebration of a marriage which would have been valid by Italian law had not been impossible.

Harold Brown, Q.C., and *N. H. Curtis-Raleigh* for the husband, the respondent.
R. F. Ormrod for the Queen's Proctor.

The wife, the petitioner, did not appear and was not represented.

F *Cur. adv. vult.*

June 6. The following judgments were read.

HODSON, L.J.: This is an appeal from an order of KARMINSKI, J., who, on Oct. 8, 1956, pronounced a decree of nullity of marriage on the petition of Krystyna Roth, spinster, against Stanislaw Taczanowski. The successful petitioner has not appeared or been represented to support the judgment under appeal, but the court has had the benefit of argument by counsel on behalf of the Queen's Proctor as *amicus curiae*.

The parties went through a form of marriage in the parish church of the Resurrectionists in Rome on July 16, 1946. They were Polish nationals, the petitioner being a civilian refugee who had been staying in a convent in Rome, and the respondent being an officer in the Polish 2nd Corps, then serving in Italy in the course of his military duties. The parties lived together until 1950, having from the early part of 1947 lived in England, where, it is pleaded, they were domiciled at the time of the institution of these proceedings on June 15, 1955. The ceremony was performed by a Roman Catholic priest then serving as a Polish army chaplain, and there is no question but that the parties intended to enter into marriage, which was followed by the birth of a child in November, 1947.

I The petitioner alleged that the ceremony was null and void because in form it did not comply with the *lex loci*, namely, Italian law. She relied on the rule established by the decision of SIR EDWARD SIMPSON, sitting in the Consistory Court of London, in *Scrimshire v. Scrimshire* (1) ((1752), 2 Hag. Con. 395). The principle is there clearly stated that in administering the law of this country the rights of the parties are to be determined by our law, which applies foreign law in such a case, since by entering into the marriage contract in another country the parties subject themselves to have the validity of the contract determined

by the laws of that country. In *Middleton v. Janverin* (2) ((1802), 2 Hag. Con. 437 at p. 446) SIR WILLIAM WYNNE referred to *Scrimshire v. Scrimshire* (1) in these words:

"... I also remember to have heard that the judgment was founded on great deliberation, and that LORD HARDWICKE, L.C., was consulted on it."

VISCOUNT DUNEDIN, giving the advice of the Privy Council in *Berthiaume v. Dastous* (3) ([1930] A.C. 79) said (*ibid.*, at p. 83):

"If the so-called marriage is no marriage in the place where it is celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage."

Thus, so far as forms and ceremonies are concerned, the general rule is that, where parties contract marriage in a country other than their own, they are taken to subject themselves to the law of that other country.

The petitioner contended that the law of Italy regulating form had not been complied with. It was conceded that the municipal law of Italy had not been followed, in that art. 143, art. 144 and art. 145 of the Italian Civil Code were not read over to the parties by the officiating priest, and in that the ceremony was not registered in the Italian civil register of marriage as required by Italian law. Italian law would, however, according to art. 226 of the general provisions preliminary to the Italian Civil Code, recognise the validity of the marriage if it was valid by Polish law, since that was at the material date the national law of both spouses.

By the old law of Poland prior to the establishment of the Lublin government* the marriage would have been valid. The relevant law which concerned the ecclesiastical organisation of the Army clergy was passed on Nov. 25, 1926, pursuant to a concordat between the Holy See and the Republic of Poland, and extended beyond the limits of the republic to places where there were Polish troops and chaplains. Under the heading "Jurisdiction of the Army Clergy", s. 10 reads:

"The field bishop shall exercise jurisdiction in respect of chaplains, all military persons and their families of Catholic denomination in the land forces and navy of the Republic of Poland."

Section 13 reads:

"With regard to the administering of the Blessed Sacrament of Marriage, the chaplain who has parish jurisdiction shall (a) publish the banns of the marriages of the military persons and their families (under his care); (b) solemnise legal and valid marriages of military persons and their families within his parochial jurisdiction."

Under the heading of "Keeping of Parish Registers", s. 20 reads:

"Army chaplains shall discharge the duties of 'civil registrars' with regard to military persons and their families according to the regulations made by the field bishop's curia."

On July 5, 1945, His Majesty's government recognised the new government of Poland, the so-called Lublin government, and Dr. Nissim, an Italian lawyer who gave evidence, stated that in his opinion the same recognition had been accorded by the government of Italy before the marriage of the parties. On Sept. 25, 1945, the Lublin government introduced a new matrimonial law with effect from Jan. 1, 1946, which provided that only a marriage contracted before an official of civil status should be valid in the eyes of the state. By art. 1 of the introductory provisions, it was provided that all previous provisions dealt with by the national law should cease to have effect, and s. 20 of the statute of Nov. 25, 1926, was expressly repealed. By a Note dated Feb. 14, 1946, the Polish

* The Polish Provisional Government of National Unity.

A Ministry of Foreign Affairs stated that as from that date the Polish forces abroad could no longer be considered units of the Polish army.

I agree with the reasoning of the learned judge and with his conclusion, having heard evidence from eminent Polish lawyers, when he found, notwithstanding an ingenious theory put forward by Dr. Bloch in support of the marriage, that there was no escape from the finding that by Polish law the ceremony of marriage in
B question was invalid. Professor Kuratowski, whose evidence was accepted, was emphatically of this opinion. This conclusion of fact is not affected by a doubt expressed by an Italian lawyer, who, under cross-examination, doubted whether the Italian courts would recognise a law passed by way of unilateral repudiation of a concordat with the Holy See.

C Reliance was placed on s. 22 of the Foreign Marriage Act, 1892, in order to save the marriage. I cannot, however, agree that this section avails the respondent. Section 22 [as originally enacted*] reads:

"It is hereby declared that all marriages solemnised within the British lines by any chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad shall be as valid in law as if the same had been solemnised within the United Kingdom with a due observance of all forms required by law."

D It is true that this section is not limited in terms to marriages between parties of whom at least one is a British subject. It re-enacted Stat. 4 Geo. 4 c. 91 (1823)†, s. 1, which read:

E "Be it declared and enacted, and it is hereby declared and enacted by the King's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That all such marriages as aforesaid shall be deemed and held to be as valid in law as if the same had been solemnised within His Majesty's dominions, with a due observance of all forms required by law."

F The preamble was:

G "Whereas it is expedient to relieve the minds of all His Majesty's subjects from any doubt concerning the validity of marriages solemnized by a minister of the Church of England and in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British Army serving abroad."

H That statute was, on the face of it, of similar general application. In my opinion, the construction of the section was not limited by the preamble to marriages contracted by spouses of whom one was a British subject. PROFESSOR DICEY was of this opinion (see DICEY'S CONFLICT OF LAWS (2nd Edn.‡) (1908) at p. 623), although other learned writers have taken a different view. This construction is,

I * The Foreign Marriage Act, 1947, s. 2, substituted a new s. 22, as from Feb. 1, 1948 (see 11 HALSBURY'S STATUTES (2nd Edn.) 755). By s. 1 of the Act of 1947, s. 22 of the Act of 1947, is deemed, as respects marriages solemnised before Feb. 1, 1948, to have had effect as if (a) the reference to a British army serving abroad were construed as referring to any part of the naval, military or air forces of His Majesty so serving; and (b) the reference to the British lines were construed as referring to any place at which any part of the said forces serving abroad was stationed.

† This Act, which was repealed by the Foreign Marriage Act, 1892, s. 26 and Schedule, was entitled "An Act to relieve His Majesty's subjects from all doubts concerning the validity of certain marriages solemnised abroad."

‡ See also 6th Edn. (1949), at p. 773.

I think, supported by contrasting the language of Stat. 4 Geo. 4 c. 91, with an earlier statute passed in the same year, Stat. 4 Geo. 4 c. 67, dealing with marriages of British subjects in the British factory at St. Petersburg. There the reference was to marriages of British subjects. Further, it would seem anomalous that, while aliens may serve in the British Forces, they should not have the privileges conferred by the section. The difficulty lies in the words "chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad." To my mind, on the evidence, the Polish 2nd Corps was an independent command and the chaplain who performed the ceremony between the parties cannot truly be regarded as "officiating under the orders of the commanding officer of a British army serving abroad." He was acting under the orders of his own field bishop, who in turn acted under the direction of the Polish commander, General Anders. Moreover, the Polish commander-in-chief, General Sikorski, had in 1941 given instructions as to, *inter alia*, "the keeping of registers and the issue of certificates of marriage". I agree with the view tentatively expressed by the learned judge that the fact that the Polish 2nd Corps was under the operational command of the Allied 8th Army is too remote to justify the court in holding that this ceremony is valid under s. 22 of the Foreign Marriage Act, 1892, even though that corps had by the time of the ceremony, been disowned by the Polish government.

It was argued here and below, however, that the Polish Resettlement Act, 1947, afforded a statutory basis in English law for holding that the ceremony was valid. Section 1 (1) reads:

"The Minister of Pensions may, with the consent of the Treasury, make a scheme for applying, in relation to the disablement or death, in consequence of service under British command, of members of . . . (b) the Polish armed forces organised and employed under British command in pursuance of the agreement made [between His Majesty's Government and the government of Poland] on Aug. 5, 1940 . . ."

That refers to an agreement which was before the court and to which I need not refer. Section 9 referred* throughout to the Polish forces mentioned in para. (a) and para. (b) of s. 1 (1) and contained provisions as to the discipline and internal administration of certain Polish forces. Section 9 (8) provided:

"As respects any period between Jan. 1, 1945, and the passing of this Act, the powers conferred by s. 1 (1) of the Allied Forces Act, 1940, shall be deemed to have been exercisable in relation to the said forces by reference to the law of Poland in force on that day and as if the said forces had not ceased to be recognised by the government of Poland, and any Order in Council made under or by virtue of that Act shall be deemed to have had effect accordingly."

Section 1 (1) of the Allied Forces Act, 1940, provided†:

"Where any naval, military or air forces of any foreign power allied with His Majesty are for the time being present in the United Kingdom or on board any of His Majesty's ships or aircraft, the naval, military and air force courts and authorities of that Power may, subject to the provisions of this Act, exercise within the United Kingdom or on board any such ship or aircraft in relation to members of those forces, in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that Power."

The question is whether this saving of the old law of Poland renders valid by English law the ceremony between the parties. Without going into the matter in great detail, I am prepared to accept that marriages by an army chaplain

* Section 9 was repealed by the Statute Law Revision Act, 1953, s. 1 and Sch. 1.

† The Act was repealed as from June 12, 1954, by the Visiting Forces Act, 1952.

A acting under the provisions of Polish law to which I have referred are matters of internal administration; but the difficulty is that the powers conferred by the Act of 1940 are powers to be exercised within the United Kingdom, and I cannot regard the performance of a ceremony of marriage in Italy as coming under this heading, even though, as counsel for the respondent argued, the authority under which the chaplain acted was itself situate in the United Kingdom at the
 B relevant time. In my judgment, the relevant authority in this matter is the chaplain who officiated at the ceremony in Italy, and nothing in the Polish Resettlement Act, 1947, enables the court to say that by English law this ceremony should be held to be valid.

C There remains the argument put forward by the Queen's Proctor and supported by the respondent that the ceremony was valid at common law and the requirements of the *lex loci* as to form did not apply.

At the material date the Polish land forces in Italy were forces in belligerent occupation of Italian territory and therefore, it is said, exempt from the requirements of the *lex loci*. KARMINSKI, J., pointed out ([1956] 3 All E.R. at p. 464) that the position of such persons has always been recognised by English law as requiring special consideration with regard to formalities. It is true that they
 D may in fact submit to the *lex loci*, but there is no evidence that the parties did so. The ceremony was, indeed, performed in an Italian church, but by a Polish army chaplain acting as a member of the Polish forces, and no attempt was made to comply with the local law.

This matter was considered by LORD STOWELL in *Ruding v. Smith* (4) ((1821), 2 Hag. Con. 371) after the Napoleonic wars. Before this case he had himself
 E noticed the question in *Burn v. Farrar* (5) ((1819), 2 Hag. Con. 369), reported immediately before *Ruding v. Smith* (4). The report of *Burn v. Farrar* (5) reads:

"This was a case of nullity of marriage, instituted on the part of the wife, with reference to the circumstances of the marriage, as celebrated in France, by the chaplain of the British forces, under the Duke of Wellington, and not in conformity to the law of France, as pleaded and set forth. Upon
 F admission of the libel in poenam, no appearance having been given for the husband, Dr. Swabey described the nature of the case, as above stated, observing that it would be, when proved, a legal ground of nullity; as marriage, like all other contracts, should be celebrated according to the *lex loci*."

G LORD STOWELL (then SIR WILLIAM SCOTT) said (2 Hag. Con. at p. 370):

"I shall admit this libel to proof, without deciding at present on the effect which it may have if proved; but merely to assist the party proceeding in procuring, if possible, an answer to it from the opposite party. I have received several letters addressed to me by English clergymen and others in
 H foreign countries, relative to marriages of this kind, which letters I have felt it to be my duty not to answer; as it certainly is no part of my public duty to answer private inquiries upon questions which may come judicially before me. Some of the marriages which gave occasion to those letters have been contracted under circumstances similar to the present; and it will be too much to expect that I should instantly give a judgment upon
 I such questions in an undefended suit, and in which I can hear no argument in support of the validity of the marriage. It appears that the husband here was an officer of the army of occupation; and it may, therefore, very well be doubted whether he was at all subject to the French law, as pleaded in the libel. I shall give no decided opinion on that point at present; but I shall admit the libel, in order that the party may be the better enabled to obtain an appearance, and bring the cause to a regular decision upon proper argument."

LORD STOWELL in *Ruding v. Smith* (4) did not found his judgment on the proposition now contended for, although he said nothing to the contrary, and it is, therefore, necessary to consider the judgment in some detail. The suit was for nullity to set aside a marriage celebrated in a room in a private house between British subjects at the Cape of Good Hope on Oct. 2, 1796, by the chaplain of the English forces by virtue of a licence or permission from the general officer commanding the British Forces in the colony. DR. JENNER and DR. PHILLIMORE argued that the general principle of the *lex loci* could not apply to persons being at the Cape, as British subjects, under the protection of the British forces then in possession of the settlement by virtue of the recent surrender, even though in that case the terms of the capitulation might have preserved to the inhabitants the enjoyment of their former laws. DR. JENNER did not feel himself called on to maintain the proposition that all marriages abroad according to the British law would be good, but submitted that there were no cases to the contrary, and rested his case on the impossibility of subjecting all individuals accompanying a conquering army to the laws of the conquered country.

LORD STOWELL held that the terms of the capitulation preserving the prerogatives which the Dutch enjoyed were not binding on the conquerors. He rejected the submission that the *lex loci* applied to the conquerors. He said (2 Hag. Con. at p. 380):

“ Now if that be true, that the law binds the British conqueror immediately upon the capitulation (there being no express covenant to that effect) it must be either from some known rule of the law of nations, which subjects the conquerors to the laws of the conquered, or from some peculiar principle of the law of England, which imposes such an obligation upon the British conquerors of the possessions of the enemy; for clearly the Dutch law, taken by itself, cannot directly and by its own force bind them. Dutch authority could not impose it, for Dutch authority had ceased; and a Dutch court, taking upon itself to force this law upon British parties only and in transactions purely British, might be thought to put forward no very just or moderate pretension; unless some authority superior to it had imparted to it a force which it did not itself directly possess. Such an authority if it exists at all, must be found either in the law of nations or in the British law, for no other authority could give it. I am not aware that any such principle or practice exists in the general law of nations. It sometimes happens that the conquered are left in possession of their own laws—more frequently the laws of the conquerors are imposed upon them; and sometimes the conquerors, if they settle in the country, are content to adopt for their own use such part of the laws prevailing before the conquest as they may find convenient under the change of authority to retain. I presume that there is no legal difference between a conquered country and a conquered colony in this respect, as far as general law is concerned; and I am yet to seek for any principle derivable from that law which bows the conquerors of a country to the legal institutions of the conquered. Such a principle may be attended with most severe inconvenience in its operation. The laws may be harsh and oppressive in the extreme; may contain institutions abhorrent to all the feelings, and opinions, and habits of the conquerors: at any rate they can be but imperfectly understood; and that they should all of them instantaneously attach and continue obligatory upon them till their own government had time to learn them, and select and correct them, is a proposition which I think a professor of general law would be inclined to consider cautiously before it could be unreservedly admitted.”

Later in his judgment LORD STOWELL said (*ibid.*, at pp. 390, 391):

“ It is true, indeed, that English decisions have established this rule, that a foreign marriage, valid according to the law of the place where celebrated, is good every where else; but they have not *à converso* established that

A marriages of British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England. It is therefore certainly to be advised that the safest course is always to be married according to the law of the country, for then no question can be stirred; but if this cannot be done on account of legal or religious difficulties, the law of this country does not say that its subjects shall not marry abroad. And even in cases where no difficulties of that insuperable magnitude exist, yet, if a contrary practice has been sanctioned by long acquiescence and acceptance of the one country, that has silently permitted such marriages, and of the other, that has silently accepted them, the courts of this country, I presume, would not incline to shake their validity, upon these large and general theories, encountered, as they are, by numerous exceptions in the practice of nations."

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LORD STOWELL'S conclusion was, however, of a guarded and limited nature, for he said at the conclusion of his judgment (*ibid.*, at p. 394):

"In my opinion, this marriage (for I desire to be understood as not extending this decision beyond cases including nearly the same circumstances) rests upon solid foundations. On the distinct British character of the parties—on their independence of the Dutch law, in their own British transactions—on the insuperable difficulties of obtaining any marriage conformable to the Dutch law—on the countenance given by British authority, and British ministration to this British transaction—upon the whole country being under British dominion—and upon the other grounds to which I have adverted; and I therefore dismiss this libel, as insufficient, if proved for the conclusion its prays."

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This authority for an exception to the *lex loci* rule is recognised by the citation of the case by the Privy Council in *Berthiaume v. Dastous* (3). The decision is, however, only to be taken as authority for the particular case, and, as KARMINSKI, J., noticed ([1956] 3 All E.R. at p. 464), the decision was based in part on the insuperable difficulties of obtaining any marriage according to Dutch law. Therefore, holding, as he rightly did, that there were no such insuperable difficulties in this case in the celebration of a marriage by Italian law, he found himself unable to treat this case as one in which the exception to the rule applied. Indeed, it is right to say that, so far as the researches of counsel have gone, there is no authority which goes the whole length of the submissions of the Queen's

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Proctor in this case.

LORD STOWELL laid emphasis on the British character of the parties, but there is, as KARMINSKI, J., also pointed out, nothing in the judgment in *Ruding v. Smith* (4) which would indicate that he would necessarily have refused to take the same view in the case of a foreigner. LORD STOWELL'S observations in the course of his judgment show that he relied to a great extent on the mere fact of the position of a conquering army in a conquered country—a situation which exists in the present case, and I do not see in principle why, if this consideration is taken into account, it should not prevail even though the possibility of submitting to the laws of the conquered exists."

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The principle in *Scrimshire v. Scrimshire* (1) that parties, by entering into a marriage contract in a foreign country, subject themselves to have the validity of it determined by the laws of that country, does not apply in the case of a contract performed in an occupied country by a member of the occupying forces.

I

SIR EDWARD SIMPSON said (2 Hag. Con. at p. 408):

"There can be no doubt, then, but that both the parties in this cause, though they were English subjects, obtained a forum, by virtue of the contract, in France. By entering into the marriage contract there, they subjected themselves to have the validity of it determined by the laws of that country."

Later in his judgment he said (*ibid.*, at p. 412):

"As both the parties, by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage; and as their mutual intention must be presumed to be that it should be a marriage or not, according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage or contract, 'ad aliud examen', to be tried by different laws than those of the place where the parties contracted. They may change the forum, but they must be tried by the laws of the country which they left. This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is conformable to what is laid down in our books, and what is practised in all civilised countries, and what is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such."

This reasoning has no application when one is considering the position of a conquering army in a conquered country. The present case is not complicated by any terms of capitulation and there was no evidence that in 1946 the Allied forces in Italy were in any way subject to the laws of that country. I see no reason, therefore, why the validity of the ceremony in form should be governed by the *lex loci* in the case which we are now considering.

If it be said that, since the parties are not British subjects, the common law of England does not apply to them, my answer is that such is the law *prima facie* to be administered in the courts of this country. There is no question here of personal incapacity to marry or any other consideration apart from form for which one would look to the law of the domicile, and there would be a grave difficulty in applying the law of the domicile or nationality, amounting to an impossibility in some cases, where a marriage had been celebrated between persons of different nations or different domicils. In dealing with form, this obstacle to applying the law of the domicile was pointed out by SIR EDWARD SIMPSON in *Scrimshire v. Scrimshire* (1) (2 Hag. Con. at p. 417):

"If that principle* is not to govern such cases, what is to be the rule, where one party is domiciled, and the other not? The *jus gentium* is the law of every country, and is obligatory on the subjects of every country. Every country takes notice of it; and this court observing that law, in determining upon this case, cannot be said to determine English rights by the laws of France, but by the law of England, of which the *jus gentium* is part."

The common law conception of marriage knows no distinction of race or nationality. The effect of the decision in *R. v. Millis* (6) ((1844), 10 Cl. & Fin. 534) is that such a marriage, to be valid, must be celebrated before an episcopally ordained clergyman. A priest of the Church of Rome is in the same position as an Anglican clergyman; see *R. v. Brampton* (7) ((1808), 10 East, 282).

The common law conception of marriage is thus stated in the speech of LORD BROUGHAM in *R. v. Millis* (6) (10 Cl. & Fin. at p. 719):

"Now, by the civil law, and by the earlier ecclesiastical law,—indeed by that law until the 16th century,—marriage was a mere consensual contract, only differing from other contracts of this class in being indissoluble even by the consent of the contracting parties. It was always deemed to be a contract executed without any part performance; so that the maxim was undisputed, and it was peremptory, 'Consensus, non concubitus, facit nuptias vel matrimonium'."

*The principle that "it is the *jus gentium*, that the solemnities of the different nations with respect to marriages should be observed, and that contracts of this kind are to be determined by the laws of the country where they are made."

A The ceremony of marriage in the present case fulfils all the essentials of a common law marriage, and, in my opinion, should be recognised as such notwithstanding the foreign nationality and domicile of the parties at the date of the ceremony. The same conclusion was reached in *Savenis v. Savenis* (8) ([1950] S.A.S.R. 309), a decision of MAYO, J., where the facts have some similarity to those with which we are here concerned. The parties were Lithuanians who
B were married on Nov. 1, 1945, in Bavaria in a Roman Catholic church according to the ritual of that church without complying with the German law as to form. Lithuania was then incorporated in the U.S.S.R. and warfare with Germany had ceased. Compliance with the local law was impossible, since no registrars were available. MAYO, J., having regard to *Ruding v. Smith* (4) and other cases, said ([1950] S.A.S.R. at p. 311):

C "If the matter be res integra, in circumstances where a marriage cannot be lawfully solemnised in accordance with the laws of some territory owing to chaotic conditions brought about (inter alia) by warfare, and if the country in which the parties are, or were formerly, domiciled is itself overrun, the government being taken over by an alien power, then in such a case so far as
D our courts are concerned I think it would be proper to extend (if it be necessary) the area of legal recognition given to marriages that conform to our own common law: compare LORD HERSCHELL'S remarks in *Alexander v. Jenkins* (9) ([1892] 1 Q.B. 797 at p. 801). Apart from local measures, such as provision for the licensing of celebrants, and for the recording of marriages, which do not go to the fundamentals of the actual rite, the ceremony performed on Nov. 1, 1945, was such as would be given legal
E recognition in all civilised countries, or at least in many such. The marriage was given ecclesiastical sanction. If in such circumstances a marriage is to be regarded as null and void, that will have to be laid down elsewhere."

F Thus MAYO, J., having rejected the lex loci for the reasons which he gave, looked, not to the law of the domicile (Lithuania), but to the common law.

In conclusion, I would only add that the court was referred to a number of cases of which *Maclean v. Cristall* (10) ((1849), 7 Notes of Cases, Supp. xvii. Supreme Court of Judicature) is an example, and *Wolfenden v. Wolfenden* (11) ([1945] 2 All E.R. 539), which was expressly approved by the Privy Council in *Isaac Penhas v. Tan Soo Eng* (12) ([1953] A.C. 304), is another example, which
G are apparent but not real exceptions to the lex loci rule, since they are cases in which British subjects were held to have taken with them to a British colony so much of the common law as was applicable to their present situation, so that, in truth, the law applied was the law as found by the court in the particular cases to be the lex loci itself. These cases cannot, in my opinion, be directly relevant to the problem under consideration, since in the present case there is no
H question of the subjects of a paramount power taking with them their own laws into colonies where those subjects have settled. I would allow the appeal.

PARKER, L.J.: I agree, and would only add a few words on the point argued by counsel for the Queen's Proctor.

I It is, of course, a well-established principle of English law that the formal validity of a marriage depends on the lex loci celebrationis. I need only refer to what was said by VISCOUNT DUNEDIN in *Berthiaume v. Dastous* (3) ([1930] A.C. 79 at p. 83):

"If a marriage is good by the laws of the country where it is effected, it is good all the world over, no matter whether the proceeding or ceremony which constituted marriage according to the law of the place would or would not constitute marriage in the country of the domicile of one or other of the spouses. If the so-called marriage is no marriage in the place where it is

celebrated, there is no marriage anywhere, although the ceremony or proceeding if conducted in the place of the parties' domicile would be considered a good marriage."

It is, however, clear that this is not an absolute rule. Thus a marriage celebrated in accordance with the Foreign Marriage Acts, 1892 to 1947, is valid notwithstanding that the form does not comply with the *lex loci*. Again, circumstances in the foreign country may be such that it is impossible for the marriage to be performed according to the *lex loci*. Thus in *Savenis v. Savenis* (8) ([1950] S.A.S.R. 309), the conditions in Germany, where the marriage was performed, were such that a valid marriage according to German law could not be performed. There were no registrars, before whom alone a valid marriage was possible. Again, in *Ruding v. Smith* (4) ((1821), 2 Hag. Con. 371), one, at any rate, of the grounds of LORD STOWELL's judgment was the insuperable difficulty of getting married at the time by Dutch law. It is sometimes said that another exception arises in the case of British colonists and settlers, see, for example, *Wolfenden v. Wolfenden* (11) ([1945] 2 All E.R. 539) and *Isaac Penhas v. Tan Soo Eng* (12) ([1953] A.C. 304). Such cases are, however, only apparent exceptions, since I think that the ratio decidendi was that the English common law, or, rather, so much of it as is applicable in the circumstances, has become part of the *lex loci*.

In the present case, however, there was no obstacle to the performance of a valid ceremony of marriage in Italy according to Italian law, and that being so, the learned judge felt constrained to hold that there was nothing to displace the *lex loci*. Again, in *Pilinski v. Pilinska* (13) ([1955] 1 All E.R. 631), Mr. Commissioner LATEY, Q.C., for the same reason felt unable to depart from that law. In other words, they took the view that the only permissible departure from the *lex loci* arises in the case of impossibility. Whether this contention is valid depends, I think, on the proper view to be taken of the reasons for looking to the *lex loci*. It is fundamental to remember that what our courts administer is English law. Thus, in *Dalrymple v. Dalrymple* (14) ((1811), 2 Hag. Con. 54), in connexion with a marriage in Scotland, SIR WILLIAM SCOTT said (*ibid.*, at pp. 58, 59):

"Being entertained in an English court, it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country, where, if they exist at all, they had their origin. Having furnished this principle the law of England withdraws altogether and leaves the legal question to the exclusive judgment of the law of Scotland."

The first case to establish the principle that the formal validity of a marriage depends on the *lex loci* was *Scrimshire v. Scrimshire* (1) ((1752), 2 Hag. Con. 395), printed from a manuscript note of SIR EDWARD SIMPSON, communicated by Dr. Swabey. Of that decision SIR WILLIAM WYNNE, in *Middleton v. Janverin* (2) ((1802), 2 Hag. Con. 437 at p. 446), said:

"But I also remember to have heard that the judgment was founded on great deliberation, and that LORD HARDWICKE, L.C., was consulted on it."

The law stated in *Scrimshire v. Scrimshire* (1) has stood ever since and the decision has received constant approval from the highest source. SIR EDWARD SIMPSON said (2 Hag. Con. at p. 408):

"There can be no doubt, then, but that both the parties in this cause, though they were English subjects, obtained a forum, by virtue of the contract, in France. By entering into the marriage contract there, they subjected themselves to have the validity of it determined by the laws of that country."

A Again, he said (*ibid.*, at p. 412):

“As both the parties, by celebrating the marriage in France, have subjected themselves to the law of that country relating to marriage; and as their mutual intention must be presumed to be that it should be a marriage or not, according to the laws of France, I apprehend it is not in the power of one of the parties, by leaving the place, to draw the question of the marriage or contract, ‘*ad aliud examen*’, to be tried by different laws than those of the place where the parties contracted. They may change the forum, but they must be tried by the laws of the country which they left. This doctrine of trying contracts, especially those of marriage, according to the laws of the country where they were made, is conformable to what is laid down in our books, and what is practised in all civilised countries, and what is agreeable to the law of nations, which is the law of every particular country, and taken notice of as such.”

B If, however, the rule is based on the fact that the parties must be taken to have subjected themselves to the law of the country where the marriage took place, what is the position of a party who is a member of a military force in belligerent occupation of that country? No doubt, it is often physically possible for him to marry according to the laws of that country, but, if he does not in fact subject himself to that law, what ground is there for presuming that he has done so? The law of nations certainly does not demand that result. I think that LORD STOWELL (then SIR WILLIAM SCOTT) must have had this point in mind when, in *Burn v. Farrar* (5) ((1819), 2 Hag. Con. 369), he said (*ibid.*, at p. 370):

F “It appears that the husband here was an officer of the army of occupation; and it may, therefore, very well be doubted whether he was at all subject to the French law, as pleaded in the libel. I shall give no decided opinion on that point at present; but I shall admit the libel, in order that the party may be the better enabled to obtain an appearance, and bring the cause to a regular decision upon proper argument.”

G The matter, however, never came to trial. Two years later LORD STOWELL gave the decision in *Ruding v. Smith* (4). He might, it seems to me, have decided that case on this ground. He was, however, anxious not to go further than he needed, and his decision rests (2 Hag. Con. at p. 394) on the particular facts of the case, namely:

H “On the distinct British character of the parties—on their independence of the Dutch law, in their own British transactions—on the insuperable difficulties of obtaining any marriage conformable to the Dutch law—on the countenance given by British authority, and British ministration to this British transaction—upon the whole country being under British dominion—and upon the other grounds to which I have adverted . . .”

At the same time he said nothing in conflict with this view. Indeed, in considering whether there was an principle “which bows the conquerors of a country to the legal institutions of the conquered”, he said (*ibid.*, at p. 380): “I am not aware that any such principle or practice exists in the general law of nations.”

I In my judgment we should not, in such a case as this, look to the *lex loci*, nor do I see any reason why we should look to the law of the domicile of the spouses at the time of the marriage. No doubt, English law will look at the law of domicile to determine capacity, but for no other purpose. Indeed, if English law were to look to the law of the domicile, what would be the position where the two spouses had different domicils? In my judgment, there is no authority or reason which requires us to look to any other law, once the *lex loci* is inapplicable. I agree in this with MAYO, J., in *Savenis v. Savenis* (8). That being so, the only question is whether the marriage in this case is valid under the common law, and for the

reasons given by my Lord I think that it is. Accordingly I would allow this appeal. A

ORMEROD, L.J.: I agree and would only wish to add a few words on the question of the validity of this marriage as a common law marriage. As the learned judge has found, the parties went through a ceremony of marriage in Rome not only with the desire of entering into a valid marriage, but in the belief that the ceremony was effective; and they lived together as man and wife for a period of four years after the marriage, during which time a child was born to them. He felt compelled, however, to declare the marriage null and void on the ground that on the authorities the law governing the case must be the *lex loci celebrationis*. As I understand his judgment, he based his decision on the view that the *lex loci* must prevail unless a marriage by that law was impossible or at least contrary to conscience, and he referred to the words in the final paragraph of the judgment of LORD STOWELL in *Ruding v. Smith* (4) ((1821), 2 Hag. Con. 371), where undoubtedly one of the reasons for declaring the marriage to be valid was the insuperable difficulty of obtaining any marriage conformable to the Dutch law. LORD STOWELL, however, clearly had in mind the fact that the husband had gone to the Cape under orders as a member of an occupying authority. He said (*ibid.*, at p. 389): B C D

“The husband goes there, not as a volunteer or a settler, by intention of his own, or there to remain; but in the character of a British soldier, in the prosecution of a further voyage directed by British authority. He does not put himself under the law of the place; he goes there neither to purchase, sue, nor live.” E

It was unnecessary for LORD STOWELL, in the circumstances of *Ruding v. Smith* (4), to decide that the *lex loci* should not apply on the ground that the parties should not be deemed to have submitted to the laws of the country in which the marriage took place. But that he had considered the question is clear from his short judgment in *Burn v. Farrar* (5) ((1819), 2 Hag. Con. 369), a case which arose some two years earlier than *Ruding v. Smith* (4), and he might well have decided the later case on that ground had the necessity arisen. F

If the true reason for application of the *lex loci* is based on the principle that the parties shall be deemed to have submitted to it, then it seems difficult to apply that principle to a case such as the one at present under consideration, where the husband was in Italy not from choice, but under the orders of his military superiors as a member of an occupying army. There can, I think, be no doubt on the learned judge's findings that this marriage was in a form recognised by the courts of this country as a common law marriage, and if the *lex loci* does not apply in this case—and, in my view, it does not—then for the reasons which have already been given in the judgments which have been read, I agree that this marriage should be declared to be valid, and I agree that the appeal should be allowed. G H

Appeal allowed.

Solicitors: *Lawrence & Co.* (for the respondent); *Queen's Proctor.*

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

A

BRIDGES v. MEES.

[CHANCERY DIVISION (Harman, J.), May 28, 29, June 6, 1957.]

Land Registration—Overriding interest—Rights under the Limitation Acts—Rights of a person in actual occupation of the land—Purchaser paying purchase price—No conveyance—Purchaser in possession more than twelve years—Vendor conveying to third party—Third party registered as proprietor—Land Registration Act, 1925 (15 & 16 Geo. 5 c. 21), s. 69 (1), s. 70 (1) (f) (g)—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 9 (1), s. 10 (1).

Limitation of Action—Trustee—Land—Purchaser paying purchase price and taking possession—No conveyance—Acquisition by purchaser of title by adverse possession—Person in whose favour the period of limitation can run—Limitation Act, 1939 (2 & 3 Geo. 6 c. 21), s. 9 (1), s. 10 (1).

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In April, 1936, the plaintiff, being then the registered proprietor of No. 6, Priory Road, Surbiton, contracted with a company to purchase from it a strip of land at the back of No. 6 and of the adjoining property, No. 8, Priory Road, of which the defendant was the registered proprietor. The plaintiff paid a deposit of £2, obtained a written memorandum of receipt for the deposit and his purchase, entered into occupation of the strip of land and thereafter retained possession of it without any interference by the company. He completed payment of the purchase price (£7) in 1937, but the land was never transferred to him, nor was any entry made on the register at the Land Registry to protect his rights. In 1955 the company went into liquidation, and in that year the defendant offered to buy the strip of land and the liquidator agreed to sell to the defendant for £5 such rights in the land as the company had. The company by its liquidator conveyed (as trustee) the strip of land to the defendant, and on Apr. 13, 1956, the defendant was entered on the register as proprietor with absolute title. The plaintiff claimed to be beneficial owner of the strip of land and claimed rectification of the register.

Held: the defendant (being seised of an estate in fee simple in the strip of land by virtue of s. 69 (1) of the Land Registration Act, 1925) was trustee of the land for the plaintiff who was entitled to a transfer of the land or to rectification of the register by entering his name as proprietor with absolute title, for the following reasons—

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(i) after the company had received full payment of the purchase price in 1937, it became a bare trustee of the legal fee simple for the plaintiff and its title was barred under the Limitation Act, 1939, s. 10 (1), by the plaintiff's subsequent possession for twelve years (the plaintiff being a "person in whose favour the period of limitation can run" within s. 10 (1)); and the title acquired by the defendant as registered proprietor was subject to the rights of the plaintiff under the Act of 1939 as they were overriding interests within s. 70 (1) (f) of the Land Registration Act, 1925.

Dictum of KEKEWICH, J., in *Re Cussons, Ltd.* ((1904), 73 L.J.Ch. at p. 298) applied.

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(ii) overriding interests within s. 70 (1) (g) of the Land Registration Act, 1925, were not limited to such as could not be protected by entering a caution on the register, and the defendant's title as registered proprietor was therefore subject to the overriding interests of the plaintiff as being a "person in actual occupation of the land". such interests being his equitable estate under the contract of 1936 and his right to bring an action for specific performance of the contract.

Per CURIAM: before 1939, the cestui que trust, having regard to a proviso to the Real Property Limitation Act, 1833, s. 7, could not acquire a title against the trustee. That proviso is omitted from the corresponding

section, s. 9 (1) of the Limitation Act, 1939, with the result that time can now run in favour of the cestui que trust (see p. 581, letter F, post). A

[For the Land Registration Act, 1925, s. 69 (1) and s. 70 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 1000 and 1002; and for the Limitation Act, 1939, s. 7 (3), s. 9 (1) and s. 10 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 1169, 1170 and 1171.]

Cases referred to:

- (1) *Thomas v. Thomas*, (1855), 2 K. & J. 79; 25 L.J.Ch. 159; 69 E.R. 701; 22 Digest (Repl.) 156, 1420.
- (2) *Corea v. Appuhamy*, [1912] A.C. 230; 81 L.J.C.P. 151; 105 L.T. 836; 22 Digest (Repl.) 156, 1421.
- (3) *Re Cussons, Ltd.*, (1904), 73 L.J.Ch. 296; 11 Mans. 192; 32 Digest 453, 1197. C
- (4) *Coventry Permanent Economic Building Society v. Jones*, [1951] 1 All E.R. 901; 2nd Digest Supp.
- (5) *Hunt v. Luck*, [1901] 1 Ch. 45; 70 L.J.Ch. 30; 83 L.T. 479; *affd.* C.A., [1902] 1 Ch. 428; 71 L.J.Ch. 239; 86 L.T. 68; 35 Digest 469, 2044.
- (6) *Woolwich Equitable Building Society v. Marshall*, [1951] 2 All E.R. 769; [1952] Ch. 1; 2nd Digest Supp. D
- (7) *Mornington Permanent Building Society v. Kenway*, [1953] 1 All E.R. 951; [1953] Ch. 382; 3rd Digest Supp.

Action.

The plaintiff was the occupier and registered owner of the freehold of No. 6, Priory Road, Surbiton in the County of Surrey. The defendant was the occupier and registered owner of the freehold of No. 8, Priory Road aforesaid. The two properties adjoined and at the rear there was a small quadrangular piece of land (the "disputed land") which was the subject of this action. The plaintiff alleged that the defendant held the legal estate in the disputed land in trust for the plaintiff by virtue of an oral agreement, made on or about Apr. 6, 1936, by the plaintiff with the then owner or of the joint effect of s. 4 and s. 16 of the Limitation Act, 1939, and s. 70 and s. 75 of the Land Registration Act, 1925; and further or alternatively that the plaintiff had at all material times been in actual occupation of the disputed land and was entitled to an overriding interest therein within s. 70 of the Land Registration Act, 1925. E

The plaintiff claimed (i) a declaration that he was beneficially entitled to the disputed land in fee simple; (ii) rectification accordingly of the register of the relevant title at H.M. Land Registry; (iii) alternatively, an order on the defendant to execute a transfer of the disputed land in favour of the plaintiff; (iv) an injunction restraining the defendant from trespassing on the disputed land; and (v) damages for trespass. The defendant denied the plaintiff's allegations and counterclaimed for an order restraining the plaintiff from trespassing on the disputed land and for damages. F

Robert S. Lazarus for the plaintiff.

S. L. Newcombe for the defendant.

Cur. adv. vult.

June 6. **HARMAN, J.**, read the following judgment: In January, 1932, a company known as Surbiton (Hook) Estates Co., Ltd., became registered proprietor of some land at Surbiton which it proposed to develop by building houses and selling them. The plaintiff bought one of these houses and was registered as proprietor on July 10, 1933, of a strip of land bordering on Priory Road, Surbiton, and called 6 Priory Road. It was bounded on the north by Priory Road, and on the south-west by Hunters Road. The defendant comes into the picture on Sept. 14, 1935, when he was registered as the proprietor of I

- A No. 8, Priory Road, adjoining the plaintiff's property on the east side. At the back of both these properties, but much more at the back of the defendant's than the plaintiff's, there was left an irregular four-sided piece of land which was conveyed to neither of the contending parties; but it was a piece of land which the plaintiff had his eye on, and a document was produced to me which shows that on Apr. 6, 1936, he contracted with the company to purchase it.
- B The document is a receipt for the sum of £2 as

“deposit on freehold plot of land at rear of 6 Priory Road with a frontage to Grange Road, Surbiton [I do not know what that means]. Purchase price £7, including fence; balance to be paid, £5.”

- C The plaintiff removed what was then a hedge between 6, Priory Road and this plot and went into occupation of it; and by the middle of 1937 he had by instalments paid the remaining £5 of the purchase price. From then onwards he remained in occupation, using the land to stand his caravan on, and at one time as a chicken run and sometimes as a place for a motor car. He got leave to have a run-in over the kerb of Hunters Road, he put in a double-sided gate, and all seemed to go on quite smoothly. There was a hedge between the defendant's land and this piece of land, i.e., on the southern boundary of the defendant's land, until 1954, when the defendant removed that hedge, but there still remained a wire fence which kept in the plaintiff's chickens.
- D

- E On Mar. 3, 1955, the development company having, I suppose, completed its functions, went into voluntary liquidation. In the autumn of 1955 the defendant apparently conceived the idea of acquiring the irregular piece of land for himself. He did not tell the plaintiff anything about it, but he applied to the liquidator and got the answer that the vendors would sell such rights as they had over the plot. The defendant offered £5, and that sum was paid. It was also agreed that the vendors (namely, the company by its liquidator) would only covenant for title as trustee. The company executed a transfer
- F in the defendant's favour on Apr. 7, 1956, and it was not till then that the defendant thought fit to spring the mine under the plaintiff's feet by telling him what he had done. He told the plaintiff on Apr. 11, 1956, and asked him to give up possession. On Apr. 13, 1956, the defendant became the registered proprietor of the piece of land. This action is an action by the plaintiff to establish the plaintiff's title and obtain a conveyance from the defendant. It was not until May 9, 1956, that the plaintiff registered a caution on the register. That, of course, was too late to have any effect. The writ was issued on May 9, 1956, and asks by way of relief for a declaration that the plaintiff is the owner in fee simple of the land, and for rectification of the register, if necessary, or a conveyance from the defendant. There were certain issues of fact raised by
- G the defence, as, for instance, that the plaintiff had not had actual occupation, and a counterclaim to restrain the plaintiff from trespassing. The issue is thus
- H joined.

- I The result of the transactions which I have described is, admittedly, that the defendant is seised of the property for an estate in fee simple in possession. This is so even if the plaintiff has acquired by possession a right to the property under the Limitation Act, 1939; for, this being registered land, the defendant gets the title which the register gives him, even though the title of the transferor would, in the case of unregistered land, have been extinguished by virtue of the Limitation Act, 1939, s. 16. It is provided by the Land Registration Act, 1925, s. 75 (1), that the registered proprietor's title shall not be extinguished after time has run, but shall be held on trust for the person who, if the land were unregistered, would have acquired a title by adverse possession. It follows (and the Land Registration Act, 1925, s. 69 (1), so enacts) that the defendant,

as proprietor, is seised for an estate in fee simple in possession, subject, however, to what are called "the overriding interests". These are defined by s. 3 (xvi) of the Act in these terms: A

" 'Overriding interests' mean all the incumbrances, interests, rights, and powers not entered on the register but subject to which registered dispositions are by this Act to take effect . . . " B

Liability to them is particularised in the Land Registration Act, 1925, s. 70 (1), in these terms:

" All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto, and such interests shall not be treated as incumbrances within the meaning of this Act . . . " C

Then a number are set out, of which those in para. (f) and para. (g) are relevant:

" (f) Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts; D

" (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such persons and the rights are not disclosed."

It is the plaintiff's claim that he is entitled to an overriding interest under one or both of the paragraphs which I have read. As to the former, his claim is that when he entered into possession in 1936 under the contract to buy made in that year, that no doubt was by the permission of the vendor, who retained a lien on the property for the purchase money. By 1937, however, the plaintiff had paid off by instalments all the purchase money and the lien disappeared and he became, he says, the sole beneficial owner. The vendor retained the legal estate which entitled him *prima facie* to resume possession, but as he did not exercise that right for twelve years, the plaintiff says it was extinguished and at the end of that time the vendor became a trustee of the legal estate for the purchaser (i.e., the plaintiff) as above described. If that be right, the defendant is in no better position; but his answer is that the plaintiff's possession did not ripen into ownership, because it was not "adverse", on the ground that possession can only be adverse if it be not referable to a lawful right. For this proposition the defendant referred me to *Thomas v. Thomas* (1) ((1855), 2 K. & J. 79) as approved by *Corea v. Appuhamy* (2) ([1912] A.C. 230). E

As to this, I am of opinion that so far the plaintiff's claim is right. No doubt possession, when originally taken, may be referred to the vendor's leave and licence, but this position is altered when the vendor's lien disappeared. The defendant, however, further points out that by the Limitation Act, 1939, s. 10 (1), this is enacted: F

" No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to as 'adverse possession') . . . " G

Can it therefore be said that the plaintiff is a person in whose favour the period of limitation "can run"? For the answer to this, reference must be made to s. 7 of the Limitation Act, 1939, by sub-s. (3) of which it is enacted: H

" Where any land is held upon trust including a trust for sale, and the period prescribed by this Act has expired for the bringing of an action to recover the land by the trustees, the estate of the trustees shall not be extinguished if and so long as the right of action to recover the land of any I

A person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Act, but if and when every such right of action has been so barred, the estate of the trustees shall be extinguished."

Now in this case the vendor became a trustee of the legal estate in 1936, and from 1937 a bare trustee, and no beneficiary had any right of action to recover. It seems to me to follow that from that date the period of limitation could and therefore did run in favour of the beneficial owner and that thus (but for the provisions as to registered land) the trustee's title would have been extinguished in 1949.

It was argued that from 1937 the trustee himself could never have brought an effective action to recover the land, because he would have been met by the plea that the whole beneficial interest was vested in the purchaser; but, in my judgment, the question cannot turn on whether the action would have succeeded or no: see *Re Cussons, Ltd.* (3) ((1904), 73 L.J.Ch. 296), where KEKEWICH, J., says (*ibid.*, at p. 298):

"Here twelve years have elapsed since the incorporated company have been in possession, and the trustees have not interfered as trustees. This seems to me to be a new application of the Act, that a person who is a bare trustee without duties may lose his trust estate at the end of twelve years if he does not interfere. But I do not see why he does not come within the section, and I think that this contention on behalf of the vendors is right. One can see cases where a trustee might keep alive the right that he has by bringing an action of ejectment; but if he allows the cestui que trust to remain in possession, the statute must run against him, and by virtue of the Act of 1874 and the earlier Act the title is gone."

Before I leave this part of the case, I ought perhaps to refer to the change in the law brought about by the Limitation Act, 1939, in the relations of trustee and cestui que trust. Before 1939, the cestui que trust, having regard to a proviso attached to the Real Property Limitation Act, 1833, s. 7*, could not acquire a title against the trustee. That proviso is omitted from the corresponding section, s. 9 (1), of the Act of 1939, with the result that time can now run in favour of the cestui que trust. I find myself in agreement on this point with the statement by the editors of UNDERHILL'S LAW OF TRUSTS AND TRUSTEES (10th Edn.), at p. 232:

"... it is apprehended that any other trustee, including a constructive trustee (as, for example, a vendor under an uncompleted contract), is liable to be divested of the legal estate by possession of a person entitled in equity in exactly the same way as if the latter were a stranger."

No very precise authority is given for that proposition, but I think that it is right. It is fair to say that s. 7 (3) and (5) of the Act of 1939 are far from clear and this result is only, at the best, implicit in them.

Now, if this be right so far, it is enough to dispose of the defence, for the defendant is a mere trustee of the legal estate and must convey it to the plaintiff. But, if it be wrong, the plaintiff has another string to his bow, namely, the Land Registration Act, 1925, s. 70 (1) (g). It is admitted that at the date of the defendant's registration the plaintiff was in "actual occupation" of the land. The defendant therefore took subject to his rights. What were they? They were an equitable estate in the land existing under the contract of 1936 and the right to bring an action against the company for specific performance by a

* Repealed by the Limitation Act, 1939, s. 34, and Schedule.

conveyance of the legal estate. The answer of the defendant here is that these rights, not being protected by a caution on the register, can be ignored by a subsequent purchaser. A

If this were unregistered land, the contract of 1936 was an "estate contract" registrable as a land charge under the Land Charges Act, 1925, s. 10, Class C (iv), and not having been so registered was "void" against a subsequent purchaser (such as the defendant) by virtue of s. 13 (2) of the same Act. My attention was called to a decision of my own, *Coventry Permanent Economic Building Society v. Jones* (4) ([1951] 1 All E.R. 901), where I held (though this was not necessary to my decision) that a subsequent purchaser could ignore the rights of persons in possession under such an unregistered contract, on the ground apparently that the rights of the person in possession, though valid against the vendor, could be treated as void by the subsequent purchaser. Whether this was right or no, I need not here decide, for this is registered land and the Land Charges Act, 1925, has no application to it, as appears by s. 23 (1): B C

"As respects . . . land charges . . . required to be registered . . . after the commencement of this Act, this Act shall not apply thereto, if and so far as they affect registered land, and can be protected under the Land Registration Act, 1925 . . ."; D

so that land charges under the Land Charges Act, 1925, do not affect the matter. But, argues the defendant, there is a parallel provision in the Land Registration Act, 1925, s. 59 (1) which is in these terms: E

"A writ, order, deed of arrangement, pending action, or other interest which in the case of unregistered land may be protected by registration under the Land Charges Act, 1925, shall, where the land affected or the charge securing the debt affected is registered, be protected only by lodging a creditor's notice, a bankruptcy inhibition or a caution against dealings with the land or the charge." F

It is argued that, as the wording says "only", it means that that is the only way of protecting it, and if you do not so protect it, the charge or the registrable interest is void against a subsequent purchaser.

The answer to this seems to me to be provided by s. 59 (6)*, which excepts "overriding interests" from the need to be protected by a caution. I do not accede to the argument that s. 70 (1) (g), preserving the rights of those in actual occupation, is to be limited to such rights as cannot be protected by a caution. This seems to me inconsistent with the Land Registration Act, 1925, s. 20. Moreover, it would have the effect of overruling *Hunt v. Luck* (5) ([1901] 1 Ch. 45) and would be inconsistent with the decisions of DANCKWERTS, J., in *Woolwich Equitable Building Society v. Marshall* (6) ([1951] 2 All E.R. 769), see *ibid.*, at p. 773, and of VAISEY, J., in *Mornington Permanent Building Society v. Kenway* (7) ([1953] 1 All E.R. 951), see *ibid.*, at p. 953. G H

My attention was drawn to a number of cases before the legislation of 1925; but, in my judgment, the statutory provisions to which I have referred have superseded them and they are no longer relevant. I

In my judgment, therefore, the plaintiff is entitled to succeed on both points and to the relief prayed by para. 3† of the prayer.

[After discussion HIS LORDSHIP made an order for rectification‡ of the register

* Land Registration Act, 1925, s. 59 (6); 20 HALSBURY'S STATUTES (2nd Edn.) 993.

† See head (iii), p. 578, letter G, ante.

‡ I.e., pursuant to s. 82 of the Land Registration Act, 1925; 20 HALSBURY'S STATUTES (2nd Edn.) 1013.

A by registration of the plaintiff's name in lieu of the defendant's name in the proprietorship register.]

Judgment for the plaintiff.

Solicitors: *Barton & Hanning* (for the plaintiff); *Bower, Cotton & Bower*, agents for *Sherwood, Cobbling & Williams*, Kingston-on-Thames (for the defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

SHEFFIELD CORPORATION v. TRANTER (VALUATION OFFICER).

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Pearce, L.JJ.), June 5, 6, 1957.]

Rates—Rateable occupation—Public park—Refreshment pavilion—Letting to ice-cream merchant—Refreshments for the use of persons resorting to the park only—Duty to keep open during specified hours—Occupation ancillary to that of the park.

A local authority acquired a park under the Public Health Act, 1875, s. 164. The land was by deed subjected to trusts whereby it was to be used for ever as public walks and pleasure grounds within the meaning of s. 164 of the Act. In accordance with the principle of *Lambeth Overseers v. London County Council* ([1897] A.C. 625) the park as a whole was not rateable, as was conceded for the purposes of the present proceedings. The local authority let a refreshment pavilion in the park to an ice-cream merchant on a yearly tenancy. The tenancy agreement gave the tenant the right to supply and sell refreshments "for the use of persons resorting to the said park only", and required him to keep the pavilion "open to the public for the supply of refreshments on all weekdays (except Christmas Days) between the hours of 10 a.m. and half an hour before" closing time and on Sundays from 11 a.m. to half an hour before closing time. The refreshments and their prices were to be to the requirements and satisfaction of the authority, and refreshments were not to be sold outside the pavilion and the pavilion was not to be used as a general salesshop or store. The only customers were people frequenting the park. On the question whether the pavilion was rateable as a separate rateable hereditament in the occupation of the tenant,

Held: the refreshment pavilion was not in separate rateable occupation, since on the facts it was an essential amenity of the public park, and it remained part of the park itself for rating purposes, although it was let to the tenant; the pavilion was thus occupied on behalf of the public and, therefore, was not rateable.

Lambeth Overseers v. London County Council ([1897] A.C. 625) and *Manchester Corpn. v. Chorlton Union Assessment Committee* ((1899), 15 T.L.R. 327), applied.

Appeal dismissed.

[**Editorial Note.** The question whether the refreshment pavilion was "carved out" of the park so as to become rateable as a separate hereditament was a question of degree and fact, and in other cases the circumstances may be such that a particular restaurant or building in a public park is not really in the

occupation of the public, as is the rest of the park, and thus becomes rateable (see p. 591, letter F, to p. 592, letter A, post). A

As to occupation and beneficial occupation of a hereditament for rating purposes, see 27 HALSBURY'S LAWS (2nd Edn.) 351, para. 782, and as to occupation of property for public purposes see *ibid.*, 366, 367, paras. 795, 796; for the rating of open spaces and recreation grounds, see 24 *ibid.* 120, para. 203; and for cases on the rating of open spaces and recreation grounds, see 36 DIGEST (Repl.) 351-353, 12-25.] B

Cases referred to:

- (1) *Lambeth Overseers v. London County Council*, [1895] 2 Q.B. 511; *reversd.* C.A., [1896] 2 Q.B. 25; *affd.* H.L., [1897] A.C. 625; 66 L.J.Q.B. 806; 76 L.T. 795; sub nom. *St. Mary, Lambeth (Churchwardens & Overseers) v. London County Council*, 61 J.P. 580; 36 Digest (Repl.) 351, 13. C
- (2) *Laing (John) & Son, Ltd. v. Kingswood Assessment Area Assessment Committee*, [1949] 1 All E.R. 224; [1949] 1 K.B. 344; 113 J.P. 111; 2nd Digest Supp.
- (3) *Hare v. Putney Overseers*, (1881), 7 Q.B.D. 223; 50 L.J.M.C. 81; 45 L.T. 339; 46 J.P. 100; 38 Digest 428, 34.
- (4) *Manchester Corp'n. v. Chorlton Union Assessment Committee*, (1899), 15 T.L.R. 327; 36 Digest (Repl.) 352, 14. D
- (5) *Westminster Corp'n. v. Southern Ry. Co.*, [1936] 2 All E.R. 322; [1936] A.C. 511; 105 L.J.K.B. 537; sub nom. *Re Southern Ry. Co.'s Appeals*, 155 L.T. 33; 100 J.P. 327; Digest Supp.
- (6) *Burnell v. Downham Market Urban District Council*, [1952] 1 All E.R. 601; [1952] 2 Q.B. 55; 116 J.P. 168; 36 Digest (Repl.) 352, 17. E
- (7) *Liverpool Corp'n. v. West Derby Assessment Committee*, [1908] 2 K.B. 647; 77 L.J.K.B. 1032; 99 L.T. 435; 72 J.P. 397; 36 Digest (Repl.) 353, 23.
- (8) *London County Council v. Robinson*, (1955), 48 R. & I.T. 455.
- (9) *North Riding of Yorkshire County Valuation Committee v. Redcar Corp'n.*, [1942] 2 All E.R. 589; [1943] 1 K.B. 114; 112 L.J.K.B. 97; 168 L.T. 81; 106 J.P. 11; 2nd Digest Supp. F
- (10) *Mersey Docks v. Cameron, Jones v. Mersey Docks*, (1865), 11 H.L. Cas. 443; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 E.R. 1405; 38 Digest 466, 286.
- (11) *London County Council v. Erith Parish (Churchwardens, etc.) & Others*, [1893] A.C. 562; 63 L.J.M.C. 9; 69 L.T. 725; 57 J.P. 821; 38 Digest 429, 41. G
- (12) *Mitcham Golf Course Trustees v. Ercaut*, [1937] 3 All E.R. 450; 21 Tax Cas. 239; Digest Supp.
- (13) *London C.C. v. Wilkins*, [1955] 2 All E.R. 180; 119 J.P. 351; sub nom. *London C.C. v. Knight*, [1955] 2 Q.B. 653; 3rd Digest Supp.

Appeal.

The valuation officer appealed against a decision of the Lands Tribunal (SIR WILLIAM FITZGERALD, President) given on Mar. 12, 1956, allowing an appeal by the corporation against a decision of a local valuation court of the West Riding of Yorkshire (South) Local Valuation Panel, whereby it was directed that a hereditament comprising a refreshment pavilion, High Hazels Park, Sheffield, should be entered in the valuation list for Sheffield County Borough with an assessment of £105 gross value, £84 rateable value, George Dale being shown as occupier and the corporation as owners. H

High Hazels Park was acquired by Sheffield Corporation in 1894 under the Public Health Act, 1875, on trust by deed to permit it to be used for ever thereafter as public walks and pleasure grounds within the meaning of s. 164 of the Act. It was agreed between the parties that the park (apart from the pavilion under appeal) was not rateable within the principle of *Lambeth Overseers v. London County Council* (1) ([1897] A.C. 625), and that the cost of maintenance of I

- A the park as a whole exceeded any income therefrom. The refreshment pavilion was let to Mr. Dale, the tenant, an ice-cream merchant, under a tenancy agreement dated Apr. 22, 1954, as from Mar. 25, 1954, at a yearly rent of £225, payable quarterly in advance. Under the agreement the tenant had the right to supply and sell refreshments, and subject to his obtaining the necessary licences to supply and sell tobacco, cigarettes and cigars, from the interior of the pavilion
- B for the use of persons resorting to the park only. He was liable to pay by way of increased rent any increase of rates or water rent payable over those assessed on the hereditament on Mar. 25, 1954. He was required inter alia: (i) to ensure that the pavilion was kept open to the public for the supply of refreshments on all weekdays (except Christmas Days) between 10 a.m. and half an hour before the official time for the closing of the park and on Sundays between 11 a.m.
- C and half an hour before the official time for closing; (ii) to cause a list of the prices of all commodities sold in the pavilion to be hung in a conspicuous position in it; (iii) to take all reasonable care of the corporation's furniture, fixtures and fittings and to replace any items lost, worn out or become unfit for use with similar articles of equal quality and value; (iv) to keep the pavilion at all times in a clean and tidy condition to the satisfaction of the corporation; (v) at his own expense to provide all crockery and other utensils and any additional furniture, fixtures and fittings required; (vi) to see that all refreshments provided for sale in the pavilion and their prices were to the requirements and satisfaction of the corporation; (vii) not to sell refreshments outside the pavilion or allow the pavilion to be used as a general salesshop or store; (viii) not to sell intoxicating liquors; (ix) not to permit the holding of any public dancing, singing, music or other entertainment in the pavilion; (x) not to do or permit any act or thing in the pavilion which in the corporation's opinion might be a nuisance, damage, annoyance or inconvenience to the corporation or persons resorting to the park or the neighbourhood; (xi) not to underlet or part with possession without consent; and (xii) to accept responsibility for accidents, damages, injuries, or losses to persons using the pavilion and the tenant himself and to indemnify the corporation against any proceedings in respect thereof. The corporation undertook to pay the general rates and water rent (subject to the increase agreed to be met by the tenant) and to keep the pavilion in good and tenantable repair including decoration. The tenancy was determinable by six months' notice expiring on Mar. 25 in any year. The corporation had a right of re-entry for non-payment of rent, breach by the tenant of the agreement and the tenant's bankruptcy, etc.
- G No main meals were provided in the pavilion. The tenant sold the usual ices, sandwiches, cakes and tea at prices agreed by the corporation. The only customers frequenting the pavilion were people using the park.

The corporation contended that the purpose of the letting by the corporation to the tenant was solely to secure park services and that the pavilion was not rateable. The valuation officer contended that the tenant was in rateable occupation of the pavilion and that the pavilion should be included in the valuation list. It was agreed that, if the pavilion was rateable, the assessment of £105 gross value, £84 rateable value, should remain in the valuation list. The Lands Tribunal was of opinion that the provision of such a refreshment pavilion in any public park was just as essential as other amenities associated with a public park and the amenities provided did not go outside the requirements of the park. The tenant did nothing which the corporation themselves would not have been bound to do for the purpose of providing the usual amenities expected in a park of the nature of High Hazels Park. The tribunal was unable to draw any distinction between the case and that of *Manchester Corpn. v. Chorlton Union Assessment Committee* (4) ((1889), 15 T.L.R. 327) and allowed the appeal. In his notice of appeal, the valuation officer contended that the Lands Tribunal misdirected itself in holding that the tenant was not in rateable occupation of the pavilion and was wrong in law in holding that the pavilion was not rateable by

virtue of the decision of the House of Lords in *Lambeth Overseers v. London County Council* (1) and that the case could not be distinguished from *Manchester Corpn. v. Chorlton Union Assessment Committee* (4).

The Solicitor-General (Sir Harry Hylton-Foster, Q.C.) and P. R. E. Broune for the valuation officer.

D. G. Widdicombe for the corporation.

LORD EVERSHED, M.R.: This is an appeal by way of Case Stated from a decision of the Lands Tribunal that a certain piece of land, in the actual occupation of a Mr. George Dale but being within the confines of High Hazels Park, Sheffield, is not liable to rating assessment. High Hazels Park, Sheffield, was acquired, according to the statement in the Case Stated, in 1894 under the Public Health Act, 1875, by a deed under the terms of which the respondent corporation were bound to permit the park to be used for ever after as public walks and pleasure grounds within the meaning of s. 164 of the Public Health Act, 1875. We do not know more about the terms of the deed, but it has not really been in dispute before us and I think that it must be taken that this park, in all relevant respects, should be treated as of a similar character to Brockwell Park, the subject-matter of *Lambeth Overseers v. London County Council* (1) ([1897] A.C. 625) which came before the House of Lords in 1897. According to the Case Stated, an agreement was made in April, 1954, between the corporation and Mr. Dale, the tenant, whereby a refreshment pavilion was let to the tenant, by profession or trade an ice-cream merchant.

The parties before us have been the valuation officer as appellant, and Sheffield Corporation as respondents. It appeared at first a point of some materiality that Mr. Dale was not himself before the court; but junior counsel for the valuation officer has drawn our attention to the relevant statutory provisions, and it is sufficient for me to say that a notice was served accordingly by the valuation officer on Mr. Dale and, if he had chosen to take it, he had an opportunity of contesting the claim to rate this refreshment pavilion. Under the same statutory provisions it was no less competent for the owners of the pavilion, Sheffield Corporation, also to contest the claim to rateability. In the event, only the corporation have challenged the valuation officer, and so it is that the parties before us are those which I have named. This case is, however, in one respect unlike others which have been before the court and particularly the *Brockwell Park* case (1). In this case the claim to assess a hereditament in the valuation list is limited to the particular pavilion occupied by Mr. Dale. It is not a claim to rate at large the park or parts of the park in the actual occupation of the corporation.

If I may say so, the case for the Crown has the attractions both of simplicity and of common sense, for this refreshment pavilion is in the exclusive occupation of the ice-cream merchant, the tenant, who is carrying on there in an ordinary sense the business of a proprietor of a refreshment house. The confines of the pavilion and the surrounding area are defined, and the business is his business, out of which no doubt he is making his living. Not only so, but, as the learned Solicitor-General observed, all the four requisite ingredients for rateable occupation formulated in 1949 by counsel, Mr. Rowe, in his argument, and accepted by TUCKER, L.J., in *John Laing & Son, Ltd. v. Kingswood Assessment Area Assessment Committee* (2) ([1949] 1 All E.R. 224), on the face of them are satisfied in this case (see [1949] 1 All E.R. at p. 228): (i) there must be actual occupation; (ii) it must be exclusive for the particular purposes of the possessor; (iii) the possession must be of some value or benefit to the possessor; and (iv) the possession must not be for too transient a period. Anticipating my view of the agreement of 1954, it may be said that all four of those conditions are satisfied in this case. If, then, the sole question for the court was whether those ingredients were satisfied, in my view,

A the conclusion would be for the valuation officer. But that is not an exhaustive statement of the matters which have to be determined. It is of the essence of this case that the refreshment pavilion is on an essential part of High Hazels Park. Again anticipating the conclusion which I have reached, it seems to me that, in the light of the guidance we have from decisions, particularly in the *Brockwell Park* case (1), and in the light of the findings of fact in this case, we must conclude
B here that there has not been such a "carving out" (to use the phrase of the Solicitor-General) of this pavilion from the park as a whole to make it in relevant respects distinct from the park and so expose it to rating liability.

The facts in the *Brockwell Park* case (1) are set out most fully in the report before the Divisional Court ([1895] 2 Q.B. 511). The park had been acquired by London County Council under empowering Acts in 1891. It was not
C very different in area from High Hazels Park. It had on it certain particular features, including the former mansion house, of which

"The part which is entered by the original back door, consisting of eight living rooms and a small office, is occupied by the resident superintendent of the park and his family."

D The Case goes on to say that such a resident superintendent was reasonably necessary for the protection and proper management of the park for the purposes of the Act. It further states that certain other premises had been converted into use as a gymnasium and other like conveniences, and, of the part of the mansion house which was entered by the original front door, the ground floor and basement were occupied under a licence while the other floors were unused. The
E occupation of the ground floor and basement was for the purposes of providing refreshment. The Solicitor-General provided a copy of the licence agreement, under which the occupier, a Mrs. Hart, was not treated as having exclusive rights of occupation; but beyond doubt that part of the former mansion house was used in the same way and for exactly the same purpose as the refreshment pavilion in the present case, viz., for providing refreshments for users of the park
F in the ordinary course.

As I have already said, in the *Brockwell Park* case (1) the claim was not made to rate as a separate rateable hereditament the mansion-house or any part of it; it was a general claim for rating the park as a whole. Indeed, the opinion of the Divisional Court was that the claim was well founded. In the Court of Appeal, however, a different view was taken. The basis of the decision in the Court of
G Appeal was alternatively put on the two grounds, first, that the occupation by London County Council was occupation by the public and, secondly, on the ground, which finds a place in the headnote, that the occupation could not be treated in the circumstances as having any net annual value at all and, therefore, on one or both grounds, the claim to rate could not be supported.

H In the course of the argument, however, a subsidiary point was taken, which is stated by A. L. SMITH, L.J., as follows ([1896] 2 Q.B. at p. 40):

"A subsidiary point was taken by the respondents that certain parts of the park—for instance, that part of the old mansion-house which is now used for refreshments for the public, and the other part of the old mansion which was not occupied at all, and also the lodge and cottage—were subject-matters for separate assessments distinct from the park itself, and had a
I rateable value of their own. The Divisional Court held that this was not so, and I agree with them. The obligation imposed upon the London County Council by the Act of 1890 was to lay out, maintain, and preserve Brockwell Park, and every part of it, as a park for the perpetual use thereof by the public for exercise and recreation. As before stated, the London County Council could let off no part of it. The legislature enacted that if the London County Council purchased Brockwell Park, they should take to it as a

whole, and for ever maintain it as a whole, and that the whole should be used for a public purpose for ever." A

In the House of Lords LORD HALSBURY, L.C., in one of the only two speeches delivered, said ([1897] A.C. at p. 630):

"I have hitherto dealt only with the question of occupation, and, as I have said, I think there is no occupation at all, the county council being merely custodians and trustees for the public." B

In other words, the Lord Chancellor was basing his opinion—and, in my judgment, that must be taken to be the ratio of the decision in the House—on the former of the two alternatives that I earlier mentioned; viz., that in the circumstances the occupation by London County Council was in truth occupation by the public. LORD HALSBURY went on (ibid.): C

"But I do not disagree with the reasoning of SMITH, L.J., and RIGBY, L.J., as to the rateability of an occupation where an occupation exists",

and he goes on to say that no tenant would give anything for an occupation such as that which would give him no capacity to make anything out of it. He proceeded later (ibid., at p. 631): D

"It is hardly necessary to deal with the other point, if it can be called another point, in respect of the mansion-house and refreshment-rooms",

and I take that to be a reflection of what A. L. SMITH, L.J., had called the subsidiary item. E

"They are and must remain part of the park, and are no more capable or in fact subject to different considerations than the park itself. They are and must be part of the park. They cannot be separated from it, and are within the principle which I have already explained." F

In the opinion of LORD HERSCHELL the matter is put as follows (ibid., at p. 632):

"Here these very lands and every part thereof, by statute, must be held in perpetuity for the use of the public, and the question is, whether, under these circumstances, they are rateable at all. I think that on principle they are not." G

Then a little later, after referring to *Hare v. Putney Overseers* (3) ((1881), 7 Q.B.D. 223):

"They [that is the London County Council] seem to me to be merely custodians or trustees to hold it and manage it for the use of the public." H

It is true that emphasis is laid in the speeches and in the judgments in the Court of Appeal on the particular legislation which, as A. L. SMITH, L.J., had pointed out, prevented London County Council from letting off any part of the park, and as I said earlier, we have not got any very precise statement of the exact terms on which the corporation hold High Hazels Park. But I cannot think that in that respect there is any relevant difference between the two cases. After all, it is not here suggested that the corporation have let this refreshment pavilion off as being surplus to the requirements of the park, or anything of that kind. They are using it or securing its use as part of the park, as will be more plain when I deal with the particular facts concerning the tenancy agreement. I

The significance of *Manchester Corpn. v. Chorlton Union Assessment Committee* (4) ((1899), 15 T.L.R. 327) is that the Lands Tribunal regarded it as governing

A the present case. It had features in its facts which made it fairly closely comparable, for there was a refreshment pavilion which was the subject of an arrangement with a Miss Davis as follows (*ibid.*, at p. 327):

B “The refreshment pavilion and verandah were prior to and at the date of the rate in the occupation of a Miss Davis, under an agreement with the appellants [Manchester Corporation], at a rent, the agreement providing that the tenant should not carry on any other business than that of a refreshment-room keeper upon the demised premises . . .”;

C and there were other conditions about keeping the place open and accessible to the public and otherwise making it subject to a high measure of control on the part of the Manchester Corporation. On the facts, then, there was much in common between that case and the present, for whether Miss Davis was a tenant or a mere licensee would not of itself be a relevant consideration in the light of the well-known passage from the speech of LORD RUSSELL OF KILLOWEN in *Westminster Corpn. v. Southern Ry. Co.* (5) ([1936] 2 All E.R. 322). But the *Manchester Corpn.* case (4), as Mr. Widdicombe conceded in his very clear address, did not raise in terms the precise point raised in this case; i.e., the rating authority were not seeking to rate as a separate hereditament in the occupation of Miss Davis the refreshment pavilion in the Alexandra Park, Manchester. The Divisional Court held that the attempt to rate Manchester Corporation in respect of the whole park must be rejected, because that claim must be decided adversely in the light of the *Brockwell Park* case (1). To that extent, therefore, it may be said to be a matter of criticism of the present decision that the *Manchester Corpn.* case (4), as reported, cannot itself be treated as governing and conclusively deciding the present case.

E In *Burnell v. Downham Market Urban District Council* (6) ([1952] 1 All E.R. 601), which related to the war memorial playing fields and cricket ground at Downham Market in Norfolk, the point was not the same as that presented to us, for the claim was to rate the whole ground, and it was rested on the premise that on the facts the ground was not held by the urban district council as custodians and trustees for the public. It was pointed out that the council let certain cricket and football pitches, at a price, to certain clubs and on certain occasions excluded the public altogether except on payment of entrance gate fees; and so it was suggested that the case could be distinguished from the *Brockwell Park* case (1). It was the view of this court that, looking at the facts as a whole, there was a justification for the conclusion that, notwithstanding the temporary and limited exclusions of the public, the principle that the public was really in occupation remained as valid in the *Downham Market* case (6) as in the *Brockwell Park* case (1). It is pointed out in the judgment of the court ([1952] 1 All E.R. at p. 606, letter H) that “free and unrestricted use” by the public does not involve this, that any member of the public must be free to go on every part of the park at any time he chooses during the day or night. The judgment proceeds (*ibid.*, at p. 607):

“These exclusions are the manifestations of the duty and exercise of management, and their total area compared with that of the whole park was negligible.”

I Then, after referring to *Liverpool Corpn. v. West Derby Assessment Committee* (7) ([1908] 2 K.B. 647) which has also been drawn to our attention, that part of the judgment concludes in reference to the *Liverpool* case (7) with this sentence ([1952] 1 All E.R. at p. 607):

“ . . ., but this court found no difficulty in concluding that the Liverpool Corporation’s power of exclusion and its exercise were merely ancillary to the dedication of the land as a public park . . .”

I conclude from these authorities that the principle to be applied is that prima facie a public park such as this—i.e., a place dedicated to, and used as such by, the public—is to be treated as in the occupation of the public. Therefore, since the public are not rateable, the park is itself free from rating liability, and that exemption is not removed by the circumstance that the public may be excluded in certain respects and from certain parts in the course of the ordinary necessities of proper management. For example, in the present case, if the provision of refreshments were conducted directly by the corporation through their own servants or agents, it must be taken as clearly established that the fact that they occupied for that purpose some part of the park and excluded the public altogether from that part—e.g., the kitchens, etc., where they prepared the refreshments and so on—would not render them liable to be rated in respect of that part. But here the corporation are not themselves conducting the task, ancillary to the general management of the park, of providing proper refreshments. They have made a specific arrangement with Mr. Dale whereby he carries on his own business for that purpose.

The terms of the arrangement with the tenant are contained in an agreement attached to the Case, a reference to the terms of which shows how closely it resembles in essential characteristics the arrangement between Manchester Corporation and Miss Davis in the *Manchester Corpn.* case (4). As I read it, the form of the arrangement was a tenancy from year to year at an annual rent. From that circumstance it is quite plain that there is here the requisite degree of permanency of occupation, and also that by virtue of the tenancy the tenant has the necessarily exclusive right of possession.

Paragraph 1 of the agreement provides that during the continuance of the agreement the tenant is to have the right to supply and sell refreshments, and so on, “for the use of persons resorting to the said park only”. There is then a rather complicated arrangement about rates, which I pass over, as I do not think that any inference relevant to this decision can be derived from it. But under one of the sub-paragraphs to cl. 2 the tenant is to ensure

“that the said premises are kept open to the public for the supply of refreshments on all weekdays (except Christmas Days) between the hours of 10 a.m. and half an hour before the official time for the closing of the said park and on Sundays between the hours of 11 a.m. and half an hour before the official time for the closing of the said park.”

That example—and there are others—shows that the case is not at all that of a man being given a lease of shop premises in the ordinary way, so that he might conduct thereon a shop business according to normal shop hours and under the conditions which would be applicable in the case of an ordinary shop. There is a positive obligation to keep this shop open every weekday except on Christmas Day between the hours I have named, and also on Sundays—in other words, to make sure that it was a park amenity, no more, no less, for the users of the park.

The same clause provides:

“(x) All refreshments to be provided for sale on the said premises and the prices to be paid therefor shall be to the requirements and satisfaction of the corporation. (xi) Not to sell or cause to be sold any refreshments outside the said premises and not to allow the said premises to be used as a general saleshop or store.”

Other provisions, which I will not read, all lead inescapably to this conclusion, that the tenant's transactions as tenant of this refreshment pavilion were in the first place under a close supervision on the part of the corporation and also were plainly such as to make them exclusively a part of the park amenities.

A I come then to two findings of the Lands Tribunal, the second partly expressed rather in the form of an opinion. In para. 2, after referring to the fact that the cakes and the like must be sold at a price agreed by the corporation, sub-para. (d) reads:

B "The only customers frequenting this pavilion are people who are using the park."

Then in para. 7:

C "I was of opinion that the provision of a refreshment pavilion such as this in any public park nowadays is just as essential as the provision of other amenities which one associates with a public park, and that the amenities provided in this pavilion did not go outside the requirements of the park. [The tenant] did nothing that the corporation themselves would not be bound to do for the purpose of providing the usual amenities expected in a park of this nature."

D In my judgment, the tribunal was well justified in saying that the provision of refreshments such as are provided in this pavilion can properly be described as an essential amenity of a public park, and it was also amply justified on the facts in finding that the tenant's conduct of this refreshment pavilion was nothing more than an ancillary activity of the conduct of the park itself. I said earlier that in my judgment it could not now be questioned that the corporation themselves would be free of rating liability if they conducted this pavilion through an agent or servant, and it is inherent in the judgment in this court and speeches in the House of Lords, which I have read, in the *Brockwell Park* case (1) that the situation is not altered by the mere fact that the conduct of the refreshment pavilion is not in the hands of an agent of the park owner, the corporation, but is in the hands of a third party, with whom the corporation make the requisite arrangement, be it by way of a licence or a tenancy.

F That is not to say that it follows that every letting off by a local authority of part of a public park, assuming power so to let it off, to a man to carry on there some business of his own, will produce the result that the part so let off will be free of rating liability. It is in every case a matter of degree and of the facts to be found in the case. Counsel for the corporation drew our attention by way of illustration to *London County Council v. Robinson* (8) ((1955), 48 R. & I.T. 455) where the opposite conclusion had been reached by the President of the Lands Tribunal, who himself decided the present case. There London County Council had let off the Thameside Restaurant on the south side of the river, associated with the Festival of Britain some years ago, to certain individuals for the purpose of carrying on a restaurant business. The tribunal found as a fact that the restaurant could not properly and sensibly be regarded merely as an amenity of, or ancillary to, the riverside walk. It had acquired an altogether independent and distinct status as a restaurant, comparable to and competitive with other restaurants in London. It therefore concluded that the restaurant, so to speak, had been severed from the park as a park and, as it had the independent status of a restaurant, that there had been a sufficient carving out (and I revert to the Solicitor-General's phrase) of the park as a park from the hereditament to make the case distinguishable from the cases of *Brockwell Park* (1) and *Downham Market* (6).

I We are not, of course, deciding that case, and it is unnecessary to express any view about it, though I must not be taken to be criticising it in any way. I cite it merely to illustrate the point that, as it seems to me, it must be a question of fact and degree in cases of this kind whether it can be said that the refreshment pavilion—or, to take an example cited in argument, a hut or a shed for storing other amenities of the park such as the park chairs—and the part of the park so occupied and used, is in reality still an inherent and essential part of

the park as an entity, providing a necessary amenity for the park; or whether the hereditament has been so carved out as to acquire a distinct status from the park and to render itself liable for rating assessment.

On the authorities which I have cited, and in the light of their guidance which we must follow, and on the facts found in this case, which seem to me to be well justified, I conclude that the Lands Tribunal rightly held that this pavilion was still part of the park, could still be treated for relevant purposes as in public occupation or occupied on behalf of the public, and was, therefore, exempt from rating liability. For those reasons, I would dismiss the appeal.

MORRIS, L.J.: I have reached the same conclusion. It is found as a fact that High Hazels Park was acquired by Sheffield Corporation for the purpose of its being used in perpetuity as public walks or pleasure grounds. It was so acquired by deed of trust under s. 164 of the Public Health Act, 1875. We were referred to *North Riding of Yorkshire County Valuation Committee v. Redcar Corpn.* (9) ([1942] 2 All E.R. 589). The foreshore and the lands which were purchased by the Redcar Corporation were also purchased by the corporation under s. 164 of the Public Health Act, 1875; but, whereas in the *Redcar* case (9) there was elaborate development and construction which brought about the result that the corporation came to be in occupation of profit-earning properties, in the present case the park is merely being maintained as a park.

The Case Stated records that it was agreed that the park was not rateable. This means that the corporation are not in rateable occupation of the park. They are the owners of it, but, in the words of LORD HERSCHELL in *Lambeth Overseers v. London County Council* (1) ([1897] A.C. 625), they are merely custodians or trustees to hold it and manage it for the use of the public. In truth the public are the real occupiers. The Case Stated records that the corporation acquired the park

“upon trust by deed to permit the said hereditament to be for ever used hereafter as public walks and pleasure grounds.”

This appears to show, and the actual maintenance as a park appears further to show, that there is in the public what LORD HALSBURY, L.C., in his speech in the *Brockwell Park* case (1) referred to as “the free and unrestricted use”. Furthermore, the Case finds that the cost of maintaining the park as a whole exceeds any income derived from it.

I see no reason, however, why in certain circumstances some particular place contained within the perimeter of a park might not be a rateable hereditament, though this will not be so in the case of a hereditament which is used in a way that is merely ancillary to the use of the park. If, in managing the park as custodians for the public, the corporation had themselves opened and maintained this refreshment pavilion in order to supply the needs of visitors to the park, I cannot think that they would have become rateable in respect of the pavilion. The pavilion would merely have been used as a means of providing a modest amenity for members of the public using the park. The position would be comparable to that in *Manchester Corpn. v. Chorlton Union Assessment Committee* (4) ((1899), 15 T.L.R. 327). So, too, in the *Brockwell Park* case (1) itself, the use of part of the house in the park as refreshment rooms was merely ancillary to the use of the park.

It is found in the present case that the only customers frequenting this pavilion are people who are using the park, and the amenities provided in the pavilion did not go outside the requirements of the park. The circumstances make the present case very different from the one referred to in argument by counsel for the corporation [*London County Council v. Robinson* (8) ((1955), 48 R. & I.T. 455)], in which the use of a restaurant sited in a place or park dedicated to the public could not be said on the facts to be ancillary to the use by the public

A of the public place or park. If, then, the nature of the use of this refreshment pavilion was such that, had the corporation themselves been running it, the pavilion would not have been rateable and the corporation would not have been in rateable occupation, the position should not be different if the corporation, instead of running it themselves and employing servants or agents or a manager, grant a licence to someone else to do so or grant a tenancy to someone

B else in terms such as those of the tenancy in this case.

Counsel for the corporation in his argument submitted that it would be anomalous if the corporation would not be in rateable occupation if they themselves managed, whereas the tenant would be if merely doing what the corporation might have done. In reply to that submission the Solicitor-General referred us to a passage in *Mersey Docks v. Cameron* (10) ((1865), 11 H.L. Cas. 443 at

C p. 463):

“The exemption depends entirely on the occupier and not on the title to the property. The tenants of Crown property, paying rent for it, are rateable like all other occupiers; and it has even been determined that where apartments in Hampton Court, a royal palace, were gratuitously assigned to a subject, who occupied them by the permission of the Sovereign but for the subject’s benefit, the subject was rateable in respect of her occupation of this royal property . . .”

D

But it seems to me that the reason why the corporation are not rateable in respect of the park is not that they as a corporation enjoy any special immunity but because they are not in rateable occupation of the park.

E My Lord has referred to the terms of the agreement with the tenant, and, in my judgment, those terms are of importance. They show that the tenant is under obligation to run this refreshment pavilion and to keep it open at the times referred to in cl. 2 (v) of the agreement. The other terms of the agreement imposed on the tenant, particularly those to which my Lord has referred, in my judgment show that the purpose of the agreement with the tenant was to ensure that the needs of the public when using the park would be met. The position

F remains the same, that the real occupiers of the park are the public and that in the circumstances of this case this pavilion ought not to be regarded as a kind of island hereditament with activities and purposes detached from those for which a public park exists. The corporation have, so to speak, delegated to the tenant certain activities which form a part of the function of managing the park for the

G benefit of the occupiers of the park, i.e., the public.

In my judgment, therefore, the pavilion was not in rateable occupation, and I would dismiss the appeal.

PEARCE, L.J.: I agree.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Town clerk*, Sheffield (for the corporation).

[*Reported by F. A. AMIES, ESQ., Barrister-at-Law.*]

A

Re STRATTON'S DEED OF DISCLAIMER.
STRATTON AND OTHERS *v.* INLAND REVENUE
COMMISSIONERS.

[COURT OF APPEAL (Jenkins and Sellers, L.J.J., and Roxburgh, J.), May 24, 27,
June 6, 1957.]

Estate Duty—Disclaimer—Legacy to wife—Wife disclaiming—Wife dying within five years after disclaimer—Whether duty payable on property disclaimed—Finance Act, 1940 (3 & 4 Geo. 6 c. 29), s. 45 (2). B

By his will a testator made a specific bequest and a specific devise in favour of his wife, and gave his residuary estate to his three sons. The testator died on Oct. 20, 1949, and his will was proved on Nov. 2, 1950. By a deed of disclaimer dated May 28, 1951, the testator's widow disclaimed and renounced all beneficial interest to which she was entitled under the specific bequest and devise. The purpose of the disclaimer was not stated in the deed and no evidence of her intentions was adduced. On June 27, 1953, the widow died, and estate duty was claimed in respect of the property disclaimed by virtue of the Finance Act, 1940, s. 45 (2)* and the Finance Act, 1894, s. 2 (1) (c). C

Held: estate duty was payable as claimed because (a) the inchoate right which the widow had to take the gifts made to her by the testator's will was a "right" within s. 45 (2) (*Re Parsons*, [1942] 2 All E.R. 496, applied; *Townson v. Tickell*, (1819) 3 B. & Ald. 31, and *Re Wimperis*, [1914] 1 Ch. 502, explained); (b) that right was extinguished by the disclaimer; (c) the extinguishment of that right was at the expense of the widow, the deceased; and (d) that extinguishment in fact operated for the benefit of the three sons. D

Per CURIAM: the motive or purpose of the deceased [in extinguishing the right] is immaterial, provided that the transaction was gratuitous and did in fact benefit the other person concerned (see p. 601, letter A, p. 603, letters B and E, post). E

Semble (per JENKINS, L.J.): section 45 (2) would probably not apply to a gift on a condition precedent which the donee was unable or unwilling to fulfil (see p. 602, letter E, post). F

Decision of DANCKWERTS, J. ([1956] 3 All E.R. 862) affirmed, but on a different ground in respect of holding (d) above.

[As to estate duty on a gift by way of release of a right, see 15 HALSBURY'S LAWS (3rd Edn.) 19, para. 37. G

For the Finance Act, 1940, s. 45 (2), see 9 HALSBURY'S STATUTES (2nd Edn.) 473.

For the Customs and Inland Revenue Act, 1881, s. 38 (2) (a), as amended by the Finance (1909-10) Act, 1910, s. 59, and the Finance Act, 1946, s. 47, see 9 HALSBURY'S STATUTES (2nd Edn.) 403, 516; for the Finance Act, 1894, s. 2 (1) (c), see *ibid.*, 350.] H

Cases referred to:

- (1) *Townson v. Tickell*, (1819), 3 B. & Ald. 31; 106 E.R. 575; 44 Digest 399, 2316.
- (2) *Thompson v. Leach*, (1690), as reported in 2 Vent. 198; 86 E.R. 391; on appeal, (1692), 2 Vent. 208; 25 Digest 518, 130.
- (3) *Re Wimperis*, *Wicken v. Wilson*, [1914] 1 Ch. 502; 83 L.J.Ch. 511; 110 L.T. 477; 44 Digest 400, 2329.
- (4) *Bateman (Lady) v. Faber*, [1898] 1 Ch. 144; 67 L.J.Ch. 130; 77 L.T. 576; 21 Digest 273, 911.
- (5) *Re Parsons*, *Parsons v. A.-G.* [1942] 2 All E.R. 496; [1943] Ch. 12; 112 L.J.Ch. 65; 167 L.T. 384; 2nd Digest Supp.

* Section 45 is set out at p. 596, letter B, post. I

A Appeal.

The plaintiffs, the three sons of the testator and his deceased widow and the executors of the widow, appealed from a decision of DANCKWERTS, J., dated Nov. 21, 1956, and reported [1956] 3 All E.R. 862, that estate duty was payable on the death of the widow in respect of property given to the widow by the testator's will but disclaimed by her by a deed of disclaimer executed by her within five years of her death.

Charles Russell, Q.C., and *A. J. Belsham* for the three sons, the plaintiffs.

J. Pennycuik, Q.C., and *E. Blanshard Stamp* for the Commissioners of Inland Revenue, the defendants.

Cur. adv. vult.

C June 6. The following judgments were read.

JENKINS, L.J.: This is an appeal by three brothers, the plaintiffs Frederick, William and Stanley Stratton, who are the executors of their mother, Mrs. Fanny Stratton, deceased, and residuary legatees under the will of their father, Mr. Frederick William Stratton, deceased (whom I will call "the testator"), from an order of DANCKWERTS, J., dated Nov. 21, 1956, whereby he upheld a claim on the part of the defendant Commissioners of Inland Revenue to the effect that, by virtue of s. 45 (2) of the Finance Act, 1940, a liability for estate duty arose, on the death of Mrs. Stratton, under s. 2 (1) (c) of the Finance Act, 1894 (as amended), in respect of certain property given to Mrs. Stratton by the testator's will but disclaimed by a deed of disclaimer executed by her within five years of her death.

The testator by his will, dated July 16, 1946, and proved on Nov. 2, 1950, by his son Frederick and his widow Mrs. Stratton, the executors therein named, gave to Mrs. Stratton various benefits including certain policies of insurance on his life and (in the events which happened) his freehold property Nos. 15 and 16, Bruce Grove, Tottenham, and gave to his three sons (inter alia) the residue of his real and personal estate.

The testator died on Oct. 20, 1949, and by a deed of disclaimer dated May 28, 1951, Mrs. Stratton irrevocably disclaimed and renounced all beneficial interest to which she was or might be entitled under the testator's will in the policies and freehold property referred to above.

The deed contained no reference to the destination of the policies and freehold property thereby disclaimed, but the effect of it plainly was to bring about a total failure ab initio of the gifts to her of these assets contained in the will, with the result that they fell into residue for the benefit of the three sons as residuary legatees and devisees.

Mrs. Stratton died on June 27, 1953, a date well within five years of the disclaimer. Clearly if she had accepted the gifts made to her by the will and had then within five years of her death transferred the assets comprised in them to her three sons by way of gift, estate duty would have been exigible on her death in respect of such gift by virtue of s. 2 (1) (c) of the Finance Act, 1894, of the provisions incorporated therein of s. 38 of the Customs and Inland Revenue Act, 1881, and of s. 11 of the Customs and Inland Revenue Act, 1889, and of the extensions of the liability to duty, first to gifts made within three years of the death by the Finance (1909-10) Act, 1910, and then to gifts made within five years of the death by the Finance Act, 1946. However, instead of proceeding by way of acceptance and transfer, Mrs. Stratton (as one would expect in the circumstances) preferred to achieve substantially the same result by the simpler and cheaper method of a disclaimer, which did not transfer her interest to the three sons by way of gift but destroyed her interest with the legal consequence that the disclaimed assets fell into residue for their benefit.

The question in the case is whether s. 45 (2) of the Finance Act, 1940, has the effect of extending the liability to duty on gifts inter vivos imposed by s. 2 (1) (c)

of the Finance Act, 1894 (as amended), to the comparable benefit conferred on a residuary legatee or devisee by means of a disclaimer, whereby the subject-matter of the gift disclaimed is caused to sink into the residue to which he is entitled. A

Section 45 of the Finance Act, 1940 (the sidenote to which is "Gifts by way of creation of burden or release of right"), is in these terms:

"(1) The creation by a person or with his consent of a debt or other right enforceable against him personally or against property of which he was or might become competent to dispose, or to charge or burden for his own benefit, shall be deemed for the purposes of the enactments relating to estate duty, including this Part of this Act, to have been a disposition made by that person, and in relation to such a disposition the expression 'property' in the said enactments shall include the debt or right created. B

"(2) The extinguishment at the expense of the deceased of a debt or other right shall be deemed for the purposes of the said enactments to have been a disposition made by the deceased in favour of the person for whose benefit the debt or right was extinguished, and in relation to such a disposition the expression 'property' in the said enactments shall include the benefit conferred by the extinguishment of the debt or right. C

"(3) The proviso to s. 4 of the Finance Act, 1894 (which excepts from aggregation property in which the deceased never had an interest) shall not have effect in relation to property passing on the death of the deceased which consists of a debt or right or benefit that is treated as property by virtue of this section." D

It will be seen that to found liability under sub-s. (2) of the section there must be (i) a debt or other right, and (ii) an extinguishment of that debt or other right, (a) at the expense of the deceased, and (b) for the benefit of some other person. Where these elements are present the enactment imputes to the deceased for estate duty purposes a disposition, in favour of the person for whose benefit the debt or right was extinguished, of property consisting of the benefit conferred by such extinguishment. This produces the result that the benefit conferred by a transaction falling within the ambit of sub-s. (2) of s. 45 of the Act of 1940 is to be treated as "property . . . taken under a voluntary disposition made by [the deceased] purporting to operate as an immediate gift *inter vivos*" within the meaning of s. 2 (1) (c) of the Act of 1894 and the provisions incorporated therein of s. 38 (2) (a) of the Customs and Inland Revenue Act, 1881, and is therefore to be deemed under s. 2 (1) (c) of the Act of 1894 to pass, and accordingly attract estate duty, on the death of the deceased within the statutory period (now five years) of the making of such disposition. E

The application of s. 45 (2) of the Act of 1940 to the transaction now in question thus demands an affirmative answer to each of the following questions: F

(1) Did Mrs. Stratton have a "right" in respect of the policies and freehold property bequeathed and devised to her during the period between the death of the testator and the execution of the deed of disclaimer? G

(2) If so, did the disclaimer bring about an "extinguishment" of that right? H

(3) If so, was such extinguishment effected "at the expense of" Mrs. Stratton? I

(4) If so, was the right extinguished "for" the "benefit" of the three sons?

As to the first question, we were referred to certain authorities bearing on the right to disclaim, the effect of disclaimer and the position of a legatee or devisee pending disclaimer.

In *Townson v. Tickell* (1) ((1819), 3 B. & Ald. 31), ABBOTT, C.J., said this (*ibid.*, at p. 36):

"The law certainly is not so absurd as to force a man to take an estate against his will. *Prima facie*, every estate, whether given by will or other-

A wise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge, and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift."

Then, after referring to *Thompson v. Leach* (2) ((1690), 2 Vent. 198) ABBOTT, C.J., went on (3 B. & Ald. at p. 37):

B "That learned judge [i.e., VENTRIS, J.] expressly states, that a man 'cannot have an estate put into him in spite of his teeth'. I concur in that opinion, and think that the renunciation here having been by deed under the hand and seal of the party, must have the effect of making the devise with respect to him null and void, and, consequently, that there must be judgment for the plaintiff."

C Then BAYLEY, J., said this (*ibid.*, at p. 37):

D "The good sense of the thing is quite the other way; the law indeed presumes, that the estate devised will be beneficial to the devisee, and that he will accept of it, until there is proof to the contrary. Here is a renunciation by a most solemn act, viz., by deed; and by that he has said, that he did not choose to accept that which is devised to him. It seems to me, that the effect of that is, that the estate never was in him at all. For I consider the devise to be nothing more than an offer which the devisee may accept or refuse, and if he refuses, he is in the same situation as if the offer never had been made; and that being so, I am of opinion, that the disclaimer, in this case, was sufficient, and that there ought to be judgment for the plaintiff."

E Then HOLROYD, J., said (*ibid.*, at p. 38):

F "I think that an estate cannot be forced on a man. A devise, however, being *prima facie* for the devisee's benefit, he is supposed to assent to it, until he does some act to show his dissent. The law presumes that he will assent until the contrary be proved; when the contrary, however, is proved, it shows that he never did assent to the devise, and, consequently, that the estate never was in him. I cannot think that it is necessary for a party to go through the form of disclaiming in a court of record, nor that he should be at the trouble or expense of executing a deed to show, that he did not assent to the devise."

G In *Re Wimperis, Wicken v. Wilson* (3) ([1914] 1 Ch. 502) WARRINGTON, J., held that a married woman could disclaim an annuity given to her by will subject to a restraint on anticipation. He said this (*ibid.*, at p. 508):

H "So far I have dealt with the case of a married woman not restrained from anticipation. But suppose the married woman is restrained from anticipation, does a restraint on anticipation make any difference? It is still property which she has power to acquire and hold as a *feme sole*. If she acquires it the restraint on anticipation applies, but I fail to see how the fact that if she acquired the property it would be subject to the restraint on anticipation would prevent her from saying 'I will not acquire it'. I think she is entitled to say 'No, I will have nothing to do with it. I decline to take it with the burden imposed on it'. It is said, however, that that is contrary to s. 19 of the Married Women's Property Act, 1882. Section 19, so far as is material, provides that nothing in the Act contained shall interfere with or render inoperative any restriction against anticipation attached to the enjoyment of any property or income by a married woman under any settlement, agreement for a settlement, will, or other instrument. In the case of a disclaimer the restraint on anticipation never becomes attached to the enjoyment of the property at all because the married woman has not become entitled to the property. It seems to me that the provision in

the Act cannot apply to the case of a disclaimer or prevent a married woman from disclaiming the property to which if not disclaimed the restraint on anticipation would attach."

Then the learned judge said (*ibid.*, at p. 509), after referring to *Lady Bateman v. Faber* (4) ([1898] 1 Ch. 144):

"The Master of the Rolls*, however, in stating the result is careful to say 'that a married woman, having an estate for her separate use without power of anticipation, can play fast and loose to a greater extent than if she were a feme sole'. But in the present case if the married woman has in fact declined the gift she never had an estate for her separate use and has never been subject to the restraint on anticipation, and the remarks of LINDLEY, M.R., are not applicable. In my judgment, therefore, a married woman may since the passing of the Married Women's Property Act, 1882, disclaim a gift to her of personal estate although it is given to her with a restraint on anticipation. I think, therefore, that a disclaimer under these circumstances would be valid."

These cases contain observations which might be taken to indicate that disclaimer, in making the gift disclaimed void ab initio, has the effect in law of placing the disclaiming party retrospectively in the same position for all purposes, throughout the period from the date of the gift to the date of disclaimer, as if the gift had never been made, so that the disclaiming party is to be looked on as having never had any right in respect of the gift disclaimed. That extreme position goes beyond anything that was necessary to the decision of the cases cited, and cannot now be maintained in view of the decision of this court in *Re Parsons, Parsons v. A.-G.* (5) ([1942] 2 All E.R. 496). In that case a testatrix left her husband a sum of stock absolutely and gave him a life interest in the residue of her estate. The husband by deed disclaimed the legacy which accordingly fell into residue, and as part of the residue became subject to the husband's life interest. On the death of the husband the question arose whether between the date of the testatrix' death and the date of the disclaimer the husband had been competent to dispose of the stock, so as to exclude it from the exemption from estate duty on his death accorded to the testatrix' residuary estate by the saving provision in favour of spouses contained in proviso (a) to s. 14 of the Finance Act, 1914, which in other cases abolished the relief in respect of settled property allowed by s. 5 (2) of the Finance Act, 1894. The court held that this question should be answered in the affirmative. LORD GREENE, M.R., said ([1942] 2 All E.R. at p. 497):

"It was said that the competence of the husband in relation to the sum of consols ceased when the disclaimer took place. No criticism can be made of that. It was also conceded that between the date of the death and the disclaimer, which in the present case was evidenced by a deed, some interval of time passed during which the husband had not yet decided to disclaim; and it was admitted that during that period he was competent to acquire the right to dispose of the consols, but that right he never in fact acquired because he disclaimed the legacy. The argument then proceeded on the basis that upon the true construction of the sub-section a legatee who is competent to acquire the right to his legacy—that is, who is competent to take it if he decides not to disclaim—is not competent to dispose of the subject-matter of the legacy within the meaning of the sub-section."

Then a little later on the learned Master of the Rolls said (*ibid.*):

"The husband, in the present case, from the moment of death was able to make the legacy his own; in fact, if he had done nothing but had proceeded to die, his executors would have been entitled to that legacy

* I.e., LINDLEY, M.R., in *Lady Bateman v. Faber* (4) ([1898] 1 Ch. at p. 149).

A from the mere fact that he had not disclaimed it. During the period between death and disclaimer, he was unquestionably to my mind 'competent to dispose' within the meaning of those words, which I think are wide and in a sense popular in meaning . . . picking out the words [from s. 22 (2) (a) of the Finance Act, 1894] which would be applicable to the present case, the definition clause would run: 'A person shall be deemed competent to dispose of property if he has . . . every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit . . .' That language seems to me beyond doubt to cover the case of a legatee to whom a legacy has been given and who is in a position either to take it or to transfer it to somebody else or to disclaim it as he thinks fit. The husband was in that position . . . during the interval between the death and the disclaimer; and I need scarcely add that the fact that for some purposes a disclaimer is to be described as making the gift or grant void ab initio does not . . . mean that during the period to which I have referred the competence . . . must be treated in law as not existing. The doctrine of the gift being void ab initio has nothing . . . to do with considerations of that kind."

D Then the learned Master of the Rolls said ([1942] 2 All E.R. at p. 498):

"He [i.e. the husband] was, as counsel for the respondent put it, in a position not unlike that of a person with a confirmed option. . . . he could take the legacy out of the mass if he thought fit, and, of course, the court would assume that he had intended to take it but for disclaimer or acts from which disclaimer could be inferred."

E Then LORD CLAUSON, after expressing his complete agreement with the Master of the Rolls, said this towards the end of his short judgment (*ibid.*, at p. 498):

"The practical position is just the same as if he had accepted the legacy and had then assigned it to the trustees of the will upon the trusts of the settlement. If that had happened, the revenue . . . obviously would have been entitled to the estate duty which they are now claiming. I cannot help saying that I feel some satisfaction that we have not been forced by any technical considerations attaching to disclaimer to . . . give the estate a benefit in regard to estate duty which could not have been plausibly argued for except upon such purely technical considerations."

G I think it is clear from that case that a disclaiming legatee or devisee has, between the testator's death and the moment of disclaimer, a right in respect of the legacy or devise in that he is during that period entitled to call on the executors to pay or transfer to him the subject-matter of the bequest or devise in due course of administration. It is none the less a right because it is defeasible by the beneficiary's own act of disclaimer. That merely means that he is free to choose whether to avail himself of it or not until such time as he has either unequivocally disclaimed or unequivocally accepted the gift. If he disclaims, then he avoids the gift and with it the concomitant right, but that does not alter the fact that down to the moment of disclaimer he did have the right and would still have had it if he had not disclaimed. Counsel for the three sons did not in the end dispute that between the death of the testator and the date of her disclaimer Mrs. Stratton did have a right of a sort in respect of the policies and freehold property bequeathed and devised to her. He said, however, that it was a right of a peculiar and circumscribed character, a mere right to accept or refuse a proffered gift, which could not fairly be brought within the scope of s. 45 (2) on the strength of its sweeping and unparticularised reference to "a debt or other right". I cannot accept this argument. Counsel for the sons did not seek to limit the effect of the words "debt or other right" by an application of the *ejusdem generis* rule, and in my view it would not be possible to do so. In the absence of any such

restriction on its meaning the word "right" is a word of the widest import, and if, in accordance with my view, Mrs. Stratton can properly be held to have had a right in respect of the specific bequest and devise pending disclaimer, I see no ground for holding that it was not a right within the meaning of s. 45 (2). I am accordingly of opinion, as was the learned judge, that the first of the four questions posed above must be answered in the affirmative. A

As to the second question, I entirely agree with the learned judge that the disclaimer must be held to have operated as an extinguishment of Mrs. Stratton's right in respect of the specific bequest and devise. It seems to me that a disclaimer such as this is a typical example of the extinguishment of a right. B

As to the third question, the extinguishment of the right was at the expense of Mrs. Stratton in that she thereby lost the benefit of the specific bequest and devise. That seems to me to suffice to satisfy this requirement of s. 45 (2). Here again I find myself in agreement with the learned judge who said as regards this aspect of the case ([1956] 3 All E.R. at p. 865): C

"I come to the third requirement, the words 'at the expense of the deceased'. It was contended on behalf of the plaintiffs that that inferred that there must be something like the putting of his hand in his pocket by the person who extinguished the debt. I cannot see why there should be any such limitation. It seems to me that the words 'at the expense of the deceased' are not used in any technical manner but in an ordinary and natural manner which is plainly covered by the definitions contained in the OXFORD DICTIONARY of 'expense'; the words 'cost or sacrifice involved in any course of action' and so on are used. Consequently this requirement is satisfied." D E

I think this view is borne out by a consideration of the case, specifically mentioned in s. 45 (2), of the extinguishment of a debt. In the case of a debt owing to the deceased it is plain that its extinguishment would not involve the deceased in any "expense" in the sense of paying out money. Nevertheless such extinguishment would rightly be described as having been effected at his expense, in that by extinguishing the debt he deprived himself of his right to recover it. If this was not so, it would be difficult to see how the requirement of s. 45 (2) that the extinguishment should be at the expense of the deceased could ever be satisfied in the case of the extinguishment of a debt owing to the deceased, although that is clearly one of the possible transactions at which s. 45 (2) is aimed. Accordingly I would give an affirmative answer to the third question also. F

As to the fourth and final question, it is to my mind self-evident that the extinguishment of Mrs. Stratton's right in respect of the specific bequest and devise was for the benefit of the three sons. The effect of the extinguishment was to cause the policies and freehold property to sink into the residue of the testator's estate, and the three sons being entitled to such residue in equal shares benefited accordingly. The learned judge apparently took the view that in order to satisfy this requirement of s. 45 (2) it was necessary that a positive intention on the part of Mrs. Stratton to benefit the three sons must be shown. There was no direct evidence to this effect, but the learned judge found ([1956] 3 All E.R. at p. 866) that the facts raised a presumption that Mrs. Stratton did intend to benefit the three sons on the principle that one should G

"attribute ... the intention to produce the results which naturally follow from the transaction in question." I

He held (*ibid.*) that there was no evidence to rebut the presumption, and that as it was not rebutted he

"must presume that the disclaimer was executed for the purpose of benefiting the three sons."

I cannot accept the view that in referring to "the person for whose benefit the debt or right was extinguished" s. 45 (2) means any more than the person for

A whose benefit the extinguishment of the debt or right operated. I find it impossible to hold that the section requires it to be shown not only that some person benefited in fact but also that in bringing about or suffering the extinguishment the deceased was actuated by the intention, purpose or desire of benefiting that person. The motive or purpose of the deceased appears to me to be immaterial, provided that the transaction was gratuitous and did in fact benefit the other

B person concerned.

In the vast majority of cases there would, no doubt, be an intention on the part of the deceased to benefit the person in fact benefited by the transaction, and it is clear that to bring a case within s. 45 (2) it must be shown that some person did in fact benefit. It is also true to say that the effect of the referential operation of s. 45 (2) is (as indicated by the sidenote) to bring the transactions to

C which it relates into the category of gifts inter vivos taxed under s. 2 (1) (c) of the Act of 1894; and, as the learned judge observed, gifts involve the relationship of donor and donee. However, to take the ordinary case of a gift inter vivos, it seems to me to be plain that where a donor gratuitously transfers property to a donee so as to constitute the donee beneficial owner of the property transferred, there is a gift of that property to the donee whatever the motive, purpose or

D intention of the donor may have been. A man may (for instance) give his property to a charity not because he wants to benefit the charity but because he wants to prevent some other person from getting it. There can be no doubt, however, that the disposition in favour of the charity would be a gift. The same would to my mind be the case where the gift proceeded from motives other than that of benefiting the donee such as those instanced by the learned judge ([1956] 3 All

E E.R. at p. 866):

"... it might be because the legatee did not wish to receive any benefit from a testator because he or she regarded the property as tainted in some way or other, or had a personal dislike for the testator."

Returning to the language of s. 45 (2) I cannot find in it any indication that the

F sub-section is only to apply where the right is extinguished for the purpose, or with the intention, of benefiting some other person. It assumes that some person will in fact benefit and creates a notional disposition in favour of that person as the person for whose benefit the right is extinguished. If the sub-section had been meant to apply only where a positive intention to benefit some person, as well as a benefit to him in fact, can be found, I think it would inevitably have

G contained some reference to intention. The word "for" in the phrase "for whose benefit" seems to connote result rather than intention, and I cannot regard it as sufficient to introduce into the sub-section the requirement of intention to benefit as well as of benefit in fact.

Similar phrases can be found in other sections of the enactments relating to estate duty, in contexts where they appear to mean nothing more than the benefit

H in fact of the person concerned. Section 11 (1) of the Finance Act, 1900, spoke* of a life interest having been

"surrendered, assured, divested, or otherwise disposed of... to or for the benefit of any person entitled to an estate or interest in remainder or reversion..."

In that passage "to or for the benefit of" seems to mean in effect "directly to, or indirectly so as to benefit". In s. 39 of the Finance Act, 1930*, which in effect extended the provisions of s. 11 of the Finance Act, 1900, to annuities, the words

I "to or for the benefit of" appear to bear a similar meaning.

Accordingly, while differing from the learned judge so far as he considered that s. 45 (2) requires that an intention to benefit the person in fact benefited by the extinguishment of the right should be shown, I agree with his conclusion to the

* This section was repealed, except as respects persons dying before June 27, 1940, by the Finance Act, 1940, s. 65 (8) and Sch. 8.

effect that the fourth question should, like the others, be affirmatively answered. A

It follows that all the requirements of s. 45 (2) are satisfied in this case, and that the consequent claim to estate duty on the death of Mrs. Stratton was rightly upheld by the learned judge.

In the course of his argument to the contrary, counsel for the three sons relied on s. 43 of the Act of 1940 which relates to the "disposition or determination of life interests etc." He pointed out that s. 43 contained no reference to the disclaimer of a life interest, and used that omission as an indication that s. 45 (2) did not extend to disclaimers. I do not follow this. I fail to see why all cases of the extinguishment of rights should not have been advisedly dealt with together in one section. B

Counsel for the three sons also relied, by way of *reductio ad absurdum* on various examples of the possible results of the inclusion of disclaimers in s. 45 (2), especially if the view I have expressed above on the question of intention were to prevail. He instanced the imaginary case of a lady receiving through the post a parcel of jewels from an unwanted admirer, suggesting that if she rejected them and returned them forthwith to the sender, duty would be chargeable on them in the event of her death within five years. I think the answer may be that in such a case there would be no extinguishment of a right but merely a failure of an abortive gift. D

Counsel for the three sons also suggested the possible case of a gift to a person on some condition (such as change of religion or something of that sort) which the donee was unable or unwilling to fulfil, and which accordingly led him to disclaim the gift. I am not satisfied that s. 45 (2) would apply to such a case, or that if it did, would result in any duty being exigible, and, as at present advised, I think that, at all events if the condition was a condition precedent, it probably would not be within s. 45 (2), though I must not be taken as prejudging any question of this kind which may hereafter actually arise for decision. E

Counsel for the three sons gave other examples of disclaimers on grounds of conscience, dislike of the donor, dislike of the source of the donor's money or of the character of the asset given (e.g. a gift of brewery shares to a teetotaler) and the like, which seemed to me (while they did credit to counsel's (Mr. Russell) ingenuity) to be for the most part somewhat improbable and far fetched. Counsel also emphasised the unfairness (as he would have it) of aggregation in the hypothetical cases to which he referred. I find in counsel's submissions no sufficient ground for excluding the transaction with which we are now concerned from the operation of s. 45 (2) if, as I think, it falls fairly within the language of the enactment. I confess that I am disposed to deprecate recourse in revenue legislation to sweeping generalities of this kind, but the mere fact that an enactment is couched in general and comprehensive terms affords no ground for excluding from its operation transactions falling fairly within its provisions, general though they may be. F

Finally, whatever may be thought of counsel for the three sons' hypothetical cases, it seems to me that arguments *ad absurdum* on the side of the taxpayer are to some extent offset by the consideration that it might be said to be, to say the least, anomalous that a benefit conferred by transfer should be dutiable in the event of the donor's death within five years, while a precisely similar benefit conferred by disclaimer should not attract duty on the death of the disclaiming party however soon after the date of the disclaimer that event might occur. I quote again the concluding sentence of the judgment of LORD CLAUSON in *Re Parsons* (5) ([1942] 2 All E.R. at p. 498): G

"I cannot help saying that I feel some satisfaction that we have not been forced by any technical considerations attaching to disclaimer to reach a conclusion which would give the estate a benefit in regard to estate duty . . ."

For the reasons which I have endeavoured to state, I think the learned judge came to a right conclusion in this case, and I would accordingly dismiss the appeal. H

A **SELLERS, L.J.:** I agree with the judgment which my Lord has delivered. I have felt some hesitation in accepting the argument for the Crown which challenged DANCKWERTS, J.'s opinion ([1956] 3 All E.R. at p. 866) that the extinguishment, to fulfil the requirement of s. 45, must be for the benefit of some person, in the sense of a "conscious intention on the part of the person who executes the disclaimer to benefit somebody else".

B The learned judge pointed out that the section is concerned with gifts and, of more importance, that it contains the words "for whose benefit the right was extinguished" which seem to give some indication of motive or intention. The words are not very clear and, on consideration, I agree with the opinions expressed by JENKINS, L.J., and ROXBURGH, J.

C The other view would have served to overcome many of the criticisms to which the section perhaps lays itself open, an opportunity of which counsel for the three sons was not slow to avail himself.

However, if I had adhered to the learned judge's interpretation, my decision would not have assisted the three sons because in my view the learned judge was justified in holding in this case that the disclaimer was with the intention or for the purpose of benefiting the children.

D **ROXBURGH, J.:** I agree, and should not have added anything if we had not been differing from DANCKWERTS, J., on a point important in itself though not decisive of the present case. On this point I adopt what JENKINS, L.J., has already said, and would add that in my opinion the structure of s. 45 (2) of the Finance Act, 1940, points to the same conclusion. A certain state of facts is to be deemed to be a different state of facts, and the line between fact and hypothesis seems to me to be drawn by the word "deemed". If this be so, only three actual facts are expressed to be necessary in order to involve the hypothetical situation (1) the existence of a right, (2) its extinguishment, (3) its extinguishment at the expense of the deceased. When those three facts concur, the hypothesis goes into action, and the hypothesis is that these facts are equivalent to a disposition made by the deceased in favour of the person for whose benefit the right was extinguished. These words all form part of the hypothesis and the concluding words are necessary to define the hypothetical donee. If they were intended to add a fourth limb to the actual facts, they ought to have preceded the word "deemed". Even if they had done so, there might well still have been a doubt whether positive intention to benefit would have to be proved. But in their actual position in the sub-clause, that argument is much more difficult and ought not to prevail.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Mackrell, Maton & Co.* (for the three sons, the plaintiffs); *Solicitor of Inland Revenue.*

[Reported by HENRY SUMMERFIELD, Esq., Barrister-at-Law.]

PRACTICE NOTE.

DIVORCE REGISTRY.

Legal Aid—Costs—Counsel's fees—Matrimonial causes.

Registrar's Circular dated June 24, 1957, is as follows:—

The registrars of the Divorce Registry have at the request of the professional bodies issued the following statement of their policy as regards counsel's fees on taxations under Sch. 3 to the Legal Aid and Advice Act, 1949. They wish to make it clear that, while this statement represents their general policy, it cannot fetter the discretion of the individual officer of the court taxing any particular bill.

1. Settling Documents.

(a) *Pleadings*: A fee will always be allowed, unless the document is a plain denial or joinder of issue and a conference or advice has already been allowed on it.

(b) *Discretion Statement*: A fee will be allowed, unless the facts are so simple that it is little more than a verbatim extract from the proof.

(c) *Application for Particulars*: A fee will be allowed, except when confined to a request for particulars of the "general charge" or other short and simple request.

(d) *Affidavits*: A fee will usually be allowed if the affidavit is more than a simple statement of facts, though less readily in undefended applications. Under R.S.C., Ord. 65, r. 27 (15), one suitable fee only will be allowed for a group of affidavits.

(e) *Summonses*: No fee will be allowed unless the summons is of a technical or complicated character.

2. Opinion and Advice.

A clear distinction is drawn between a preliminary opinion and advice on evidence.

A preliminary opinion before, or with, the settling of the petition will be allowed only if the case has features of special difficulty: for instance, if the party has disclosed details which suggest further inquiries might be necessary to support an alternative charge; or if questions of domicile or jurisdiction arise. An opinion specially required by an area or local committee will always be allowed. One appropriate fee only will be allowed for such an opinion, whether given in writing or in conference.

One fee for advice on evidence will always be allowed if it is taken after the close of pleadings, but not if taken earlier. Any further advice must be justified on the facts.

3. Conference.

A fee will always be allowed on a main brief, but not on a brief for a summons or interlocutory proceeding which is of a very simple character or in which counsel has already advised or settled the papers. Conferences other than on a brief must be justified on the facts. A fee will seldom be allowed for a conference held before appearance.

4. Brief fees on summonses and other interlocutory proceedings.

(a) A certificate for counsel will not be given on either side where the application is a simple procedural one which does not justify his attendance. Examples of applications on which a certificate will be given only in exceptional circumstances are:—

All unopposed applications (i.e., by consent, or agreed "no cause to show," or not requiring service), whether included in the list below or not:

Leave to amend pleading; Discovery; Appointment of medical inspectors; Further time or leave to file out of time; To stay prayer and proceed on

A answer; Particulars, if confined to the "general charge" or other very simple request; Security for costs; Removal of solicitor's name from record; Variation of venue; Removal of stay of proceedings; Appointment of guardian; Garnishee or charging order.

(b) A certificate will be given on opposed applications for ancillary relief where the circumstances and the complexity of the parties' affairs are such that the attendance of counsel is likely to be of assistance to the registrar.

(c) Ordinary consent orders for alimony, maintenance, etc., are not regarded as requiring the attendance of counsel. If, however, a deed of settlement or a secured provision is the subject of a compromise affecting the interests of an infant, this may be regarded as an exceptional circumstance justifying the attendance of counsel even on a consent application.

B. LONG,

Senior Registrar.

Divorce Registry,
Somerset House,
Strand, London, W.C.2.

D

E WILLIAM GWENNAP (AGRICULTURAL), LTD. AND ANOTHER v. AMPHLETT.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Devlin, JJ.), June 20, 1957.]

F *Road Traffic—Motor tractor—Overall width—Motor tractor towing land implement on road—Whether one vehicle—Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. 1955 No. 482), reg. 33—Motor Vehicles (Authorisation of Special Types) General Order, 1955 (S.I. 1955 No. 1038), art. 10, as amended by the Motor Vehicles (Authorisation of Special Types) Order, 1956 (S.I. 1956 No. 1265), art. 3 (2).*

G An employee of the appellants, who were agricultural engineers, drove a "motor tractor"* which was towing a "land implement"† (a combine harvester), which was the property of a farmer, on a road. The overall width of the entity of the two vehicles was twelve feet six inches (the combine harvester being eleven feet four inches in width), as the tractor was on the near side of the combine harvester and overlapped it on that side. The combine harvester was not a mechanically propelled vehicle but relied for power on the tractor. In summary proceedings before justices the appellants were charged with using on a road a vehicle (viz., the motor tractor towing the combine harvester) which vehicle failed to comply with art. 10 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955, as amended. That article authorised, subject to certain restrictions, the use

I * Motor tractors are defined in s. 2 (1) (c) of the Road Traffic Act, 1930, 24 HALSBURY'S STATUTES (2nd Edn.) 573, as:

"mechanically propelled vehicles which are not constructed themselves to carry any load (other than any of the articles aforesaid), and the weight of which unladen does not exceed seven tons and a quarter."

† Defined in reg. 3 (1) of the Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. 1955 No. 482), as follows:

"any implement or machinery used with a land locomotive or a land tractor in connexion with agriculture, grass cutting, forestry, land levelling, dredging or similar operations . . ."

on roads of "land tractors" (viz., motor tractors satisfying certain particular requirements as to design, use and ownership), constructed for the combined purposes of reaping and threshing, notwithstanding that they did not comply with the requirement laid down in reg. 33 of the Motor Vehicles (Construction and Use) Regulations, 1955, that the overall width of a motor tractor should not exceed seven feet six inches. The motor tractor, which was towing the combine harvester, did not itself offend against reg. 33, but restrictions specified in art. 10 were not fulfilled, so that that article did not in the circumstances exempt the entity (viz., the motor tractor coupled to the combine harvester) from the limitation of overall width enacted by reg. 33 for motor tractors. The justices considered that the motor tractor and the combine harvester were together one vehicle and that there was thus an offence against reg. 33. On appeal against conviction,

Held: there was no offence against reg. 33, because the motor tractor and combine harvester remained two vehicles, notwithstanding that, when they were coupled together, one might be used to provide power for the other.

Appeal allowed.

Case referred to:

- (1) *Regerson v. Stephens*, [1950] 2 All E.R. 144; 114 J.P. 372; 2nd Digest Supp.

Case Stated.

This was a Case Stated by justices for the Borough of Stafford in respect of their adjudication as a magistrates' court sitting at Stafford on Dec. 10, 1956. On Nov. 9, 1956, informations were preferred by the respondent, William Charles Amphlett, against the appellants, William Gwennap (Agricultural), Ltd. and Kenneth William Dyde, that on Sept. 5, 1956, at Stafford they used on a road an agricultural tractor towing as a trailer a combine harvester, the overall width of which exceeded eleven feet, to which the requirements of reg. 33 and reg. 34 of the Motor Vehicles (Construction and Use) Regulations, 1955, did not apply, and failed to comply with the requirements laid down in art. 10 (c) (ii) of the Motor Vehicles (Authorisation of Special Types) General Order, 1955, as amended by the Motor Vehicles (Authorisation of Special Types) Order, 1956, in that whilst the vehicle was being so used there were not two persons in addition to the driver in attendance, one whenever necessary proceeding at a reasonable distance in front of the vehicle and the other whenever necessary proceeding at a reasonable distance behind the vehicle, to give warning to other traffic on the road, contrary to the orders and to s. 3 (1) (b) and (3) and s. 113 of the Road Traffic Act, 1930. There was a further information against the appellants, William Gwennap (Agricultural), Ltd. that on Sept. 5, 1956, at Stafford they used on a road an agricultural tractor towing as a trailer a combine harvester, to which the requirements of reg. 33 and reg. 34 of the Motor Vehicles (Construction and Use) Regulations, 1955, did not apply, and failed to comply with the provisions of art. 10 (d) of the Motor Vehicles (Authorisation of Special Types) General Order, 1955, as amended by the Motor Vehicles (Authorisation of Special Types) Order, 1956, in that they used the vehicle,

* Defined in reg. 3 (1) of the regulations (S.I. 1955 No. 482), as follows:

"a motor tractor designed and used primarily for work on the land in connexion with agriculture, grass cutting, forestry, land levelling, dredging or similar operations, being a vehicle which (a) is the property of a person engaged in agriculture or forestry or of a contractor engaged in the business of carrying out any such operations as aforesaid on farms or on forestry estates; and (b) is not used on a road for hauling any object other than (i) a land implement which is being hauled to or from the site where it is to be used for any such operation as aforesaid or from one part of the farm or forestry estate to another part of that farm or estate, or (ii) an agricultural trailer."

- A the overall width of which exceeded nine feet six inches, on a road and failed to give to the chief constable of Staffordshire not less than twenty-four hours' notice, such notice containing particulars of the identity and overall width of the vehicle, and the time and route of the proposed journey, contrary to the said orders and to s. 3 (1) (b) and (3) and s. 113 of the Road Traffic Act, 1930. The following facts were found. The appellant Dyde was employed by the appellants
- B William Gwennap (Agricultural), Ltd. and on Sept. 5, 1956, in the course of such employment he was driving an agricultural tractor belonging to his employers and was hauling with the tractor a combine harvester on the A34 road at Radford Bridge, Stafford. The combine harvester was being towed from a farm to the appellants, William Gwennap (Agricultural), Ltd.'s premises, and they owned the tractor and had possession of the combine harvester as bailees.
- C The overall width of the combine harvester was eleven feet four inches, but, when hauled by the tractor, the overall width of the two vehicles together was twelve feet six inches, as the tractor was on the near side of the combine harvester and overlapped it on the near side. There were no attendants on the tractor and combine harvester other than the appellant Dyde as driver. The movement of the tractor and combine harvester (exceeding nine feet six inches in width) had not been notified to the chief constable although the journey to be made exceeded a distance of five miles, namely over seven miles, and the tractor and combine harvester had travelled approximately four and a half miles when stopped. The appellants, William Gwennap (Agricultural), Ltd. had not notified the chief constable nor had they provided any attendants, and the appellant Dyde was acting under instructions in making the journey with the tractor
- E and combine harvester. The combine harvester was not mechanically propelled, but had to rely for power on an agricultural tractor or other external means, and the agricultural tractor was not constructed of itself to carry any load (therefore it was a motor tractor). The tractor and the combine harvester together were a land tractor constructed for the purpose of reaping and threshing and the two parts formed a unit for the purpose, which could normally be used
- F for reaping and threshing in that condition. A self-propelled combine harvester of twelve feet six inches was manufactured.

- It was contended on behalf of the appellants that (i) by art. 10 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955, land tractors constructed for the combined purpose of reaping and threshing were authorised to be used on roads. By art. 1 (3) of that order, "land tractor" had the meaning
- G assigned to it by the Motor Vehicles (Construction and Use) Regulations, 1955, and a land tractor was therein stated to be a motor tractor defined by the Road Traffic Act, 1930, s. 2 (1). The combined effect of these definitions was that, for art. 10 to apply, the vehicle "constructed for the combined purpose of reaping and threshing" had to be a land tractor and, therefore, had to be mechanically propelled. In this case, the combine harvester was not mechanically
- H propelled, and was being used as a trailer to an agricultural tractor which itself was not so constructed for the combined purpose of reaping and threshing, and the agricultural tractor and the combine harvester remained two separate vehicles. Therefore the requirements of art. 10 did not apply to the facts found. (ii) No evidence had been given that the appellants William Gwennap (Agricultural), Ltd. were the owners of the combine harvester and, therefore,
- I no notice under art. 10 (d) was required to be given by them to the chief constable. (iii) Evidence had been given that the distance travelled by the combine harvester was four and a half miles and it was only for a journey exceeding five miles, even if the article applied to the vehicle, of which notice had to be given to the chief officer of police. It was contended on behalf of the respondent that art. 10 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955, did apply to the tractor and combine harvester and the two vehicles formed one unit for the purpose, and that notice should have been given to the chief

constable before using a vehicle subject to the provisions of art. 10 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955, for a journey exceeding five miles. The justices were of opinion that this combination constituted a land tractor constructed for the combined purpose of reaping and threshing and that its overall width exceeded eleven feet*.

The justices convicted the appellants on all the charges and the appellant Dyde was fined £1 and the appellants William Gwennap (Agricultural) Ltd. were fined £3 on each charge. The appellants now appealed.

W. G. Wingate for the appellants.

K. S. W. Mellor for the respondent.

DEVLIN, J.: Regulation 33 of the Motor Vehicles (Construction and Use) Regulations, 1955, made under the Road Traffic Act, 1930, prescribes that the overall width of a motor tractor shall not exceed seven feet six inches. If the regulations stopped there, a motor tractor might lawfully draw some other vehicle or implement behind it which exceeded seven feet six inches in width, and, therefore, in effect diminish the space available for other traffic on the roads, which it is the object of the regulation to prevent. Accordingly, a later regulation, reg. 54, provides for the situation when the motor tractor is drawing another vehicle. It says, in para. (1): "Save as provided in para. (2) of this regulation the overall width of a trailer shall not exceed seven feet six inches". Then it gives certain exceptions to that in the case of certain particular sorts of trailers, but in para. (2) it gives a general exemption to what is called a land implement, which says: "This regulation shall not apply to a land implement . . .", and a land implement is defined in reg. 3 (1) as "any implement or machinery used with a land locomotive or a land tractor in connexion with agriculture, grass cutting, forestry . . ." etc. Everybody knows the sort of agricultural vehicles that are commonly used, hay rakes, and so on, that come within that definition of a land implement.

Therefore, the position under the regulations is that, if a tractor is drawing a land implement, there is no limit at all on the width of the land implement. That would apply to and cover, or *prima facie* it would apply to and cover, certain types of combine harvesters. Broadly speaking, they appear to be of two types. There is one type which is in itself a mechanically propelled vehicle, and there is another type which is drawn behind a tractor and derives its power, in some cases at any rate, from the tractor. What the regulations would not cover would be a self-propelled combine harvester, for that would not be a trailer; it would be one vehicle. It would fall within the definition of a motor tractor, and, if it exceeded seven feet six inches, as, of course, it always does, it could not be taken on the roads. It was to provide for that situation that another order was made, the Motor Vehicles (Authorisation of Special Types) General Order, 1955, art. 10 of which covers what are described as land tractors used for reaping and threshing. In form and substance it is by way of an exception to reg. 33 of the Motor Vehicles (Construction and Use) Regulations, and it allows

"the use on roads of land tractors constructed for the combined purpose of reaping and threshing notwithstanding that such vehicles do not comply with the requirements of reg. 33 and reg. 34 of the Construction and Use Regulations . . .",

but it is subject to certain restrictions.

A farmer was the owner of one of these combine harvesters which are drawn behind tractors and derive their power from tractors. It broke down in the

* I.e., the maximum width stated in art. 10 (c) (ii) of the Motor Vehicles (Authorisation of Special Types) General Order, 1955 (S.I. 1955 No. 1038), as amended by art. 3 (2) of the Motor Vehicles (Authorisation of Special Types) Order, 1956 (S.I. 1956 No. 1265).

- A course of the harvest, and he sent urgently for the appellants, William Gwennap (Agricultural), Ltd., who are agricultural engineers, to come and repair it, and the appellant Dyde towed the combine harvester away for repair. The tractor did not fit exactly the combine harvester in the sense that the combined width of the two was greater than the width of either one of them separately because the near side overlapped. The consequence was that it exceeded the width
- B that is prescribed in art. 10 of the Authorisation of Special Types Order. Therefore, a summons was brought against the appellants which is in form that they failed to comply with the regulations laid down in art. 10. Article 10, as I have indicated, does not lay down any requirements. What it does is that it would enable somebody who would otherwise be committing an offence against reg. 33 of the Construction and Use Regulations to provide a defence; it gives material
- C on which they can set up a defence. This case need not be decided, however, on the form of the summons. It is sufficient to say that no offence can be proved in this case—and that is accepted by learned counsel for the respondent—unless there is an offence against reg. 33, that is to say, unless the overall width of the motor tractor exceeded seven feet six inches. Therefore, for the purpose of sustaining the charge he submits, and the justices found, that this
- D combination of the motor tractor with the combine harvester behind it was a single vehicle which was properly described as a motor tractor. That would appear to lead to this conclusion, that, if a combine harvester, which is one form of land implement—there can be no dispute about that—is to be regarded when it is drawn by a motor tractor as one unit and as a motor tractor within the meaning of reg. 33, the same would apply to any other sort of land implement.
- E The result would be that the regulation which expressly, as it were, exempts from the width provisions land implements in general, would be no use at all because the prosecution could always get round it by saying that the land implement and the motor tractor were one vehicle and came within reg. 33. Not only would it produce that result but it would be contrary, if this court were to hold that two vehicles united together in such circumstances constituted
- F one motor tractor, to the reasoning in *Rogerson v. Stephens* (1) ([1950] 2 All E.R. 144).

- The way in which learned counsel for the respondent has sought to get round those two difficulties, the difficulty of the authority and the difficulty which I have indicated, and to submit that this is one motor tractor is because of the finding the justices have made that this was a combine harvester which was
- G not only not mechanically propelled but had to rely for power on the agricultural tractor. He submits that a distinction can properly be drawn between a motor vehicle or tractor which is drawing a land implement and has no other connexion with it, so to speak, and one which is drawing a land implement but which could, if necessary—it was not necessary on this occasion because it was merely being drawn along the road—supply the power which could make the
- H combined threshing and reaping part of the combine harvester work. In my judgment, that is not a true ground of distinction. They remain two vehicles notwithstanding that when they are coupled together one may be used to provide power for the other. The actual basis of the argument that has been submitted to us is really that we can draw a distinction on that ground, but, in my judgment, we cannot. Accordingly, the conviction was wrong and
- I ought to be quashed.

LORD GODDARD, C.J.: I agree. I think that this case might well be brought to the attention of the Minister because the object of these regulations which have been cited to us is to prevent these very unwieldy objects being carried along the road except under stringent conditions. In one sense, that is exactly what has happened but, for the reasons *DEVLIN, J.*, has given, it is impossible to hold that the regulations apply to it, and, therefore, this appeal must be allowed.

BYRNE, J.: I agree.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Pickering & Pickering*, Stafford (for the appellants); *Smiles & Co.*, agents for *P. T. W. Butters*, Stafford (for the respondent).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

NOTE.

R. v. LLANIDLOES LICENSING JUSTICES, *Ex parte* DAVIES.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), June 6, 1957.]

Mandamus—Costs—Payment by justices—Motion for mandamus opposed by justices—Justices appearing by counsel—Motion granted—Justices liable for costs as parties to motion—Justices entitled to file affidavits in lieu of entering an appearance—No costs then payable—Review of Justices Decisions Act, 1872 (35 & 36 Vict. c. 26), s. 2.

[For the Review of Justices Decisions Act, 1872, s. 2, s. 3, see 14 HALSBURY'S STATUTES (2nd Edn.) 842.]

Motion for Mandamus.

The applicant moved for an order of mandamus directing the licensing justices for the division of Llanidloes, Montgomeryshire, to hear and determine an application for the extension of licensing hours.

The justices appeared by counsel to oppose the motion. The court having granted the order of mandamus, counsel for the applicant asked for the costs of the application.

Richard Elwes, Q.C., and *S. H. Lamb* for the applicant.

E. P. Wallis-Jones for the respondents, the licensing justices.

LORD GODDARD, C.J.: The justices have made themselves parties to this application and the applicant is entitled to costs against them. The justices were entitled, if they chose, to avail themselves of the Review of Justices Decisions Act, 1872*, which allows them to file affidavits. They do not then make themselves liable for costs, and they do not have to pay any stamp duty on the affidavit. If, however, they choose to appear here, they make themselves parties to the lis and take the risk of being ordered to pay costs, and are entitled to receive costs if they succeed in defeating the application. I have been trying to remind justices, not only in court† but also in addresses that I have given

* Section 2 of the Review of Justices Decisions Act, 1872, provides: "Whenever the decision of any justice or justices is called in question in any superior court of common law by a rule to show cause or other process issued upon an ex parte application, it shall be lawful for any such justice to make and file in such court an affidavit setting forth the grounds of the decision so brought under review, and any facts which he may consider to have a material bearing upon the question at issue, without being required to pay any fee in respect of filing such affidavit or any stamp duty thereupon, and such affidavit . . . may be forwarded by post to one of the masters of the court for the purpose of being so filed."

Section 3 of the Act of 1872 provides: "Whenever any such affidavit has been filed as aforesaid, the court shall, before making the rule absolute against the justice or justices, or otherwise determining the matter so as to overrule or set aside the acts or decisions of the justice or justices to which the application relates, take into consideration the matters set forth in such affidavit, notwithstanding that no counsel appear on behalf of the said justices."

† The Lord Chief Justice had drawn attention to the practice of filing affidavits in, e.g., *R. v. Kingston-upon-Hull Rent Tribunal, Ex p. Black*, [1949] 1 All E.R. 260, at letter E, and *R. v. Camborne JJ., Ex p. Pearce*, [1954] 2 All E.R. at p. 856.

A to them, of their rights under the Act of 1872. That Act was passed for the very purpose of allowing justices, against whom a motion for certiorari or mandamus was made, to put in affidavits giving their reasons for opposing the motion, so that the court could decide the case on the affidavits, but if justices will insist on instructing counsel and coming before the court and arguing the case, they are making themselves parties to a lis. The legislature has given B them this opportunity of putting their views before the court without being liable for costs. If they do not choose to take it, that is their affair. The justices have come here, filed affidavit after affidavit, and have had the benefit of counsel's strenuous argument.

C *E. P. Wallis-Jones*: In my submission, it would be a departure from previous practice that costs should be awarded against justices unless they had acted capriciously or oppressively. Orders which cover the indemnity costs of justices have been commonly made.

LORD GODDARD, C.J.: Would not the justices have asked for costs if they had won?

E. P. Wallis-Jones: They would have asked for costs.

D LORD GODDARD, C.J.: Then why should they not pay if they lose? The justices need not have appeared. At one time this court very seldom ordered costs, and I think that the reason was that the Act of 1872 got overlooked. For at least three years now I have been trying to remind justices of the presence of this Act on the Statute Book. I have said over and over again that, if justices E are not content with exercising the power which Parliament has given them but will insist on appearing and arguing the case, they will make themselves parties to a lis and will have to pay costs if they lose, and if they win they will receive them.

Order for costs.

Solicitors: *J. E. Lickfold & Sons*, agents for *Emrys Jones & Co.*, Welshpool (for the applicant); *Madgett & Ball*, agents for *J. & A. Davies*, Llanidloes (for the respondents, the licensing justices).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

S. BERENDSEN, LTD. v. INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Pearce, L.J.J.), May 23, 24, 27, 28, 30, 1957.]

Profits Tax—Computation of profits—Deduction of director's remuneration—"Controlling interest" of directors—Directors not holding majority of shares—Majority of shares held by another company—Director owning majority of shares of that company—Effect of register of members—Finance Act, 1937 (1 Edw. 8 & 1 Geo. 6 c. 54), Sch. 4, para. 11—Finance Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 33), s. 34.

Less than fifty per cent. of the shares with voting rights in the taxpayer company was owned by the directors but more than fifty per cent. was owned by another company in which one of those directors owned more than fifty per cent. of the shares with voting rights. That director was therefore able to control the voting of the other company in the taxpayer company's meetings. The taxpayer company was assessed to the profits tax on the basis that it was a director-controlled company and that the deduction for the remuneration of directors to be allowed in computing its profits must be limited by para. 11 of Sch. 4 to the Finance Act, 1937, as amended by s. 34 of the Finance Act, 1952.

Held: the taxpayer company was properly assessed on the basis that it was a "company the directors whereof had a controlling interest therein" within the meaning of para. 11 of Sch. 4 to the Finance Act, 1937, as amended by s. 34 of the Finance Act, 1952, because, although it might not be possible to look beyond the company's register to ascertain who were the beneficial owners of shares held on trust, it was permissible to ascertain who were the shareholders of a limited company on the register in order to ascertain with whose voice the latter company spoke.

British American Tobacco Co., Ltd. v. Inland Revenue Comrs. ([1943] 1 All E.R. 13) applied, and *Inland Revenue Comrs. v. F. A. Clark & Son, Ltd.* ([1941] 2 All E.R. 651) followed.

Inland Revenue Comrs. v. Silverts, Ltd. ([1951] 1 All E.R. 703) explained. Decision of WYNN-PARRY, J. ([1957] 1 All E.R. 727) reversed.

Statement of the facts of *Inland Revenue Comrs. v. F. A. Clark & Son, Ltd.* ([1941] 2 All E.R. 651) made in *Inland Revenue Comrs. v. Silverts, Ltd.* ([1951] 1 All E.R. 703) corrected (see p. 619, letters C to G, post).

[For the Finance Act, 1937, Sch. 4, para. 11, see 12 HALSBURY'S STATUTES (2nd Edn.) 385; and for the Finance Act, 1952, s. 34, see 32 HALSBURY'S STATUTES (2nd Edn.) 186.]

Cases referred to:

- (1) *Inland Revenue Comrs. v. Silverts, Ltd.*, [1951] 1 All E.R. 703; [1951] Ch. 521; 29 Tax Cas. 491; 2nd Digest Supp.
- (2) *British American Tobacco Co., Ltd. v. Inland Revenue Comrs.*, *Inland Revenue Comrs. v. F. A. Clark & Son, Ltd.*, [1941] 2 All E.R. 651; [1941] 2 K.B. 270; 111 L.J.K.B. 1; 165 L.T. 275; *British American Tobacco Co., Ltd. v. Inland Revenue Comrs.*, *affd.* H.L., [1943] 1 All E.R. 13; [1943] A.C. 335; 112 L.J.K.B. 81; 169 L.T. 98; 29 Tax Cas. 49; 2nd Digest Supp.
- (3) *Inland Revenue Comrs. v. J. Bibby & Sons, Ltd.*, [1945] 1 All E.R. 667; 114 L.J.K.B. 353; 173 L.T. 17; 29 Tax Cas. 167; 2nd Digest Supp.

Appeal.

The taxpayer company appealed to the Special Commissioners of Income Tax against assessments to profits tax on the sums of £2,683 6s., £928 18s., £946 15s. and £1,100 for the chargeable accounting periods of the twelve months ending

A on Dec. 31, 1951, 1952, 1953 and 1954 respectively. The question for determination was whether the company was one whereof the directors had a controlling interest within the meaning of para. 11 of Sch. 4 to the Finance Act, 1937, as amended by s. 34 of the Finance Act, 1952. If it was, the remuneration of the directors was required to be limited in accordance with para. 11 in computing its profits for profits tax purposes. The company was incorporated in 1912 and

B carried on the business of merchanting agricultural machinery. Its issued share capital was one thousand shares of £5 each, registered in the following names: Ludwig Elsass, 300, Sophus Berendsen A/S 590, P. L. Burgin one, E. Hertel 100, A. Elsass nine. Each share carried one vote at company meetings. Sophus Berendsen A/S, was a Danish company, having been incorporated in Denmark. It and E. Hertel owned their shares beneficially but the remaining shareholders

C held the shares registered in their names as nominees of the Danish company. The directors of the company were Ludwig Elsass, E. Hertel and P. L. Burgin, who between them had a total of 401 shares registered in their names, carrying less than fifty per cent. of the votes at company meetings. Ludwig Elsass owned 395 of the six hundred issued shares of the Danish company and was thereby entitled to exercise a majority of the votes in the Danish company in open

D meeting.

The company contended that, as the total number of its shares registered in the names of its directors carried less than fifty per cent. of the votes at company meetings, the company was not director-controlled. The Crown contended that the Danish company's shareholding should be added to the shares held by the company directors because one of the directors, Ludwig Elsass, held a majority

E of the shares in the Danish company and so controlled the voting power of that company and that the directors therefore had a controlling interest in the company. The commissioners held that the directors had a controlling interest in the company and dismissed the appeal. The company appealed. On Feb. 6, 1957, WYNN-PARRY, J., allowed the appeal ([1957] 1 All E.R. 727), holding that the company was not one whereof the directors had a controlling interest therein

F on the ground that the company's register was conclusive as to the owners of the shares for this purpose and it was not permissible to look beyond it. The Crown appealed to the Court of Appeal.

F. N. Bucher, Q.C., and R. Buchanan-Dunlop for the company.

R. O. Wilberforce, Q.C., Sir Reginald Hills and E. Blanshard Stamp for the Crown.

G

Cur. adv. vult.

May 30. LORD EVERSHERD, M.R.: The question in this case is whether the company, S. Berendsen, Ltd., is liable in respect of the profits tax for the four calendar years and chargeable accounting periods ending Dec. 31, 1954;

H and that question depends on whether it is a company "the directors whereof had a controlling interest therein" in accordance with para. 11 of Sch. 4 to the Finance Act, 1937, which provides:

"In the case of a trade or business carried on in any chargeable accounting period by a company the directors whereof have a controlling interest therein, the deduction to be allowed in respect of the remuneration of the

I directors ..."

is limited as therein stated. Both the Crown and the taxpayer have emphasised that this is not a case in which some attack is made on an extravagant award of directors' remuneration.

Having been incorporated in 1912, the company had at all relevant times an issued share capital of one thousand shares of £5 each. The shares were registered in the following names: Ludwig Elsass, 300 shares; a company incorporated in the kingdom of Denmark known as Sophus Berendsen, 590 shares; P. L.

Burgin, one share; E. Hertel, 100 shares; and A. Elsass, nine shares. Of these individuals Messrs. Ludwig Elsass, P. L. Burgin and A. Elsass, in other words, all the individuals except Mr. Hertel, were stated to hold their shares as nominees of the Danish company, Sophus Berendsen. All the individuals named except Mr. A. Elsass were directors of the company at the relevant period. Ludwig Elsass owned at all material times 395 of the six hundred issued shares of the Danish company and was thereby entitled to exercise a majority of the votes in the Danish company in general meeting.

With those facts in mind, the question posed at first blush would appear to be one easy of answer. If the question were put by a man seeking to do business with S. Berendsen, Ltd., or by a man whose son or nephew was offered a post in the business of S. Berendsen, Ltd., "Who controls S. Berendsen, Ltd.?" the answer would appear to be fairly plain. It would be: "Mr. Ludwig Elsass", or, alternatively, "Mr. Ludwig Elsass and Mr. E. Hertel", both being directors of the company. But it is pointed out that "Who controls the company?" is not the question which the court is asked to answer in this appeal, a point which was similarly made in the judgment of this court in *Inland Revenue Comrs. v. Silverts, Ltd.* (1) ([1951] 1 All E.R. 703). The question is: Is this company one the directors whereof have a controlling interest therein? I have already referred to para. 11 of Sch. 4 to the Finance Act, 1937. Paragraph 7 of that Schedule as originally enacted deals with income from investments or other property to be included in a given taxpaying company's profits for the purposes of the tax. Sub-paragraph (b) includes among such income the following:

"in the case of any other trade or business . . . the profits shall include all income received by way of dividend or distribution of profits from any other body corporate in which the first-mentioned body corporate has a controlling interest and which is not liable to be assessed to the national defence contribution",

which is the name which the profits tax then bore.

Counsel for the company referred us to sections of other Finance Acts in which there occurs somewhat similar, and in many cases exactly similar, phrasing, including a reference to para. 13 of Sch. 8 to the Finance (No. 2) Act, 1945, which gives an extended definition to the phrase "controlling interest". He made the point that Parliament had forborne to express any definition of the vital phrase "controlling interest" in this Act of 1937. In my judgment these other statutory provisions do not assist in the decision in this case.

As a matter of common sense it would seem that the answer to the question, "Is this company one the directors whereof have a controlling interest therein?" would be in the affirmative; for the individual who not only stands behind the Danish company but is also, through the Danish company, its nominee shareholder, is Mr. Ludwig Elsass.

In my reading of para. 2 of the Case, I recited the statement that Mr. Ludwig Elsass, owning 395 out of the six hundred issued shares of the Danish company, was thereby entitled to exercise a majority of the votes in the Danish company in general meeting. That statement did not go on to say in terms that in the meetings of the taxpayer company, it followed that the voice of the Danish company was the voice of Mr. Ludwig Elsass. In other words it did not go on to state that Mr. Ludwig Elsass, in addition to holding a majority of the votes in the Danish company in general meeting, as a director of the Danish company, was also entitled to will and order how the Danish company through its nominees dealt with the affairs of the taxpayer company. For my part, I think it was clearly assumed that the shareholding control that Mr. Ludwig Elsass had in the Danish company carried with it the consequence that he was the person who spoke on behalf of the Danish company in every relevant sense. I draw that deduction, first, from the way in which the matter was put by the Inland Revenue Com-

A commissioners when the case came before the Special commissioners. It was contended on behalf of the commissioners (I am reading from the Case)—

B “that the Danish company’s shareholding in the company should be added to the shares held by the directors of the company because one of the directors of the company, Ludwig Elsass, held a majority of the shares in the Danish company and therefore controlled the voting power of the Danish company.”

There was no challenge of that statement by the company, and the conclusion of the Special Commissioners, which was favourable to the Crown, included this phrase:

C “. . . The directors in fact (and without the interposition of any trust) control the company by virtue of the votes conferred by the shares registered in their own names together with those registered in the name of the Danish company, and in so doing, we take into consideration the shareholding of one director in the Danish company itself.”

D In my judgment, therefore, it must now be assumed that the position of Mr. Ludwig Elsass vis-à-vis the Danish company was, as the Crown contended and as the company did not at any relevant time contest, such that he could control at his will and ordering the voting power in the taxpayer company of the Danish company. In *British American Tobacco Co., Ltd. v. Inland Revenue Comrs.* (2) ([1943] 1 All E.R. 13), VISCOUNT SIMON, L.C., stated (*ibid.*, at p. 15):

E “As to what may be the requisite proportion of voting power, I think a bare majority is sufficient.”

The sentence is not directed, of course, precisely to the point with which we are concerned; but in my judgment, LORD SIMON is saying that for the purposes in hand one who had a bare majority of the voting power of company A must be treated as having the necessary control over that company.

F Although as a matter of common sense the question would appear not to present great difficulty, the real problem has arisen because of the effect of certain decided cases; and that problem is, what is the proper guidance which those cases give to this court in determining the present question? In the *British American Tobacco* case (2) the problem arose, not under para. 11 of this Schedule*, but under para. 7. The British American Tobacco Co., Ltd., being itself amenable to the English revenue laws and to the profits tax legislation, had both directly and indirectly majority or “controlling” interests (as the House of Lords held, affirming the decisions of both courts below) in other companies, some of which were incorporated in foreign countries and were not, therefore, themselves amenable to British revenue legislation. Thus, as an illustration, it owned a certain percentage (say, 56.67 per cent.) in company Y, which itself owned the entire shareholding (one hundred per cent.) of company X. The point was whether, via the intermediary Y, it held a controlling interest in company X, not itself subject to the revenue laws. The view of LAWRENCE, J., of this court and of the House of Lords was that, on the facts of the cases, the English company did have a controlling interest via the intermediary in the third or foreign company. Both LAWRENCE, J., and SCOTT, L.J., based their conclusion on the view that the words “controlling interest” were words of ordinary usage

G to be given a wide connotation, and were not intended to have a limited technical sense, confining their meaning to an interest of a particular legal or equitable character. In other words, the argument that the British American Tobacco Co., Ltd., had not a controlling interest over company X unless it was itself beneficially entitled to the requisite majority of the shares in company X was rejected.

H

I

Both before LAWRENCE, J., and in the Court of Appeal the *British American Tobacco* case (2) was dealt with at the same time as *F. A. Clark & Son, Ltd. v.*

* I.e., Sch. 4 to the Finance Act, 1937.

Inland Revenue Comrs. (2) ([1941] 2 All E.R. 651). In *Clark's case* (2) no appeal was taken to the House of Lords, so that the speeches in the House of Lords must fairly be taken as related to the facts in the *British American Tobacco case* (2). I think, however, that, having regard to the previous history of the case, the facts in *Clark's case* (2) cannot have been wholly outside the consideration of their Lordships, and it must be borne in mind that, when their Lordships affirmed the views of the Court of Appeal and of LAWRENCE, J., both those courts had given their judgment in both cases. The significance of that fact is this: that *Clark's case* (2) arose under para. 11 of Sch. 4 to the Act of 1937, the paragraph with which we are concerned. Indeed, in my judgment, the reasoning in *Clark's case* (2) provides an answer which binds us in the present case. However that may be, I confine myself for the moment to observing that both LAWRENCE, J., and the Court of Appeal took the view that the same principles of construction must be applied as regards the phrase "controlling interest" in both paras. 7 and 11.

In the *British American Tobacco case* (2) in the House of Lords VISCOUNT SIMON, L.C. (with whose opinion the other noble Lords expressed their concurrence), said ([1943] 1 All E.R. at p. 15):

"The word 'interest', however, as pointed out by LAWRENCE, J., is a word of wide connotation, and I think the conception of 'controlling interest' may well cover the relationship of one company towards another, the requisite majority of whose shares are, as regards their voting power, subject, whether directly or indirectly, to the will and ordering of the first-mentioned company. If, for example, the appellant company owns one-third of the shares in company X, and the remaining two-thirds are owned by company Y, the appellant company will none the less have a controlling interest in company X if it owns enough shares in company Y to control the latter . . . I find it impossible to adopt the view that a person who, by having the requisite voting power in a company subject to his will and ordering, can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs, is a person of whom it can be said that he has not in this connexion got a controlling interest in the company."

In reading the latter part, I have somewhat emphasised the use by LORD SIMON of the words "a person". In that case the "person" was a *persona ficta*, the *British American Tobacco Co., Ltd.*; but I have already mentioned that this case had been tried in the two courts below with *Clark's case* (2) and it seems to me, at first sight at any rate, that the formula I have read would be applicable, and might be said to have been intended to be applicable, to the case where, by having the requisite voting power in a company subject to his will and ordering, an individual person was able to make all the ultimate decisions in that company's name. But that conclusion may be somewhat qualified by *Inland Revenue Comrs. v. J. Bibby & Sons, Ltd.* (3) ([1945] 1 All E.R. 667), which also went to the House of Lords. Two of the noble and learned Lords in that case, LORD RUSSELL OF KILLOWEN and LORD PORTER, had also participated by their concurrence in the decision of LORD SIMON in the *British American Tobacco case* (2).

The *Bibby case* (3) did not arise under the profits tax legislation at all. It arose under the Finance (No. 2) Act, 1939, which imposed excess profits tax. Section 13 (9) of that Act made special provision for arriving at what was called "standard profits" for the purposes of the excess profits tax in the case of a company "the directors whereof have a controlling interest therein"—words identical with those appearing in the earlier Acts. Of the company's share capital the ordinary shares alone carried voting rights. Half a million such ordinary shares were issued. The directors held between them in their own right 209,332 of the ordinary shares, less than fifty per cent. of the total; but three of the directors (who were also brothers) were trustees of the marriage

A settlement of their sister, and in that capacity they were the registered joint holders of a further 57,500 ordinary shares, making, with the 209,332, more than a quarter of a million, and therefore more than half the shares carrying alone the voting rights. The three director trustees had in fact also contingent beneficial interests under the sister's marriage settlement in that they were entitled to the property subject to the settlement in the event of the sister dying without issue. At all relevant times the sister was still living. It was in this case in the interest of the company to contend that its directors had a controlling interest therein, and learned counsel for the company founded their contention on the simple proposition that the directors between them had 209,332 plus 57,500 shares registered in their names (as was the fact) and that, as the directors were between them the registered holders of that quantity of shares, it followed that they had a controlling interest in the company. The Crown contended that that was not so, and that the interest of the three director trustees for this purpose could not count, for they did not have the complete beneficial interest in the shares of which they were trustees, and could not, therefore, vote in respect of those shares exactly as they wished; they must abide by the obligations placed on them by the trust. The contention of the taxpaying company, however, prevailed both in the Court of Appeal and in the House of Lords. The judgment in this court was delivered by LORD GREENE, M.R., who based himself on the view that, where an individual or two or more individuals were registered shareholders in a company, notwithstanding that they were trustees of the shares in which they were so registered, for the purposes in hand that sufficed. He made the one exception of a bare trustee of the shares for a third party, on which, however, he expressed no final view.

In the House of Lords somewhat less emphasis was put on the trust aspect of the matter. It was there held that for this purpose the share register was to be regarded as conclusive, since the share register provided the answer to the question: Who controlled the voting rights? The House rejected the contention that, in considering the matter of controlling interest, it was legitimate to pay regard to the quality of the shareholding and to inquire whether the shareholder had an interest in the legal or equitable sense in the shares which he held; i.e., whether he was beneficially entitled to them. In that respect, as LORD RUSSELL OF KILLOWEN expressly stated, he was following and not seeking to distinguish the *British American Tobacco* case (2); in other words (and I will read the decision of the House of Lords as based on this view), that in the case before it and similar cases the question was determined by answering the question: Who were the unrestricted masters of the voting power from the point of view of the company? In the view of the House, the answer was that the directors were; for theirs was the will and ordering when they were exercising the voting powers vested in them, and it was not legitimate to inquire whether that will and ordering was in any way affected by extraneous obligations which lay on them under the terms of a trust or otherwise. After expressing his agreement with the Court of Appeal, LORD RUSSELL OF KILLOWEN said ([1945] 1 All E.R. at p. 669):

"When the section speaks of directors having a controlling interest in a company, what it is immediately concerned with in using the words 'controlling interest' is not the extent to which the individuals are beneficially interested in the profits of the company as a going concern or in the surplus assets in a winding up, but the extent to which they have vested in them the power of controlling by votes the decisions which will bind the company in the shape of resolutions passed by the shareholders in general meeting. In other words, the test which is to exclude a company's business from sub-s. (9) (a) and include it in sub-s. (9) (b), is the voting power of its directors, not their beneficial interest in the company."

He observed that in that respect he was following the principles underlying the conclusions of the House in the *British American Tobacco* case (2) and continued (*ibid.*, at p. 670):

"Counsel for the appellants [the Crown], at one stage of the argument, suggested that shares registered in the name of a director but held by him as trustee might be included in reckoning the controlling interest in cases where the trustee had also what was described as a predominating beneficial interest in the shares. For myself I am unable to appreciate how these supposed different degrees of beneficial interest, or the existence in the trustees of any beneficial interest can affect the question of control. The words 'controlling interest' mean 'controlling voting power': that is the interest in view, not beneficial interest."

Then, though still reserving the question of the purely nominee shareholder, he expressed perhaps some doubt whether he would have gone so far as this court did in regard to that exceptional case.

LORD SIMONDS said (*ibid.*, at p. 672):

"What, my Lords, constitutes a controlling interest in a company? It is the power by the exercise of voting rights to carry a resolution at a general meeting of the company. Can the directors of the respondent company by the exercise of their voting rights carry such a resolution? Yes: for they are the registered holders of more than half the ordinary shares of the company. Therefore they have a controlling interest in the company. . . . My Lords, in my opinion the Crown's contention cannot be sustained. Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control. Theirs is the control, though in the exercise of it they may be guilty of some breach of obligation whether of conscience or of law."

It is on *Bibby's* case (3), of course, that the taxpayer in the present case has mainly founded himself, because the gist of his argument is that it decided that in a para. 11 case (and I gratefully adopt the short statement of it by Mr. Bucher) there must be a "clean cut at the share register"; that it is not legitimate for any purpose under para. 11 to look beyond the share register and find the individual, in this case Mr. Elsass, who controls the voting power of the Danish company, which itself holds more than half of the shares of the taxpayer company.

Inland Revenue Comrs. v. Silverts, Ltd. (1) in this court arose under para. 11 of the Act of 1937. Certain of the shares which had voting rights were registered in the name of the National Provincial Bank, which was a custodian trustee under certain trusts, and the management trustees behind the custodian trustee, so to speak, were certain of the directors. It was therefore contended successfully, in the first court before ROMER, J., that the custodian trustee for this purpose was in the same position as a bare trustee. Accordingly, following the exception indicated by LORD GREENE, M.R., in *Bibby's* case (3), the right answer to the problem was that one could neglect the appearance of the National Provincial Bank on the register and look to the persons who were directors, the management trustees. In this court a different view was taken. In the light of what had been said in the House of Lords, and since we thought that a custodian trustee could not in any case be treated as in the same position as a bare trustee or a mere nominee, it seemed to us that it must follow that the ordering of the voting power of the shares lay with the National Provincial Bank, and that one could not inquire whether, in exercising it, the bank had to observe extraneous obligations or obey the orders of the management trustees.

The National Provincial Bank, however, was itself a company controlled by its own shareholders and directors. In the course of the argument in this case the example was put: supposing the custodian trustee had been, not the

A National Provincial Bank but the X and Y Trustee and Executor Co., Ltd., of which the sole shareholders and directors were X and Y, directors of Silverts, Ltd., would the answer have been the same? In my judgment, the *Silverts'* case (1) on its facts would then be distinct from the present on the ground which I have already indicated. The National Provincial Bank was not itself in any sense relevant to our problem controlled by the directors or any of the directors of Silverts, Ltd. But at the end of the judgment of the court in the *Silverts'* case (1) references were made to *Clark's* case (2), which was dealt with up to this court together with the *British American Tobacco* case (2); and I think that WYNN-PARRY, J., in the court below may have been somewhat misled by what was said in this court about *Clark's* case (2) in *Silverts'* case (1) and not without reason; for I regret to say that the statement of the facts of *Clark's* case (2) made by this court in the *Silverts* case (1) was erroneous. We made a statement about the effect of *Clark's* case (2) which I therefore think was per incuriam and wrong.

To make that intelligible, I must go back to the facts in *Clark's* case (2). Of the shares which controlled the Clark company, a certain number were held by three trustees under a trust, two Messrs. Clarks, two of the directors, and a third individual, a Mr. Bessemer, who was not a director. As counsel for the taxpayer company pointed out, it may well be that only the first of those three on the register would be in complete control of the votes vis-à-vis the Clark company; and if, as was said, the first on the register was one of the two directors, that would be the consequence. But that fact is not alluded to in the judgments, and no point was ever made about it. What did happen, and what was considered in the case, was this: these three trustees sold their trust shares to a company called Phoenix, all the shares in which were held by directors of the Clark company, so that Phoenix was a company wholly controlled by directors of the Clark company. Notwithstanding the sale, no move was made to transfer the shares on the register to Phoenix until eight days before the end of the chargeable accounting period. Throughout the whole of the rest of the period the three trustees remained the registered shareholders, though, having regard to the contract for sale, they were in the position of holding them in equity for Phoenix absolutely. For the last eight days of the chargeable accounting period Phoenix was on the register and Phoenix was wholly controlled by the Clark company directors. LAWRENCE, J., and this court in the *Clark* case (2) concluded that, since the beneficial interest throughout the first 357 days of the year belonged to Phoenix, the three trustees being during that period bare trustees for that company, since at the end of the period Phoenix was on the register, and, since Phoenix was wholly controlled by the directors, therefore these shares must be treated as being subject to the will and ordering of directors, which led to the conclusion that the Clark company was a company the directors whereof had a controlling interest therein.

On its facts the case is more close to the present case than any of the others which I have mentioned. In *Silverts'* case (1), however, the following passage appears in regard to *Clark's* case (2) ([1951] 1 All E.R. at p. 709):

"The facts were that certain shares which were at all material times registered in the names of two directors of the company had been held in trust for one of the directors for life and subject thereto for the other of them absolutely. The two directors had then sold their respective interests in the shares to another company (the Phoenix company) so that the Phoenix company became absolutely entitled to the shares. The two directors between them held (admittedly) a controlling interest in the Phoenix company. As part of the sale agreement, the two directors undertook to execute such transfers of the shares as the Phoenix company might require so as to vest in the Phoenix company the legal estate in the shares. But the shares in fact (as already stated) remained, at all material times,

registered in the names of the two directors, who may, accordingly, be said to have been bare trustees thereof for the Phoenix company.”

Then, after stating the arguments and the reference to the judgment, reading the judgment of the court, I said (*ibid.*, at p. 710):

“But the Phoenix company was not on the register. The directors were.

No point appears to have been made in the argument of that essential fact”—

which was not in truth a fact at all.

“Had the point been made, the result would, indeed, have been, in our judgment, the same. In the circumstances, the case can bring no comfort or support to either side in the present case.”

As I read it, the conclusion was this: that, since the two directors were on the register, it did not matter whether one looked only at their position on the register, or whether one went behind them and, via the Phoenix company, came back to where one started, viz., the same two directors. Stating, therefore, that the *Clark* case (2) gave no comfort to either side, we, as it were, eliminated it as a relevant authority, leaving the *Bibby* case (3) standing alone. I think that what was said in *Silverts'* case (1) about the *Clark* case (2) does not in any degree affect the conclusion which this court reached in *Silverts'* case (1); but I think that WYNN-PARRY, J., may well have been misled by what is there stated and deflected from considering the bearing that *Clark's* case (2) and the reasoning of this court in *Clark's* case (2) properly has on the conclusion in the present case.

I now go back to read a passage from SCOTT, L.J.'s judgment in its relation to *Clark's* case (2). I say “in its relation to *Clark's* case (2)”, because the greater part of SCOTT, L.J.'s judgment was devoted to the *British American Tobacco* case (2); but there is no doubt that he treated the principles of construction to be applied in both the *British American Tobacco* case (2) under para. 7 and in *Clark's* case (2) under para. 11 as the same. He stated his reasoning in the following way ([1941] 2 All E.R., at p. 655):

“Paragraph 11 is a similar provision, limiting the remuneration of directors where they have a ‘controlling interest’.”

Then, after saying that the cases of *Clark* (2) and the *British American Tobacco Co., Ltd.* (3) were heard by different individuals representing the Special Commissioners, he said (*ibid.*):

“It is the same question as that in the case of the *British American Tobacco Co., Ltd.*, except that the phrase ‘controlling interest’ is applied to directors who control the company, instead of to one company controlling another. The judge could find no sufficient legal ground for giving the phrase one meaning in para. 7 and another in paras. 4 and 11, and we agree with him. In each case, the decision must depend on the meaning of the phrase. In my opinion, when standing alone in the context of any one of the three paragraphs, it contemplates such a relationship as brings about a control in fact, by whatever machinery or means that result is effected.”

He had earlier derived his view of the meaning of the word “control” from its definition in, for example, the OXFORD ENGLISH DICTIONARY.

The learned lord justice referred to LAWRENCE, J., who said in the court below ([1941] 2 All E.R. at p. 89):

“It was contended by counsel for the respondents in the first appeal, and by counsel for the appellants in the second appeal [i.e., in both cases for the taxpayers], that the word ‘interest’ in these contexts means a legal or equitable interest of a proprietary nature in the shares of the company sought to be taxed, and that directors of a company who had a controlling interest in the company sought to be taxed only by holding

A a controlling interest in the shares of another company, which in turn held a controlling interest in the shares of the company sought to be taxed, had not a controlling interest within the meaning of the above-mentioned paragraphs . . .”

Then he referred to certain authorities, and said (*ibid.*, at p. 90):

B “I have come to the conclusion that the contention of the Crown is correct. I do not think that it is a proper inference that, because the Finance Act, 1920, mentions expressly a controlling interest, direct or indirect, when the legislature spoke of ‘a controlling interest’ simpliciter in 1937, it meant only a direct controlling interest.”

C What is the conclusion as a result of these authorities? In my judgment, they do not disabie what I stated was the common-sense conclusion, as I posed the problem at the beginning of my judgment. I think that it is clearly laid down that no different meaning or significance is to be given to these two words “controlling interest” where they occur respectively in paras. 11 and 7 of the Schedule. As counsel for the company pointed out, it is quite true that in a para. 7 case, the *British American Tobacco* type of case (2), attention is directed primarily D to the control as it emerges according to the internal constitution of the company, whereas, in the para. 11 case, the *Bibby* case (3), the control is alleged to arise from some source outside the company itself. But I think that that distinction does not assist for present purposes, and only arises because, as counsel for the Crown put it, in the first case the question is whether the taxpaying company controls some other company, and in the second case the question is: Do the E directors control the taxpaying company?

With that premise, I apply to the present case the language used, e.g., by LORD SIMONDS in the *Bibby* case (3). He used the phrase ([1945] 1 All E.R. at p. 673):

F “Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control.”

Who by their votes control this company? Of course, the phrase as used by LORD SIMONDS was particularly directed, having regard to the facts of *Bibby’s* case (3) to the individuals who were supposedly voting. But in the present case the first answer to the question, who by their votes can control, is perhaps the G Danish company; but the Danish company is itself not a person capable of voting save through the instrumentality of an individual.

In my judgment, the result of these decisions may be formulated somewhat in this fashion. The House has laid it down that one cannot ask the question, when the votes are cast: Is the voice of the voter affected by obligations imposed on him by some external control? One cannot ask, so to speak: Has the tune been H called by some third party? But one surely can and must ask, since the company itself cannot speak, whose is the voice that one hears? I see nothing in the language of LORD SIMONDS’s speech or of LORD RUSSELL OF KILLOWEN’s which in any sense runs counter to the validity of that essential question. I have already supposed the case, by way of contrast to the facts in *Silverts’* case (1), in which the custodian trustee happened to be a private company incorporated I by two of the directors, all the shares of which were held by two of the directors. In such a case the votes of such a company would in truth be the votes of the directors, theirs would be the voice, theirs the will and ordering of that company’s voting power, and the fact that the company had obligations as a trustee which were imposed on it from an external source would not make it legitimate to consider the interest of that external source. Put the other way, the National Provincial Bank, for the present purposes, votes not with the voice of the management trustees in question but with the voice of its own management, the shareholders and directors controlling. It is no doubt in some degree a fine distinction,

and if it were necessary to do so I would for my part adopt as correct the way in which counsel for the company in arguing the case in *Silverts'* case (1) before this court put it ([1951] 1 All E.R. at p. 707):

"Counsel for the company, pinning himself to the *Bibby* decision (3), says that (save for the possible case of a bare trustee) the matter is concluded by reference to the share register, subject only to this (and he claims so to 'reconcile' the *British American Tobacco* case (2) and the *Bibby* case (3)), that where the registered shareholder is a body corporate, you may, at any rate for certain purposes, look beyond the register and seek the individuals who themselves control that body corporate."

I agree: though I do not think that in truth any reconciliation is necessary between the *British American Tobacco* case (2) and the *Bibby* case (3). In rejecting the test of *beneficial* shareholding interest the one case followed the other. But where the registered shareholder is a body corporate one nevertheless may, and indeed must, for certain purposes look beyond the register; for, since the company cannot itself speak, one must find out with whose voice it must do so. One may therefore ask: Who does control the body corporate by the necessary shareholding interest in it?

WYNN-PARRY, J., came to the conclusion that there was a conflict between the basis of the decision in *Clark's* case (2) and in *Silverts'* case (1), and that it was his duty to follow the *Silverts* case (1). He says ([1957] 1 All E.R. at p. 733):

"... if that proposition were to be accepted, [the argument of counsel which I have just read from *Silverts'* case (1)] it would remove any conflict there may be between *Clark's* case (2) and *Silverts'* case (1), and, indeed, *Bibby's* case (3), but, having regard to the passage . . . where SIR RAYMOND EVERSHED commented on the facts in *Clark's* case (2), I think that I must come to the conclusion that the Court of Appeal did not accept the proviso which Mr. Pennycuik was putting forward as part of his proposition."

Had the learned judge appreciated that we had mis-stated in a material respect the facts in *Clark's* case (2), and therefore really had not properly stated the ratio of SCOTT, L.J.'s decision, he might very likely have come to a different conclusion in the present case. I appreciate that, in so far as in *Clark's* case (2) SCOTT, L.J., was treating the two directors and the third individual as bare trustees and saying that one must look in such a case beyond the bare trustee to the beneficial owner, he may have gone further than the House of Lords later said they were willing to go. But beyond a doubt SCOTT, L.J., based his view, in part at least, on the acceptance of the fact that Phoenix, the beneficial owner, a company, was controlled itself by two directors. I think in so far as he did so base his decision, with all respect, he rightly so concluded, and further that we should be bound to follow SCOTT, L.J.'s decision.

One final point was made which may be put in the form: how far does this investigation of the controlling interest in bodies corporate go? MORRIS, L.J., put the case in the argument: supposing the majority shares in the Danish company were themselves held by a Norwegian company and of that company the majority shares were vested in a Swedish company, and so on, until eventually you found one of the directors at the end of an extremely long and complicated chain; it may be that in such a case, to use the picturesque phrase of counsel for the Crown, one would have to say that the man at the far end who pulls the lever would pull it in vain, because the mechanism was so complicated that no discernible effect would be seen at the other end of the machine. In my judgment, however, that is a question of fact which does not arise in the present case. Here Mr. Ludwig Elsass, as the Special Commissioners quite clearly intended to find, controlled the Danish company in the sense that his was the voice with which the Danish company spoke in its capacity as registered shareholder of the taxpayer company, and in those circumstances and for the reasons which I have stated I think that in this case the appeal should be allowed.

A MORRIS, L.J.: In computing profits for the purposes of the profits tax, limits are imposed on the deductions which may be made in respect of directors' remuneration in the case of a company the directors whereof have a controlling interest therein. In order to decide, therefore, whether those limits applied in this case, it was necessary to pose and answer the question: Had the directors of the taxpayer company got a controlling interest in the company?

B There were three directors, Mr. Ludwig Elsass, Mr. Burgin and Mr. Hertel. There were one thousand shares. Each share had one vote at meetings of the company. To what extent did the three gentlemen have the power of controlling those votes? If there was a resolution at a general meeting of the company, could those three control whether it would be carried or defeated? **C** Mr. Ludwig Elsass was the registered holder of three hundred shares, Mr. Burgin of one, Mr. Hertel of one hundred, a total of 401 votes. The three had, therefore, direct control over 401 shares and 401 votes. Even if those 401 vote-carrying shares were vested in them as trustees, they could vis-à-vis the company validly cast 401 votes.

In *Inland Revenue Comrs. v. J. Bibby & Sons, Ltd.* (3) ([1945] 1 All E.R. 667) **LORD SIMONDS** in his speech said (*ibid.*, at p. 673):

D "Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control."

Looking further at the share register, it is seen that Mr. A. Elsass held nine shares. But he was not a director. The fate of a resolution at a general meeting **E** would depend on the way in which the remaining 590 votes were cast. The shares were held by the Danish company, and, by owning 395 out of its 600 issued shares, Mr. Ludwig Elsass was entitled to exercise a majority of the votes of that company in general meeting. Counsel for the company agrees that the issue raised in this case would be just the same if the 590 shares were owned by another English company in which Mr. Ludwig Elsass held practically all the **F** shares. In such circumstances Mr. Ludwig Elsass could bring it about that he would be authorised to act as the representative of the company and to exercise the voting rights of the 590 shares.

In *British American Tobacco Co., Ltd. v. Inland Revenue Comrs.* (2) ([1943] 1 All E.R. 13) the question was whether one body corporate had a controlling interest in another body corporate. It was held that company No. 1 could **G** have a controlling interest in company No. 3 by owning all the shares in company No. 2, which in turn owned all the shares in company No. 3. In the present case the question is whether the three directors had a controlling interest in the company itself, and in my judgment it must be said that Mr. Ludwig Elsass had the power of exercising the voting power resulting from the three hundred shares in his own name on the register and also the voting power resulting from the 590 **H** shares standing in the name of the Danish company.

In the *British American Tobacco* case (2), **VISCOUNT SIMON, L.C.**, said (*ibid.*, at p. 15):

I "I find it impossible to adopt the view that a person who, by having the requisite voting power in a company subject to his will and ordering, can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs, is a person of whom it can be said that he has not in this connexion got a controlling interest in the company."

The view which I have expressed involves no departure from the directions in the *Bibby* case (3) to have regard to actual voting power and not to search for ultimate beneficial interests. But if in seeking an answer to the question, had the directors of the taxpayer company got a controlling interest in that company? it is merely said that 590 shares out of the one thousand are held by a limited

company and no further inquiry is made or is permitted as to the shareholding in that company, then in my judgment the task of answering the question posed is not being pursued but is being abandoned. A

It cannot be said that there is any conflict between the *British American Tobacco* case (2) and the *Bibby* case (3), nor, of course, does counsel for the company so suggest. He submits that the two cases dealt with different topics. He submits that, under para. 7, the inquiry raised is whether one company has a controlling interest in another, and that a process of looking outwards is involved; whereas, under para. 11, a process of looking inwards is involved in that the inquiry is whether the directors of a company concerned control that company itself. But the *British American Tobacco* case (2) lays it down that, when it is being investigated whether company No. 1 has a controlling interest in company No. 3, it is not appropriate to end the inquiry after looking at the register of company No. 3 and finding that company No. 1 holds no shares, inasmuch as all the shares are held by company No. 2. It is proper, and indeed necessary, to look at the register of company No. 2. When on so doing it is found that all the shares in company No. 2 are held by company No. 1, the answer to the inquiry is revealed. Similarly, if under para. 11 the inquiry is whether Mr. A and Mr. B and Mr. C control company No. 1, it would seem to be pointless and profitless to call a halt on finding that the register of company No. 1 records that the majority of the shares are held by company No. 2, when an examination of the register of company No. 2 might reveal that all or nearly all of its shares were held by Mr. A. B C D

It was submitted by counsel for the company that the result reached in *Inland Revenue Comrs. v. F. A. Clark & Son, Ltd.* (2) ([1941] 2 All E.R. 651) was correct, in that, for nearly the whole of the accounting period between Apr. 1 and Dec. 31, the voting rights of the 14,599 shares which were in the names of the three trustees were exercisable by Mr. F. C. Brown Clark, who was a director. But, if this is assumed, it seems clear that the decision involved this, that the two directors of *F. A. Clark & Son, Ltd.*, had a controlling interest in that company by reason of their holdings in the Phoenix company. SCOTT, L.J., F said (*ibid.*, at p. 655): E

"It is the same question as that in the case of the *British American Tobacco Co., Ltd.*, except that the phrase 'controlling interest' is applied to directors who control the company, instead of to one company controlling another."

In my judgment, the reasoning in the *Bibby* case (3) is not inconsistent with this, and therefore does not overrule the reasoning on which the decision in the *Clark* case (2) was based. The decision in the *Clark* case (2) and the guidance of the *British American Tobacco* case (2) lead me to the conclusion that the directors of the taxpayer company had a controlling interest in the company. Had it been necessary to decide the case uninstructed by authority, this is the conclusion which would have commended itself to me. I find myself also in complete and full agreement with the judgment that has been delivered by the Master of the Rolls. I would allow the appeal. G H

PEARCE, L.J.: I agree with all that my Lords have said.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Denton, Hall & Burgin* (for the company); Solicitor of *Inland Revenue*.

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

A

R. v. JUDGE DUTTON BRIANT, *Ex parte* ABBEY NATIONAL BUILDING SOCIETY.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Devlin, J.J.), June 18, 19, 1957.]

B

Mortgage—Possession of mortgaged property—Mortgagee's right to recover possession—Whether mortgagee's action for possession is an action for recovery of land or for enforcement of the mortgage—County Courts Act, 1934 (24 & 25 Geo. 5 c. 53), s. 48, s. 52—County Courts Act, 1955 (4 & 5 Eliz. 2 c. 8), s. 2, Sch. 1, para. 4.

C

County Court—Jurisdiction—Mortgage—Possession—Whether action for possession is an action for recovery of land—County Courts Act, 1934 (24 & 25 Geo. 5 c. 53), s. 48, as amended by County Courts Act, 1955 (4 & 5 Eliz. 2 c. 8), s. 2, Sch. 1, para. 4.

A building society were mortgagees of certain freehold land, the title to which was registered under the Land Registration Act, 1925. The net annual value of the land for rating did not exceed £100. The amount owing on the security of the registered legal charge exceeded £500. Instalments under the legal charge being in arrear the society brought an action in the county court for possession. The county court judge declined jurisdiction on the grounds that the action (i) was one for the enforcement of a mortgage and, as the amount owing exceeded £500, was outside the jurisdiction conferred in relation to such an action by s. 52 (1) of the County Courts Act, 1934*, and (ii) was not an action for recovery of land within s. 48 of that Act*. On application by the society for mandamus,

E

Held: the county court had jurisdiction under s. 48 (1) of the County Courts Act, 1934, because the action was an action for possession by a first legal mortgagee and thus was an action for the recovery of land; accordingly an order for mandamus would issue.

F

[**Editorial Note.** By s. 87 (1) of the Law of Property Act, 1925, a mortgagee having a charge by way of legal mortgage, as was the registered charge in this case, has the "same protection, powers and remedies (including the right to take proceedings to obtain possession . . .)" as if he had a legal mortgage by demise. The right of the mortgagee having the legal term of years, or being by virtue of s. 87 in the like position as if he had the legal term of years, rests on his title to that legal estate and, subject to the terms of the mortgage, is independent of default by the mortgagor (see per HARMAN, J., in *Fourmaids, Ltd. v. Dudley Marshall (Properties), Ltd.*, p. 36, letter E, ante).

G

As to the mortgagee's right to possession, see 23 HALSBURY'S LAWS (2nd Edn.) 358, para. 535; and for cases on the subject, see 35 DIGEST 397, 398, 1394-1404.

As to mandamus to county courts, see 9 HALSBURY'S LAWS (3rd Edn.) 334, para. 807.

H

For the County Courts Act, 1934, s. 48 and s. 52, see 5 HALSBURY'S STATUTES (2nd Edn.) 44 and 48; and for the County Courts Act, 1955, s. 2 and Sch. 1, para. 4, see 35 HALSBURY'S STATUTES (2nd Edn.) 28 and 40.]

Cases referred to:

I

(1) *Hinckley & Country Building Society v. Henny*, [1953] 1 All E.R. 515; 3rd Digest Supp.

(2) *Jolly v. Arbuthnot*, (1859), 4 De G. & J. 224; 28 L.J.Ch. 547; 33 L.T.O.S. 263; 23 J.P. 677; 45 E.R. 87; 35 Digest 323, 677.

(3) *Trent v. Hunt*, (1853), 9 Exch. 14; 22 L.J.Ex. 318; 22 L.T.O.S. 23; 156 E.R. 7; 35 Digest 320, 648.

(4) *Fourmaids, Ltd. v. Dudley Marshall (Properties), Ltd.*, ante, p. 35.

* The relevant terms of s. 48 (1) and s. 52 (1) of the County Courts Act, 1934, are printed at p. 626, letters F and G, post.

Motion for Mandamus.

The applicants, the Abbey National Building Society, moved for an order of mandamus directed to His Honour JUDGE DUTTON BRIANT, judge of the county court at Chichester, requiring him to hear and determine an action for the recovery of land mortgaged to them by a registered charge by way of legal mortgage to secure moneys advanced by them and interest. The land charged was freehold vested in the defendant to the action for an estate in fee simple subject to the registered charge, the title to the land being registered under the Land Registration Acts, 1925 and 1936. The registered charge contained no demise of the land but was expressed to take effect as a charge by way of legal mortgage. The net annual value for rating of the land did not exceed £100 and at the time of the action £2,066 4s. 3d. was due and owing to the applicant on the security of the legal charge. The county court judge held that the action was an action for the enforcement of a mortgage in relation to which the court's jurisdiction was that conferred by s. 52 (1) of the County Courts Act, 1934, and that the action was not an action for the recovery of land within s. 48 (1) of the Act; and, therefore, that the court had no jurisdiction to determine the action, since jurisdiction under s. 52 (1) was limited to mortgages where the amount owing did not exceed £500.

W. W. Stabb for the applicants.

Rodger Winn for the respondent.

LORD GODDARD, C.J.: The learned county court judge, on whom of course there is not the smallest reflection because mandamus is asked against him, declined jurisdiction on the ground that there was outstanding on this mortgage a sum of something over £2,000. In his opinion he was deprived of jurisdiction by s. 52 of the County Courts Act, 1934, which deals with equity proceedings and which provides by sub-s. (1):

"A county court shall have all the jurisdiction of the High Court to hear and determine any of the following proceedings, that is to say . . . (c) proceedings for foreclosure or redemption of any mortgage or for enforcing any charge or lien, where the amount owing in respect of the mortgage, charge or lien does not exceed the sum of £500."

The learned judge took the view that the proceedings in this case were proceedings for enforcing a charge or lien and that, as the amount outstanding was more than £500, he had no jurisdiction.

Counsel for the applicants submitted that by virtue of s. 48 of the Act of 1934 there is jurisdiction because the action is one to recover possession of land. Section 48 (1) of the County Courts Act, 1934, as amended* provides:

"A county court shall have jurisdiction to hear and determine any action for the recovery of land where the net annual value for rating of the land in question does not exceed £100."

It is agreed in this case that the net annual value for rating of the land does not exceed the sum of £100.

The question is whether, where a mortgagee seeks to recover possession of the mortgaged property, he has a common law right to recover the land or whether his only right is an equitable right to enforce a charge; or, at any rate, whether the action brought to recover the land must be regarded as one which, in substance, is an action for the enforcement of a charge.

The document which constitutes the mortgage is a legal charge. In the old days, before the Law of Property Act, 1925, and the other real property legislation of that year, a mortgage was a conveyance to the mortgagee by the mortgagor. The money was advanced and the mortgage provided that it should be

* The sub-section is printed as amended by the County Courts Act, 1955, s. 2 (2) and Sch. 1, para. 4.

A repaid in six months' time. Equity, of course, always regarded a mortgage as security for a loan of money. If the mortgagee sought to enforce his rights he was always liable to be stopped by equity from enforcing them, whatever the provisions in the mortgage deed might have been, if the mortgagor could redeem the property by payment. A mortgagor had his equity of redemption; nevertheless, the mortgagee could always maintain an action at law to obtain possession of the land, although when he did recover it the right of the mortgagor to redeem still remained.

Since the Law of Property Act, 1925, many mortgages are effected by a deed of legal charge. The legal charge in this particular case provides for repayment of the moneys advanced by monthly instalments of £12 8s. 3d. As the amount advanced was £2,040, it will take some years to pay it off.

C Clause 7 of the legal charge provides:

"If default be made by the borrower for fourteen days in payment of any monthly instalment or other payment hereby covenanted to be made or if default be made by the borrower in the observance or performance of any of the covenants or obligations herein expressed or implied (other than for payment of money) or if any order for compulsory acquisition of the property or any part thereof shall be made and confirmed under or by virtue of the Act then and in any such case the whole of the money payable or to become payable hereunder shall be deemed to be forthwith due and owing and the society may without any previous notice to or concurrence on the part of the borrower:—(a) Enter upon the property and execute or cause to be executed any repairs alterations additions or other works thereto or thereon. (b) Appoint a receiver under the statutory power and eject from the property the borrower the tenants and workmen and all other persons then in possession or occupation thereof. (c) In exercise of the statutory power sell all or any part of the property. Provided always that the society shall not exercise the power of sale conferred by this deed or by statute by reason only of some payment of a monthly instalment or for interest being in arrear until such payment shall be three months in arrear after the date herein provided for the payment thereof."

That puts certain limitations on the rights of the mortgagees, but it does not deal with the question whether they are entitled to bring an action for the recovery of land.

G Clause 9 of the legal charge* provides:

"(1) The borrower hereby attorns tenant to the society of such parts of the property as now are or shall at any time during the continuance of this security (but within twenty-one years from the date of this mortgage) be in the occupation of the borrower at the yearly rent of a peppercorn if demanded. (2) Provided that the society may at any time after one month from the date hereof give any notice to the borrower determine the tenancy hereby created and enter upon the property but so that the said tenancy shall not render the society liable to account to any person as mortgagee in possession."

Counsel for the respondent pointed out that this attornment clause put the mortgagor very much at the mercy of the mortgagees because it would enable them, at the expiration of one month after the money has been advanced, to take proceedings for the ejectment of the mortgagor. It may be that it does, but at the same time, as a matter of business, no one will suppose that it will be done unless something happens, such as the mortgagor going bankrupt within a month. As has been pointed out in other cases, building societies do not want to get possession; what they want is to get punctual payment of their instalments.

The law from the earliest times has always recognised that a mortgagee has

* As regards the value of attornment clauses in mortgages at the present day, see 3 HALSBURY'S LAWS (3rd Edn.) 596, para. 1209, text and note (c).

got the right to bring an action for the recovery of land and to treat the mortgagor as a trespasser. In *Hinckley & Country Building Society v. Henny* (1) ([1953] 1 All E.R. 515) UPJOHN, J., who was considering a matter somewhat akin to the one that we are now considering, quoted a passage from the judgment of LORD CHELMSFORD, L.C., in *Jolly v. Arbuthnot* (2) ((1859), 4 De G. & J. 224 at p. 235). The Lord Chancellor said:

"A mortgagor who remains in possession after the execution of a mortgage, and continues to enjoy the profits of the land, is not considered as a tenant from year to year to the mortgagee, nor even as a tenant at will; he receives the profits for his own use, and not as agent or bailiff of the mortgagee, and when he has once received them he is absolutely entitled to keep them as his own: per ALDERSON, B. in *Trent v. Hunt* (3) ((1853), 9 Exch. 14 at p. 22). But he may at any time be treated as a trespasser by the mortgagee, who may maintain ejectment against him without any previous notice or demand of possession. Such being the precarious dependence of a mortgagor upon the will of the mortgagee, it is competent to them to enter into an agreement by which the mortgagor's possession may be rendered more secure by the creation of a tenancy. This is sometimes effected by a stipulation in the mortgage deed itself."

Therefore, if an attornment clause is included it is possible by inserting stipulations to limit the mortgagee's right, which he otherwise would possess, to turn out the mortgagor at any time. The attornment clause in the legal charge in this case does not limit this right of the mortgagees except to the extent of one month. Therefore, the attornment clause does not afford any particular protection to the mortgagor; the mortgagor is in the position that he can be turned out at any time at the pleasure of the mortgagees, at any rate after one month.

Although at law a mortgagee can treat the mortgagor as a trespasser and bring an action for ejectment, it is to be remembered that from very early days the court of equity put a restriction on a mortgagee's rights: it did not prevent him from bringing the action, for that was a common law right, but the court of equity regarded the mortgage transaction as a loan on security and provided the mortgagor with a right, known as the mortgagor's equity of redemption, to redeem and recover his property. Accordingly, if a common law action is brought by a mortgagee to recover possession he may get judgment for possession, but that judgment for possession will always be liable to be controlled by the equitable doctrine that the mortgagor may come forward and pay the money.

The County Courts Act, 1934, deals first, by s. 48 (1), which I have read, with the jurisdiction of the county court over actions for the recovery of land provided that the rateable value is not more than £100, as is the case here. The learned county court judge took the view that what was really being done was to enforce a charge and that, therefore, s. 52 of the Act of 1934 applied. Therefore he had to decline jurisdiction because he was being asked, in effect, to enforce a charge on which the amount owing exceeded £500. I do not think that that is the right view. There is, first, the common law action for the recovery of land. That is the action which was brought in the county court. It is expressly provided by the County Court Rules*, as is shown by the form of judgment which is drawn up in these cases, that the judgment for possession will provide:

"And it is ordered that upon the defendant paying to the plaintiff the moneys remaining due to the plaintiff upon the security of a mortgage (or charge) dated the . . . day of . . . the plaintiff (subject and without prejudice to the due exercise of any power of sale for the time being vested in him) do re-deliver to the defendant possession of the property subject to the said mortgage (or charge) and release to the defendant the security constituted by the said mortgage (or charge)."

* See C.C.R., Ord. 24, r. 4 (2), and County Court Forms No. 385.

A So if a judgment has been obtained, then before the mortgagees have sold the property the mortgagor can redeem his property by payment.

It may be asked what, if this is so, the position is with regard to s. 52 of the County Courts Act, 1934, because these are proceedings for the enforcement of a charge or lien. The action is, in effect, to enforce a charge. That may be conceded to the extent that the action is a remedy which the mortgagee is taking

B because he has not been paid and he wants to be paid. If the mortgage in question was an equitable mortgage, that is to say a mortgage constituted merely by the deposit of deeds as security, it is perfectly clear that if the mortgagee wanted to enforce his rights he would have to take proceedings for the enforcement of a charge. Then the proceedings would be governed by s. 52 and if the amount of the charge was over £500 the county court would have no jurisdiction.

C It may be that the mortgagee would want to take other proceedings for the protection or enforcement of his security. He might want a receiver to be appointed, and there are other equitable remedies which the courts of equity have for many years given to mortgagees. If he wants to exercise any of those remedies then he must proceed under s. 52.

All the authorities—the judgment of LORD CHELMSFORD, L.C., in *Jolly v. Arbuthnot* (2) that I have quoted, UPJOHN, J.'s judgment in *Hinckley & Country Building Society v. Henny* (1), and a recent judgment of HARMAN, J., in *Four-maids, Ltd. v. Dudley Marshall (Properties), Ltd.* (4) (ante, p. 35)—show that there always was and still is a right in the mortgagee to take proceedings for the recovery of land. Once he gets judgment equity gives the mortgagor certain rights for his relief if he chooses to use them; but it seems to me that this is a common law action which a mortgagee is entitled to bring for the recovery of the land which is the subject of the mortgage.

For these reasons I have come to the conclusion that s. 48 of the County Courts Act, 1934, is the governing section in this case and that a building society or other mortgagee can bring an action in the county court under that section to recover the land where he has a right so to do by reason of the default of the mortgagor to pay the principal or interest.

F I am glad to be able to come to this conclusion because it would, I think, be a most unfortunate state of affairs if we had to hold that all these actions must be brought in the High Court. The applicants in this case did perfectly right in taking proceedings in the county court rather than in the High Court.

For these reasons the order of mandamus must go.

G BYRNE, J.: I entirely agree.

DEVLIN, J.: I also agree.

Order of mandamus to issue.

Solicitors: *Butt & Bowyer*, agents for *Wannop & Falconer*, Bognor Regis (for the applicants); *Treasury Solicitor* (for the respondent).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

A

Re MEUX'S WILL TRUSTS.
GILMOUR v. GILMOUR AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), May 23, June 6, 1957.]

Town and Country Planning—Compensation—Land settled on trust for sale—Compensation was capital but not proceeds of sale arising under the trust for sale—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 28 (1)—Town and Country Planning Act, 1954 (2 & 3 Eliz. 2 c. 72), s. 66 (1)—Town and Country Planning (Mortgages, Rentcharges, etc.) Regulations, 1955 (S.I. 1955 No. 38), reg. 10.

Lands were devised on trust for sale and the proceeds of sale were settled on trust for G. for life with remainders to his sons, who were infants, successively. Special payments under Part 1 of the Town and Country Planning Act, 1954, for depreciation of land values, were received in respect of some of the lands, and compensation would be receivable under Part 2 and Part 5 of the Act for refusal or revocation or modification of planning permission in relation to other parts of the lands. The court having held that the sums so paid or receivable were to be treated as capital of the testator's estate, the question arose whether, under s. 66* of the Act of 1954 and reg. 10* of the Town and Country Planning (Mortgages, Rentcharges, etc.) Regulations, 1955, the sums were "proceeds of sale arising under the trust for sale" within s. 28 of the Law of Property Act, 1925, with the consequence that the provisions of that section would apply to the sums.

Held: the sums were not "proceeds of sale arising under the trust for sale," within s. 28 (1)† of the Law of Property Act, 1925, because neither s. 66 (1) of the Act of 1954 nor reg. 10 of the Regulations of 1955 stamped the sums with that character, and it was not necessary to imply in s. 66 (1) or reg. 10 words having that consequence.

Re Lord Penrhyn's Settlement Trusts ([1923] 1 Ch. 143) distinguished.

Trust and Trustee—Variation of trusts by the court—Infant tenant in tail in remainder—Proposed sale of infant's entailed interest to tenant for life, the purchase price to be paid to trustees of a new settlement for benefit of infant—Trustee Act, 1925 (15 & 16 Geo. 5 c. 19), s. 53.

By the testator's will, his residuary estate was settled on trust to pay the income thereof to G. during his life, with remainder to G.'s first and other sons successively in tail male, with remainders over. G.'s eldest son, D., the tenant in tail in remainder, was an infant. An application was made to the court under s. 53‡ of the Trustee Act, 1925, for an order appointing a person to convey to G. the entailed interest of the infant D. in the residuary trust estate, with the consent of G. as protector, in consideration of a proper purchase price which would be paid to trustees and re-settled. The intended re-settlement would settle the proceeds of sale on virtually the same trusts as those on which the residuary estate was settled, except that G. would have no beneficial interest and the infant D. would have a contingent, as opposed to a vested, interest.

Held: the court had jurisdiction to make the order because the proposed transaction should be regarded as a single transaction which would be an "application . . . for the . . . benefit of the infant", within s. 53 of the Trustee Act, 1925.

Re Heyworth's Settlements ([1956] 2 All E.R. 21) distinguished.

* The relevant terms of s. 66 of the Town and Country Planning Act, 1954, are printed at p. 633, letter D, post, and reg. 10 of the Town and Country Planning (Mortgages, Rentcharges, etc.) Regulations, 1955, is printed in the footnote at p. 635, post.

† The terms of s. 28 (1) of the Law of Property Act, 1925, are printed at p. 632, letter G, post.

‡ The relevant terms of s. 53 are printed at p. 637, letter D, post.

A [For the Law of Property Act, 1925, s. 28 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 475.

For the Town and Country Planning Act, 1954, s. 66, see 34 HALSBURY'S STATUTES (2nd Edn.) 987.

For the Trustee Act, 1925, s. 53, see 26 HALSBURY'S STATUTES (2nd Edn.) 134.]

Cases referred to:

- B (1) *Re Penrhyn's (Lord) Settlement Trusts*, *Penrhyn v. Roberts*, [1923] 1 Ch. 143; 92 L.J.Ch. 145; 128 L.T. 442; 40 Digest 656, 1956.
- (2) *Re Barker*, (1881), 17 Ch.D. 241; 50 L.J.Ch. 334; 44 L.T. 33; 42 Digest 702, 1193.
- (3) *Tinkham v. Perry*, [1951] 1 All E.R. 249; [1951] 1 K.B. 547; 2nd Digest Supp.
- C (4) *Re Gower's Settlement*, [1934] Ch. 365; 103 L.J.Ch. 164; 150 L.T. 449, Digest Supp.
- (5) *Re Heyworth's Settlements*, [1956] 2 All E.R. 21; [1956] Ch. 364.
- (6) *Re Vestey's (Baron) Settlement*, *Lloyds Bank, Ltd. v. O'Meara*, [1950] 2 All E.R. 891; [1951] Ch. 209; 2nd Digest Supp.
- (7) *Re Ropner's Settlements Trusts*, *Ropner v. Ropner*, [1956] 3 All E.R. 332.

D Adjourned Summons.

This originating summons was issued by Ian Hedworth John Little Gilmour, who was entitled during his life to the income of the residuary estate of the testator, Sir Hedworth Meux, deceased, and was also one of the trustees of the testator's will.

E By his will, dated Sept. 5, 1927, the testator, who died on Sept. 20, 1929, gave his residuary real and personal estate to his trustees on trust for sale and settled the residuary trust fund on certain trusts. In the events which had happened, the income of the residuary trust fund (subject to the payment of a certain annuity) was now payable to the plaintiff during his life, with remainder on trust for the plaintiff's first and other sons successively in tail male, with remainder on trust for the plaintiff's sister (the fourth defendant) in tail male, with remainders over. The plaintiff had three sons (the first, second and third defendants), born, respectively, in 1952, 1953 and 1956. The fifth and sixth defendants were the other two trustees of the will.

G A large part of the real estate which had been retained was in the area known as the Metropolitan "Green Belt", and under the Middlesex and Hertfordshire County Development Plan this land was to be used for agricultural purposes and not for residential or industrial purposes. As a result the trust estate had received certain payments from the Central Land Board under s. 3 (1) (a) and under s. 5 of the Town and Country Planning Act, 1954 (that is, under Part 1 of the Act), and would receive certain further sums under Part 2 and Part 5 of the Act.

H The summons asked for the determination of the following questions (among others): 1 whether on the true construction of the will of the testator the principal amount of the compensation which had been paid under Part 1 and was receivable under Part 2 and Part 5 of the Town and Country Planning Act, 1954, in respect of land subject to the trusts affecting the residuary estate of the testator ought to be treated (a) as capital of the residuary estate, or (b) as a casual profit payable to the plaintiff as the person entitled under the will to the rents and profits of such land, or (c) in some and what other manner; and 2 if the answer to the question raised in para. 1 (a) was in the affirmative, whether on the true construction of s. 66 of the Town and Country Planning Act, 1954, and the Town and Country Planning (Mortgages, Rentcharges, etc.) Regulations, 1955, the principal amount of the compensation was applicable under s. 28 of the Law of Property Act, 1925, in the same manner as if the same represented proceeds of sale of land arising under the trust for sale contained in the will. Paragraph 6 of the summons asked for an order under s. 53 of the Trustee Act,

1925, appointing a person to convey to the plaintiff the entailed interest of the infant defendant, David Robert Gilmour (the first defendant), in the residuary trust estate (with the consent of the plaintiff as protector) in consideration of a proper purchase price, with a view to such purchase price being applied for the benefit of the infant by payment thereof to the trustees of a settlement (exhibited in the proceedings) for the benefit of the infant. A

On question 1, HIS LORDSHIP made a declaration in the form of para. 1 (a). B
Thereupon question 2 of the summons arose for determination and a question of jurisdiction arose in regard to para. 6 of the summons. Other matters were referred to chambers.

Geoffrey Cross, Q.C., and J. A. Brightman for the plaintiff.

S. W. Templeman for the first, second and third defendants, infant sons of the plaintiff. C

The fourth defendant, the plaintiff's sister, was not legally represented.

E. I. Goulding for the fifth and sixth defendants, two of the trustees of the will.

Curr. adv. vult.

June 6. **WYNN-PARRY, J.**, read the following judgment: I have already declared that the principal amount of the compensation which has been paid under Part 1 and is receivable under Part 2 and Part 5 of the Town and Country Planning Act, 1954, in respect of land subject to the trusts affecting the residuary estate of the testator ought to be treated as capital of the residuary estate. The question which now arises is whether the principal amount of that compensation is applicable under s. 28 of the Law of Property Act, 1925, in the same manner as if it represented proceeds of sale of land arising under the trust for sale contained in the will. D

It is accepted by counsel for the plaintiff that, having regard to the definition of the word "sale" in s. 205 of the Law of Property Act, 1925, the principal of the compensation in question cannot be regarded as actual proceeds of sale within the meaning of the phrase "proceeds of sale" at the beginning of s. 28 (1) of that Act. So there has to be another approach to this problem, and it is made in this way. Section 28 (1) of the Law of Property Act, 1925, so far as material, reads: E

"Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925 . . . and . . . all capital money arising under the said powers shall . . . be applicable in the same manner as if the money represented proceeds of sale arising under the trust for sale." G

One of the powers conferred on a tenant for life under the Settled Land Act, 1925, is that contained in s. 58 (1)†, which reads: H

"A tenant for life may, with the consent in writing of the trustees of the settlement, either with or without giving or taking any consideration in money or otherwise, compromise, compound, abandon, submit to arbitration, or otherwise settle any claim, dispute, or question whatsoever relating to the settled land, or any part thereof . . ."

"Claim" in that sub-section, it is said, includes a claim under the Town and Country Planning Act, 1954, whether the claim arises under Part 1, Part 2, or Part 5 of that Act, and, therefore, any money received, or receivable, under that Act is received, or receivable, by virtue of the exercise of a Settled Land Act power, and is, therefore, to be treated in the hands of the trustees of the I

* By s. 205 (1) (xxiv): "'Sale' includes an extinguishment of manorial incidents, but in other respects means a sale properly so called."

† 23 HALSBURY'S STATUTES (2nd Edn.) 137.

A will of the testator "as if the money represented proceeds of sale arising under the trust for sale."

This is an ingenious argument. Whether it is sound or not depends on whether or not s. 58 (1) of the Settled Land Act, 1925, comes into operation at all. In my opinion, it does not. The principal amount of the compensation paid under Part 1 of the Town and Country Planning Act, 1954, was determined as a result of a claim established under Part 6 of the Town and Country Planning Act, 1947*, while the principal amounts receivable under Part 2 and Part 5 of the Town and Country Planning Act, 1954, will be determined under the machinery contained in those respective Parts of that Act. It appears to me, therefore, that s. 58 (1) of the Settled Land Act, 1925, does not affect the matter at all.

C It follows, therefore, that, if the compensation moneys are to be treated as stamped with the character of "proceeds of sale", this character must have been given to them by some provision in the Town and Country Planning Act, 1954. The section which was relied on as achieving this is s. 66. Section 66 (1) reads:

D "Regulations made under this section may make provision as to the exercise of the right to apply for a payment under Part 1 of this Act, or to claim compensation under Part 2 or Part 5 thereof, and as to the person to whom any such payment or compensation or any part thereof is to be paid and as to the application of any such payment or compensation or any part thereof, in cases where, apart from this section, the right to apply for the payment, or to claim the compensation, as the case may be, is exercisable by reference to . . . (b) an interest in land which is subject . . . to the trusts of a settlement, or which was so subject at a time specified in the regulations . . ."

Counsel for the plaintiff pointed out that the regulations† made under s. 66 contain no provision "as to the application of any such payment or compensation", which words, he contended, were apt to confer on the Minister the right to make a regulation directing that compensation money should, in the hands of trustees for sale, be treated as proceeds of sale. I agree with him, first, because these words must be taken as indicating something different from the mere destination of the compensation moneys, their destination having been dealt with by the preceding phrase "as to the person to whom any such payment or compensation or any part thereof is to be paid"; and, secondly, because of the language of s. 66 (3). That sub-section reads:

H "Any sum payable under this Act in relation to land which is, or on July 1, 1948, was, ecclesiastical property, being a sum which apart from this sub-section would be payable to an incumbent, shall be paid to the Church Commissioners to be applied for the purposes for which the proceeds of a sale by agreement of the land would be applicable under any enactment or Measure authorising, or disposing of the proceeds of, such a sale; and where any sum is recoverable under s. 29, s. 41, s. 46 or s. 57 of this Act in respect of such land, the Church Commissioners may apply any money or securities held by them in the payment of that sum."

I It will be seen that the sum in question is to be treated as having a particular character and is to be dealt with accordingly. The difference between sub-s. (1) and sub-s. (3) of s. 66 is that in sub-s. (1) the attribution of the particular characteristic is to be effected by the Minister, while in sub-s. (3) it is effected by the sub-section itself.

* See s. 1 of the Town and Country Planning Act, 1954.

† The Town and Country Planning (Mortgages, Rentcharges, etc.) Regulations, 1955 (S.I. 1955 No. 38). See the footnote at p. 635, post.

If, however, counsel for the plaintiff is right, a gap exists which can only be bridged by the action of the Minister in making a further regulation. Alternatively, counsel says that by necessary implication compensation must, at any rate in the case of compensation payable in respect of land subject to the trusts of a settlement, be regarded as being in the same position as proceeds of sale. A

In his approach to this aspect of the case, counsel referred me to *Re Lord Penrhyn's Settlement Trusts*, *Penrhyn v. Roberts* (1) ([1923] 1 Ch. 143). In the course of his judgment P. O. LAWRENCE, J., said (*ibid.*, at p. 147): B

"In these circumstances, the question I am asked to decide falls, in my opinion, to be determined on principle. Mr. Howard Wright [for the trustees] has referred me to the following passage in the judgment of JAMES, L.J., in *Re Barker* (2) ((1881), 17 Ch.D. 241 at p. 243) as laying down the true principle applicable to such cases as the present—namely: 'There seems to me to be a broad general principle underlying all these questions, which is this, where property is taken compulsorily from any person who is not *sui juris*, and who is not competent to make the subsequent alteration in the disposition or the devolution of that property, which would naturally follow such a change, the presumption is, if the words of the Act of Parliament really admit of that interpretation, that the legislature did not intend to interfere with any legal rights or any legitimate expectations of any persons whatsoever.' C

"In my judgment, Mr. Howard Wright is right in his contention that this passage accurately expresses the principle applicable to the present case. Here we have a right of patronage which, at the date of the passing of the Act, was settled in favour of a tenant for life with remainders over. This right was compulsorily extinguished and a sum of money has been paid in compensation for such extinction. Applying the broad general principle referred to by JAMES, L.J., the result is that the amount awarded for compensation must be held, as far as possible, upon the same limitations as the right of patronage was held at the date of its extinction. This can best be accomplished by treating it as if it were capital money arising under the Settled Land Acts." D E F

So be it, but approaching the matter with this broad principle in mind, I still have to find sufficient material to justify me in drawing the inference which counsel asks me to draw. In this connexion it is to be remembered that the court is always hesitant to read words into a statute. For instance, in *Tinkham v. Perry* (3) ([1951] 1 All E.R. 249) SIR RAYMOND EVERSHED, M.R., said (*ibid.*, at p. 250): G

"Plainly, words should not be added by implication to the language of a statute unless it is necessary to do so to give the enactment sense and meaning in its context . . ." H

Counsel's argument is based on the circumstance that in s. 66 (2) of the Town and Country Planning Act, 1954, the purposes authorised for the application of capital money by s. 73 of the Settled Land Act, 1925, and by that section as applied by s. 28 of the Law of Property Act, 1925, in relation to trusts for sale, are to include (*inter alia*) the payment of a sum recoverable under s. 29 of the Act of 1954, sub-s. (1) of which reads: I

"No person shall carry out any new development to which this section applies, on land in respect of which a notice (in this section referred to as a 'compensation notice') is registered under the last preceding section, until such amount (if any) as is recoverable under this section in respect of the compensation specified in the notice has been paid or secured to the satisfaction of the Minister."

- A It is said that, as a repayment of compensation moneys under s. 29 of the Act of 1954 is regarded as one of the purposes for which trustees for sale can apply proceeds of sale in their hands, so it follows that s. 66 presupposes that the compensation money must itself be in the position of proceeds of sale. Counsel admits that this argument involves implying something into s. 66 (1) of the Town and Country Planning Act, 1954. In my view, I can only make the implication
- B which I am asked to make if, on a review of the section, I am forced to the conclusion that "it is necessary to do so to give the enactment sense and meaning in its context."

- Two difficulties present themselves. First, as I construe the earlier part of s. 66 (1), it is open to the Minister to fill the gap which counsel seeks to fill by implication. Secondly, it appears to me that the section can be made to work
- C without either a further regulation or the introduction of any implication, although the result will not be that which the plaintiff desires to obtain. It appears to me that, if the section is applied as it stands, the destination of any compensation money is certain, because the regulations which have been made, namely, the Town and Country Planning (Mortgages, Rentcharges, etc.) Regulations, 1955, provide for this by reg. 10*. The compensation money, when
- D received by the trustees, will be held by them on the relevant trusts declared by the will, although it will not be deemed to be proceeds of sale.

- In arriving at the conclusions to which I have come, I feel a certain degree of sympathy with the applicant. It is true that moneys received by the trustees as compensation money are received by them, although they part with no land; but this payment is clearly referable to the land; it is paid because the land is
- E regarded as having suffered a depreciation; but whether or not compensation moneys are to be regarded as proceeds of sale is a matter of policy with which I am not concerned. The legislature can, of course, deal with the question if so minded, and so, in my view, can the Minister by appropriate regulations; but as matters stand it is not open to me, for the reasons which I have given,
- F to treat the compensation in question in the hands of the trustees of the will as "proceeds of sale" for the purposes of s. 28 of the Law of Property Act, 1925. I must, therefore, answer question 2 in the negative.

[His LORDSHIP then heard argument on further questions in the summons.]

- WYNN-PARRY, J.: The next question with which I have to deal is
- G question 6. [His LORDSHIP read para. 6† of the summons and continued:] There is no doubt that under s. 53 of the Trustee Act, 1925, the court has jurisdiction within the ambit of that section to appoint a person to convey the estate tail of the infant concerned. That is, I think, to be taken as demonstrated by *Re Gower's Settlement* (4) ([1934] Ch. 365). The result of that operation would be to disentail the first defendant's estate tail. It would then be proposed
- H (and it is put forward as being a necessary part of a single transaction) that the proceeds of sale should be paid over to the trustees of a settlement, the suggested form of settlement being exhibit "A.R.H." to the affidavit in support of the summons. The terms of that settlement are not, of course, final. If I should

- * The Town and Country Planning (Mortgages, Rentcharges, etc.) Regulations, 1955 (S.I. 1955 No. 38), reg. 10, reads: "Where the right to make application for any payment under any of the provisions of Part 1 of the Act, or to claim any compensation under Part 2 or Part 5 of the Act, becomes exercisable by reference to an interest in land which is, at the time when the said right is exercisable, subject to a settlement, then—(a) the right to make the application or to claim compensation, as the case may be, shall be exercisable by the trustees of the settlement; (b) where an application or claim has been made by reference to such an interest as aforesaid and a payment falls to be made, or compensation falls to be paid, the principal amount of the payment and the interest thereon or the compensation (including in the case of compensation under Part 5 of the Act the interest thereon) shall be paid to the trustees of the settlement."
- I

† See p. 631, letter I, to p. 632, letter A, ante.

decide that I have jurisdiction in the matter, no doubt the terms of the settlement would be brought before the court in chambers and would be finally settled then; but, generally speaking, the object sought to be achieved by the intended settlement is to resettle or to settle the proceeds of sale virtually on the same terms as the residuary estate is settled, except, of course, that the plaintiff would have no interest in the settlement and the first defendant would have a contingent, as opposed to a vested, interest.

The question of jurisdiction has been argued because, however beneficial the transaction may be said to be on behalf of the first defendant and the other persons who would be entitled in succession if the proposed settlement were executed, nothing can be done towards carrying the transaction into effect unless it is established that the court has jurisdiction in the matter.

The difficulty, which was very properly put forward by counsel for the plaintiff, is created by the decision of UPJOHN, J., in *Re Heyworth's Settlements* (5) ([1956] 2 All E.R. 21). In that case there was a proposed agreement between a tenant for life under two settlements and the reversioners expectant on her death, that the tenant for life should purchase the contingent reversionary interests. The arrangement was made in order that the reversioners might receive an immediate absolute interest in a sum of cash in exchange for their future contingent interests. One of the reversioners was an infant, and the proposed transaction, though for her benefit, was not necessary for her education or maintenance. On the application being made to UPJOHN, J., to sanction the sale of the infant's interests, he held that he had no jurisdiction under the Trustee Act, 1925, s. 53, nor (though I am not concerned with this) under the inherent jurisdiction of the court. *Prima facie*, that case appears to be very close to the present case, but, as was pointed out, there is the distinction that it is an essential part of the transaction envisaged in the present case that the proceeds of sale arising as a result of the sale under s. 53 are to be settled, whereas in *Re Heyworth's Settlements* (5) the proceeds of sale were to be handed over to the infant absolutely.

In his judgment UPJOHN, J., having read s. 53, said ([1956] 2 All E.R. at p. 23):

"It is to be observed that the section does not authorise the court to convey an infant's property merely because it is for his or her benefit but only 'with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant.' It was faintly suggested in evidence that this transaction was necessary in order to provide an income to enable Susan to continue her training in London as a student nurse and if that had been established I do not doubt that the court has ample jurisdiction to sanction the arrangement, but the facts did not bear serious examination. Susan has in fact been maintained as a student nurse out of other funds for nearly two years, although admittedly by way of advances rather than out of income, and it cannot be seriously suggested that this deed is necessary to enable her to be maintained down to her twenty-first birthday. Susan will then obviously execute the deed on attaining her majority, so no post-infancy period can be called in aid and counsel did not seriously press this point. I accept also the argument that the phrase 'maintenance, education, or benefit' are words of the widest import. It covers not merely expenditure but capital investment such as the purchase of a house to live in or a share in a partnership or even in some cases placing of money on deposit for an infant (*Re Baron Vestey's Settlement* (6), [1950] 2 All E.R. 891). However, to bring the jurisdiction into play there must be 'a view to the application' of the capital or income for the maintenance, education or benefit of the infant. Counsel concedes that phrase is equivalent to 'for the purpose of applying.' Shorn of the niceties of legal argument, this deed is intended to put an end to the trusts created by the settlement or to enlarge the interest of the life tenant to include some or all of the reversioners' interests by means of a sale of those reversionary interests for cash. The

- A infant (inter alia) receives an immediate absolute interest in a sum of cash in exchange for a future contingent interest. The deed is not in the least degree entered into with a view to the application of, or for the purpose of applying, any capital or income of the infant for her benefit. If I sanction this scheme on behalf of the infant I should be reading the section as though it empowered the court to convey the property of an infant whenever it was for her benefit. Unfortunately, the section only confers a more limited jurisdiction."
- B

The apparent difficulty created by that case is to some extent solved by the circumstance that it was held by HARMAN, J., in *Re Ropner's Settlements Trusts, Ropner v. Ropner* (7) ([1956] 3 All E.R. 332) that, where there was a power of advancement in a settlement and it was proposed to make advancements to beneficiaries, the amount advanced in each case to be settled, that was an application within s. 32 of the Trustee Act, 1925.

- C Section 32 (1) opens with the words:

"Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property . . ."

- D Section 53 opens with the words:

"Where an infant is beneficially entitled to any property the court may, with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant, make an order . . ."

- E In my view, it is rightly said that the word "apply" in s. 32 and the word "application" in s. 53 should be given the same meaning; and, in my view, the proposal in this case, which involves transferring proceeds of sale to the trustees of the proposed settlement, would amount to an "application" within the meaning of that word as used in s. 53 of the Trustee Act, 1925. It is then said, however, that it is not a single transaction which is involved, but two transactions, or, alternatively, a transaction having two distinct parts. There is, first, a sale, and that is a transaction, or part of the transaction; and, secondly, there is the application of the proceeds of sale by the proposed settlement. Counsel for the defendant trustees submitted that it was the sale of the reversion alone which would produce the benefit to the infant, namely, freedom from liability to what otherwise would be heavy estate duty, and that the application of moneys by settlement was something which was not of "benefit" to the infant; and he further submitted that it was the application which must be beneficial and which alone could justify the sale.
- F
- G

- I agree with counsel that, if the proper way of looking at s. 53 and at the proposed transaction is to say that two separate transactions are involved, or, alternatively, that there is a transaction in which two steps are to be taken, it appears that I have no jurisdiction. If, on the other hand, the proposed transaction can be regarded as a single transaction, the component parts of which ought not to be regarded separately for the purpose of seeing what is the impact thereon of the opening language of s. 53 of the Trustee Act, 1925, then it appears to me that I should be justified in saying that, there being admittedly, an application, this is a case in which the words "with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant" in s. 53 are satisfied.
- H
- I

I entirely accept that in this case the proposed settlement is not introduced in any way as a colourable transaction. It is an absolutely essential part of the transaction looked at as a whole, for no court would consider, in view of the limitations of the testator's will, that it would be fair to those whose interests come after that of the first defendant, merely to bar the entail and sell the property without making provision for their interests. That consideration leads

me inevitably to the conclusion that what I am dealing with in this case is one single transaction which I am not entitled to cut up in separate pieces, as suggested by counsel for the defendant trustees. When looked at as one transaction, there can be no doubt whatsoever that the transaction is one of which it may be postulated that it is overwhelmingly in favour of the first defendant and, indeed, of the other infant defendants. I come, therefore, to the conclusion that, for the reasons which I have given, this case is distinguishable from *Re Heyworth's Settlements* (5), and that the court has jurisdiction to approve a transaction on the lines indicated in the question and involving a settlement on the lines of the exhibit to which I have referred. The details of the settlement will have to be dealt with in chambers.

Declaration and order accordingly.

Solicitors: *Neish, Howell & Haldane* (for the plaintiff and the first, second and third defendants); *Speechly, Mumford & Craig* (for the fifth and sixth defendants).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

CHARTERED INSURANCE INSTITUTE v. CORPORATION OF LONDON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Devlin, J.J.), June 19, 1957.]

Rates—Limitation of rates chargeable—Organisation concerned with the “advancement of education”—Chartered Insurance Institute—Whether for advancement of education or for enabling persons to practise insurance to greater advantage—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1).

The objects of the Chartered Insurance Institute were set out in its charter, and the first object (stated in cl. 2 (a)) was: “To provide and maintain a central organisation for the promotion of efficiency, progress and general development among persons engaged or employed in insurance, whether members of the institute or not, with a view not only to their own advantage but to rendering the conduct of such business more effective, safe and scientific, and securing and justifying the confidence of the public and employers by reliable tests and assurances of the competence and trustworthiness of persons engaged or employed in insurance”. Other objects were to encourage and assist the study of subjects bearing on insurance, to publish a journal, to form a library for the use of members, to offer money and other prizes for essays or research in insurance, to examine candidates for certificates of the institute, to promote personal and friendly intercourse between members, to exercise professional supervision and control over the members of the institute, and to safeguard their interests. The institute claimed limitation of the amount of rates under the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8*, as being an organisation whose main objects were concerned with the advancement of education. Forty members of the institute's total staff of fifty were concerned with tuition and examination activities. It was found as a fact by the justices that the institute was maintained for the main purpose above-stated with a view to securing the competence of persons employed in insurance. On appeal,

Held: the institute was not entitled to relief because (per LORD GODDARD, C.J., and BYRNE, J.) on the true construction of the charter the main object of the institute was not the advancement of education but to benefit the profession of insurance generally, and (per DEVLIN, J.) on the justices'

* The relevant terms of s. 8 are printed at p. 639, letter I, post.

A findings the main object in fact being attempted or achieved was the object set out in cl. 2 (a) of the charter and on the true construction of that paragraph the purpose of the institute was to enable persons employed in insurance to practise insurance to greater advantage.

Dictum of LORD MACNAGHTEN in *Inland Revenue Comrs. v. Forrest* ((1890), 15 App. Cas. at p. 354) applied.

B Appeal dismissed.

[**Editorial Note.** The decision in *Inland Revenue Comrs. v. Forrest* ((1890), 15 App. Cas. 334), where LORD MACNAGHTEN'S formulation of the issue to be decided was stated, was a decision in relation to corporation duty. The relevant words of the statutory exemption from the duty under s. 11 (3) of the Customs and Inland Revenue Act, 1885, were: "property which . . . shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts". LORD MACNAGHTEN'S dictum has been much cited; and in relation to future cases comparison may usefully be made with *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* ([1952] 1 All E.R. 984 at pp. 996 et seq.) and *Institute of Fuel v. Morley* ([1955] 3 All E.R. 843 at p. 848).

As to educational institutions as charities, see 4 HALSBURY'S LAWS (3rd Edn.) 220, para. 498; and for cases on gifts for educational purposes, see 8 DIGEST (Repl.) 326-330, 91-118.

For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

E Case referred to:

(1) *Inland Revenue Comrs. v. Forrest*, (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; 38 Digest 496, 503.

Case Stated.

F This was an appeal by a Case Stated by the City of London Quarter Sessions to whom the appellant, the Chartered Insurance Institute, had appealed against the rate made on them by the respondent, the Corporation of London, on the ground that the amount of the rate in respect of the hereditament occupied by the appellant exceeded that provided by s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and was therefore not made in conformity with the law. The appeal was dismissed by quarter sessions and the appellant G applied for a Case to be stated. The relevant facts are set out in the judgments.

Michael Rowe, Q.C., and *W. L. Roots* for the appellant, the Chartered Insurance Institute.

N. E. Mustoe, Q.C., and *G. B. Graham* for the respondent, the Corporation of London.

H **LORD GODDARD, C.J.:** This is a Case Stated by Quarter Sessions for the City of London, to whom the Chartered Insurance Institute appealed against a rate made in March, 1956, on the ground

I "that the said rate was not made in conformity with law, namely, the Rating and Valuation (Miscellaneous Provisions) Act, 1955, in that the amount of rates charged in respect of the hereditament aforesaid exceeds that provided by s. 8 of the said Act which applied to the said hereditament."

Section 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, gives a relief from rating to

"any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

It is unquestionable that the institute is not one conducted for profit. It is not suggested that it is a charity, but it is suggested that its main objects are concerned with the advancement of education, and, as the argument has proceeded, one can see that the words "advancement of" do not add very much to the word "education" because the question is whether the main objects of the institute are education. A

I will refer to the Case, which is carefully stated. In para. 3 quarter sessions say: B

"That the work of the institute consists of oral tuition by lectures and classes; the organising of curricula by other bodies for institute members and others; postal tuition; and the conduct of examinations. The whole of the tuition service is under a director of education. Fees are charged to students. The main objects are education in insurance matters." C

The Case describes the activities of this institution, and in their finding quarter sessions say:

"We came to the conclusion that while greatly impressed by the evidence with regard to many of the activities which bring the objects of the institute very close to the line where it would be entitled to the benefit of s. 8 of the Act of 1955, we found it difficult to accept the view that this institute comes within the section which entitles it to temporary relief. In our view the hereditament is occupied mainly for purposes which cannot be described as educational in the sense in which we interpret the word. The charter of the institute does not conclude the matter, and we have been referred to definitions of 'education' in the OXFORD ENGLISH DICTIONARY and in STROUD'S JUDICIAL DICTIONARY the latter of which defines it as 'the training of the young in general, not teaching for a business or profession'. With difficulty and hesitation we have come to the conclusion that the institute is maintained for the purpose specified in cl. 2 (a) with a view to securing the competence of persons engaged or employed in insurance and that it is for that special purpose that its activities are designed and for which they are maintained. We therefore dismissed the appeal with costs." D E F

That conclusion seems to me to go rather away from the finding that had been stated in para. 3 of the Case, in which it is said: "The main objects are education in insurance matters". To my mind, and the ground on which I propose to base my judgment, the question is one of interpretation of the charter. We have to look at the charter to find the main objects because the institute is a chartered body with a charter granted by the Sovereign, and its objects and scope are set out. The objects and purposes for which the institute is constituted are set out in cl. 2 of the operative part of the charter, and the first (para. (a)) is: G H

"To provide and maintain a central organisation for the promotion of efficiency, progress and general development among persons engaged or employed in insurance, whether members of the institute or not, with a view not only to their own advantage but to rendering the conduct of such business more effective, safe and scientific, and securing and justifying the confidence of the public and employers by reliable tests and assurances of the competence and trustworthiness of persons engaged or employed in insurance." I

In other words, the institute is set up for the purpose of getting a competent and reputable body of insurance practitioners. Then comes para. (b):

"To encourage and assist the study of any subjects bearing on any branch of insurance."

A Whether that is education of young members or even older members, I feel some doubt, but I am prepared to give the appellant the benefit of the doubt and say that that might be held to be education. Then para. (c) is:

"To publish a journal and any other matter deemed desirable by the council of the institute."

B If I were satisfied that the rest of the objects were the advancement of education, I should not hold that they were defeated by the publication of a journal. Clause 2 continues:

"(d) To form a library for the use of members of the institute. (e) To offer money or other prizes for essays or research in any subject bearing on insurance. (f) To devise and impose means for testing the qualifications of candidates for the certificates of the institute by examination in theory and practice or by any other actual and practical tests, and to grant certificates of qualification to the successful candidates."

There, I think, we find an object of education, but when I have read those, I have read everything in the charter (although there are eight more clauses in it) which seems to me to refer to education. The next paragraph, para. (g), is:

D "To promote personal and friendly intercourse between members of the institute; to hold conferences and meetings for the discussion of professional affairs, interests and duties, the reading of papers and the delivery of lectures; to compile lists, registers and records of events and proceedings of interest to the members, to issue copies of such lists, registers and records from time to time to members of the institute, and generally to collect, collate and publish statistical or other information of service or interest to members of the profession."

E I do not think that by any fair construction that can be regarded as a subject of education. Paragraph (h) is:

F "To ascertain the law and practice relating to all things connected with insurance, to collect and form a strong body of expert opinion with the view of obtaining the codification and amendment of the Acts relating to insurance companies, or otherwise relating to insurance, and to watch any legislation affecting insurance."

That obviously means: "We are going to establish regular and experienced practitioners to keep themselves acquainted with the law and to get a strong body to bring about alterations in the law if we can". Paragraph (i) is:

G "To exercise professional supervision and control over the members of the institute, to safeguard their interests and welfare, to further their advancement, and to promote whatever may lead to the improvement of the status of insurance officials in general and the members of the institute in particular."

H Improvement in the status of their members and the dignity of the profession is, of course, the kind of object which any professional body has in mind. Then para. (j) is:

"To act as a means of communication between members or others seeking engagements in insurance and employers desirous of employing them."

I Then come various other provisions with regard to the relief of the necessitous members of the profession, and:

"To promote and encourage provision by the members against the contingencies of age, sickness, misfortune and death, and to assist, financially or otherwise, towards such provision."

This is in fact, it seems to me, a most desirable, worthy and respectable professional institution. It is instituted not only for the provision of examinations; but, as it seems to me, its objects also go far beyond that, and I should find without

hesitation that the main object of the institute is that which is set out in cl. 2 (a) to which I have already referred. Yet it would be stretching the interpretation of this charter beyond that which is right to say that the main object is education. Moreover when one is considering the use of the word "education" in this statute we are helped by the views of LORD MACNAGHTEN and others in *Inland Revenue Comrs. v. Forrest* (1) ((1890), 15 App. Cas. 334 at p. 354) where he says:

"That being so, the question at issue may be stated shortly. Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers in order to enable them to practise their profession to greater advantage?"

In the one case it was exempted from taxation and in the other case it was not.

The main object of this institution is to benefit the profession of insurance generally, to establish insurance practitioners as a professional body with a council or members who can exercise a certain amount of discipline over the profession. Not of course discipline in the sense that the Benchers of the Inns of Court or the Disciplinary Committee of the Law Society can exercise it, because anybody can go into the profession of insurance merely by obtaining employment with an insurance company. It is not a profession for which there is a statutory qualification. The object of the institution is generally to raise the status and dignity of the profession. That is the reason for its existence, and one of the means of doing that is to hold examinations and give lectures to young entrants to the profession, because the better they are educated in the science or art of insurance the more dignity and respect will be afforded to the profession. I cannot hold that this body comes within the relief granted by s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and for those reasons I would dismiss this appeal.

BYRNE, J.: I agree. The main question is, as my Lord has pointed out, are the main objects concerned with the advancement of education? On an examination of the charter, particularly having regard to cl. 2 (a), it appears to me to be plain that the main objects are more concerned with the advancement of members of this profession or occupation. In those circumstances, I agree that this appeal should be dismissed.

DEVLIN, J.: I have come to the same conclusion, but by a slightly different route, in which I place rather less reliance on the terms of the charter and more on the findings of fact in the Case. I agree, of course, that since what we have to ascertain under the section is whether this is a hereditament that is occupied for the purposes of an organisation whose main object is concerned with the advancement of education, the natural place to look in the first instance in order to see what are the objects of the institution is the charter. But in considering what is the main object I do not think that one can necessarily, as it were, count the different objects that are set out in the charter and see how many point to the advancement of education and how many point to such extraneous matters as disciplinary powers and the assistance of necessitous members, and so on. One must have regard to the way in which those objects have actually been achieved or attempted, and that is to be ascertained from the evidence that is set out in the Case. It is a question of fact, and I think there is evidence to support the conclusion which is set out in para. 3 of the Case, that the main objects are education in insurance matters. I note in particular the finding in para. 13:

"That if the tuition and examination activities ceased, about forty of the staff of fifty could be dispensed with. At times practically all the staff were engaged in work for these activities. The effect on the salary bill and administrative expenses would be of a similar order."

- A From that I conclude and accept as a finding of fact that about eighty per cent. of the work of the institute is devoted to tuition and examination activities rather than to the other matters which are set out in the later objects in the charter. But it does not to my mind at all follow that, because the institute is mainly engaged in tuition and examination activities, therefore its main object is concerned with the advancement of education.
- B In one sense the word "education" may be used to describe any form of training, any manner by which physical or mental aptitude, which a man may desire to have for the purpose of his work, may be acquired. If that was what was intended it would not be apt, in my judgment, to use the words "for the advancement of education". Those words suggest that the organisation is to be concerned with education for its own sake. No one can doubt, for example, that
- C a university gives education in that sense although it may very well be that one of the ancillary advantages of obtaining a university degree is to enable a man to do better in a profession. That distinction is made manifest in the passage from the speech of LORD MACNAGHTEN which my Lord has cited. It follows that if the true view of the objects and work of this institution is that although it is engaged in tuition and examination activities mainly,
- D those tuition and examination activities are designed for the benefit of the members of a particular profession in order to enable them to practise their profession to greater advantage, then the institution is not concerned with the advancement of education.

- I turn again to the facts in the Case Stated. The conclusion which quarter sessions have reached, having set out all the evidence, is that the main
- E purpose of the tuition and examination activities is that which is set out as the first object in the charter. There appears to me to be ample evidence to justify that conclusion. The first object in the charter has been read, and I need not read it again, but when it is read it seems to me to be plain that it falls on that side of the distinction drawn by LORD MACNAGHTEN which is concerned with the benefit of the members of the profession themselves in order to enable them to practise their profession to greater advantage. For
- F that reason I think that the conclusion of quarter sessions was right, and that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Linklaters & Paines* (for the appellant); *Comptroller and City Solicitor* (for the respondent).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* NATIONAL BOOK LEAGUE.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Pearce, L.J.J.), May 28, 29, 30, 1957.]

Income Tax—Income—Annual payment—Contributions to charitable organisation—Subscriptions under seven years' covenant—Covenants avoiding prospective increase of subscriptions—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. D, Case III, s. 123 (1), s. 447 (1) (b).

The National Book League was a company limited by guarantee, of which the first object was "to promote and encourage by all suitable means the habit of reading and the wider distribution of books". It was accepted as a charity by the Inland Revenue Commissioners. It issued a brochure of which a section was headed "Your club" and stated that the headquarters in London gave "the facilities of a club to members and their friends from many parts of the country and from overseas". It provided a reading room, a drawing room, and a licensed bar and restaurant, and other privileges for members, although there was no express obligation to maintain these. On Dec. 6, 1951, it passed a resolution to increase the subscriptions of ordinary individual members from £1 ls. (London) and 10s. 6d. (country) to £1 10s. and 15s. respectively as from Jan. 1, 1952, except in the case of members renewing their membership up to Aug. 31, 1952, who entered "into deeds of covenant to remain members and to pay their annual subscriptions at the existing rates for at least seven years". The same day the chairman addressed letters to members inviting them to enter into deeds of covenant and drawing attention to the advantages. Over two thousand members executed such deeds of covenant, and the league claimed to recover the tax deducted from the notional gross sums named in the deeds, as being annual payments within Case III of Sch. D in s. 123 (1) of the Income Tax Act, 1952, in respect of which the league was exempt from liability to tax as a charity under s. 447 (1) (b).

Held: the league was not entitled to recover the tax, since the subscriptions were not "annual payments" within Case III of Sch. D of s. 123 of the Income Tax Act, 1952, as they were made in circumstances which obliged the league to afford the covenantors certain benefits which were appreciable (*viz.*, the right to continue as members at a lower subscription rate and the amenities of a club), and thus the subscriptions were not pure income profit of the league.

Inland Revenue Comrs. v. City of London Corpn. ([1953] 1 All E.R. 1075) applied.

Per LORD EVERSLED, M.R.: covenantors may be allowed the use of certain reading rooms; they may be given the privilege of attending private exhibitions in private houses or elsewhere . . . it would altogether offend good sense and good law to say that the sums covenanted in such cases were not gifts to the charity in question (see p. 647, letter E, post).

Appeal dismissed.

[As to what are annual payments charged to tax under Case III of Sch. D in s. 123 of the Income Tax Act, 1952, see 17 HALSBURY'S LAWS (2nd Edn.) 232, para. 470; and for cases on the subject, see 28 DIGEST 64-72, 329-380.]

For the Income Tax Act, 1952, s. 123 (Case III of Sch. D) and s. 447 (1) (b), see 31 HALSBURY'S STATUTES (2nd Edn.) 116, 428.]

Case referred to:

(1) *Inland Revenue Comrs. v. City of London Corpn. (as the Conservators of Epping Forest)*, [1953] 1 All E.R. 1075; 117 J.P. 280; 34 Tax Cas. 293, 315; 3rd Digest Supp.

A Appeal.

The National Book League appealed to the Special Commissioners of Income Tax against the refusal of the Inland Revenue Commissioners of claims which the league had made under s. 447 (1) (b) of the Income Tax Act, 1952, for exemption from income tax chargeable for 1951-52 and 1952-53 on payments received by the league by virtue of certain deeds of covenant made by members.

- B** The league was incorporated on Nov. 28, 1925, under the Companies Acts as a company limited by guarantee and not having a share capital. Its objects were inter alia to promote and encourage by all suitable means the habit of reading and the wider distribution of books. After the war it acquired a long lease of its headquarters at 7, Albemarle Street, London, W.1. It was not disputed that since September, 1951, it had been a body of persons established for charitable purposes only. The members of the league paid annual subscriptions, the minimum rates of which were laid down in the bye-laws as £1 ls. for ordinary individual members living or having a place of business within thirty miles of the headquarters in London, and 10s. 6d. for other such members. On Dec. 6, 1951, a special resolution was passed at an extraordinary general meeting of the league increasing the rates to £1 10s. and 15s. respectively as from Jan. 1, 1952,
- D** except in respect of members who, renewing their membership by Aug. 31, 1952, entered into deeds of covenant to remain members and to pay their annual subscriptions at the existing rates for at least seven years. The bye-laws were amended accordingly. On Dec. 6, 1951, the chairman of the league sent letters to members enclosing forms of covenant and inviting them to complete the forms and drawing attention to the advantages of so doing. Of the 10,529
- E** ordinary individual members (out of a total membership of 11,936), 2,821 entered into deeds of covenant under the amended bye-laws and in 1951-52 and 1952-53 the covenantors paid £3,118 17s. 6d. in the aggregate and gave certificates of deduction of tax of £2,820 11s. 1d. on the footing that payments made under them were annual payments within the meaning of the Income Tax Acts, amounting in the aggregate to a gross sum of £5,939 8s. 7d. The league made
- F** claims under s. 447 (1) (b) of the Income Tax Act, 1952, for exemption from tax on the payments, but the claims were rejected by the Inland Revenue Commissioners on the ground that the payments under the deeds of covenant were made in consideration of membership benefits and so were not annual payments.

- The principal activities of the league were: exhibitions of rare books and other books at its headquarters and in the provinces; a book information bureau
- G** dealing with inquiries from booksellers, libraries, schools and individuals; a library; reports and surveys for the government, education authorities, etc.; lectures and discussion groups; publication of books on reading, etc., of book lists and of a journal, "Books"; and annual lectures. Its headquarters were a building of historic interest and charm and literary associations, with a large exhibition gallery, the library, a large sitting room, a smaller sitting room, a
- H** very small sitting room and a restaurant and cocktail bar.

- Within the capacity of available accommodation the league afforded the following facilities to members which were not available to non-members but there was nothing in the articles of association or bye-laws concerning their provision or continuance and the Crown admitted that there was power to withdraw them at any time: (i) Use of the three sitting rooms at 7, Albemarle
- I** Street; (ii) use of the restaurant at Albemarle Street, the prices charged (by a firm of caterers) being no less expensive than those generally charged in the district; (iii) copies of the journal "Books"; (iv) attendance at the annual lecture; (v) purchase of the league's book lists at half price and certain other publications at reduced rates. A pamphlet issued by the league to attract new members drew attention to the facilities offered to members at 7, Albemarle Street, which it described as "Your club". It was found that very few members were influenced to any appreciable extent to become or to continue as members

by these facilities and that the bulk of members paid their subscriptions or executed their deeds of covenant solely with the motive of furthering the aims of the league. A

The league contended: (i) that the payments made to the league under the deeds of covenant were annual payments within the meaning of the Income Tax Acts and were (subject to the exemption claimed) income of the league chargeable to income tax under Case III of Sch. D, and had borne such tax by deductions; (ii) that the league, being admittedly a charity, was entitled to exemption from income tax in respect of such annual payments by virtue of s. 447 (1) (b) of the Income Tax Act, 1952, and that its claim should be admitted. The Crown contended: (i) that the deeds of covenant were entered into as a result of a contract between the league and each covenantor whereby the league was obliged to afford to the covenantor all the amenities of membership, including the annual provision of goods and services; (ii) that the payments were received by the league in consideration of the annual provision of goods and services and accordingly were not "annual payments" and the claim failed. B C

The commissioners came to the conclusion that such advantages to members as the league afforded were so trifling as to justify them in describing them as affording no advantage of a substantial character and as capable of dismissal from their minds under the principle *de minimis non curat lex*. They held, therefore, that the payments were annual payments and income of the league chargeable to income tax (subject to its exemption as a charity under Case III of Sch. D) and they allowed the claim. On July 11, 1956, VAISEY, J., allowed the Crown's appeal against their decision, holding that the payments were not annual payments because they were made in return for substantial advantages. The league E appealed to the Court of Appeal.

P. J. Brennan and Mrs. H. Wilson for the league.

Geoffrey Cross, Q.C., Sir Reginald Hills and E. Blanshard Stamp for the Crown.

Cur. adv. vult.

May 30. **LORDEVERSHERD, M.R.:** The National Book League is a company limited by guarantee which was formed in 1925. It is not disputed that, since September, 1951, the league has been a body established for charitable purposes only. The question on the appeal arises in relation to some two thousand or more deeds of covenant in a common and well recognised form entered into by persons who were members—I emphasise that word for reasons which will later appear—of the league whereby the covenantors covenanted to pay for a period of seven years if they so long lived such a sum as after deduction of income tax would leave the net figures of either one guinea or 10s. 6d. The league sought to recover the amount of tax which had been deducted from the notional gross sums named in the deeds of covenant pursuant to s. 447 (1) (b) of the Income Tax Act, 1952. That sub-section provides that: F G H

"Exemption shall be granted . . . (b) from tax chargeable . . . under Sch. D in respect of any yearly interest or other annual payment, forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, [etc.] are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only." I

The tax chargeable falls under Sch. D. The league contends that the case is comprehended by Case III of Sch. D, now enshrined in s. 123 (1) of the Income Tax Act, 1952, which provides:

"Case III—tax in respect of—(a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment . . ."

A The league contends that the gross sums in question are annual sums within the comprehension of Case III or s. 123, and that, according to s. 447 (1) (b), the league is entitled to recover the tax deducted by the covenantors.

I have found the case somewhat troublesome, not least because of the conclusions to which the extremes of the argument on either side might appear to lead. For example, on the one side it was observed by counsel for the Crown that, if the argument for the league were sustained, it might be possible for a charity which, in accordance with well known practice, may require each year to augment its funds or increase public interest by holding a dance, to invite well-disposed persons to enter into deeds of covenant for seven years for a figure in return for which they would be supplied with dance tickets for the charity dance in each of the following seven years. In such a case I do not myself feel much doubt that the substance of the matter would be an arrangement for buying in advance dance tickets for charity dances by means of a covenanted payment of that kind. That being the substance of the matter, as it seems to me, it would be difficult to see how it could be brought within Case III and entitle the charity to recover tax.

On the other side and at the other extreme, the instance was taken of well known charities, of which the National Art Collections Fund may be taken as an example. In such cases the donors, the covenantors in favour of such charities, get certain privileges. They may be allowed the use of certain reading rooms; they may be given the privilege of attending private exhibitions in private houses or elsewhere; and to many I do not doubt these privileges are by no means negligible. But, although that case again is not before us, as at present advised, it seems to me that it would altogether offend good sense and good law to say that the sums covenanted in such cases were not gifts to the charity in question, that they were not pure income profit, to use LORD GREENE'S phrase*, in the hands of the charity. But the present case (like all cases) must turn on its own special facts; and I think that the facts are special in a marked degree.

The fact that the league is recognised as a body incorporated for charitable purposes only cannot be conclusive of the case in its favour. So much was clearly laid down by the House of Lords in *Inland Revenue Comrs. v. City of London Corpn.* (the Epping Forest case) (1) ([1953] 1 All E.R. 1075). But in that case the House, having rejected that answer to the claim for tax, proceeded to arrive at the same conclusion as this court on the ground that, when the facts were fully examined, the sums paid by the Corporation of London for maintaining Epping Forest were paid without any conditions or counter stipulations being made in return. LORD NORMAND said (*ibid.*, at p. 1085):

"My Lords, I am satisfied with the way in which the Special Commissioners have dealt with the question, and with their reasons. I am also in agreement with much that is said in the judgment of the Court of Appeal, though I have differed from it on the actual ground of the decision. The sum, in my opinion, is in no different position from a sum (having the requisite quality of recurrence) paid without conditions or counter stipulations out of taxed income under a covenant by a private individual to any charitable body. The Crown would neither admit nor deny that such a payment would be an annual payment to the charity within the meaning of Case III, or that the party paying it would be entitled to retain the tax, or that the charity would be entitled to recover it. We were implored to be guarded in our opinions on covenants in favour of charities. I can only say that I am compelled to follow where the argument leads. If the payment under covenant were made by an individual to a body not a charity, it could still be an annual payment, but the question whether it was in return for some consideration would probably be much more prominent and acute. If it were an annual payment the payer would be entitled to deduct tax under r. 19, but the payee would not be entitled to recover the tax."

* See *Re Hanbury, Comiskey v. Hanbury*, (1939), 20 A.T.C. 332, 333; Digest Supp.

It seems to me that that paragraph states also the problem in this case. Applying those sentences to this case, can it fairly be said the covenanted sums here, having the requisite quality of recurrence, as they undoubtedly have, were paid out of taxed income without conditions or counter stipulations? On that question, one must look at the facts of the case and at their substance and reality. A

As I have said, the facts are in many respects special. The National Book League is a league, in the sensible use of that phrase, of members who support its objects. It is a company limited by guarantee. To a large degree its funds are obtained from membership in the form of annual subscriptions. As I understand the constitution of the league, all the members become members of the company, and their subscriptions, or at least their minimum subscriptions as they are called, and their rights and duties, are regulated under the company's regulations, i.e., its articles and bye-laws made thereunder. Strictly speaking, like members of other institutions, the members cannot resign save on giving some appropriate notice. Moreover, differential rates are applied to members who live or have their business in London and country members who live away from London. That is not of itself necessarily surprising, but I state it as a fact. B
C
The first of the objects stated in the memorandum is:

"To promote and encourage by all suitable means the habit of reading and the wider distribution of books." D

Since the company is established in London the means whereby the habit of reading can be encouraged will be found most naturally situated in London, so that its supporters, those who desire to benefit from the objects of the league and who live in London, will find the benefits more readily available than will persons who live a great distance from the capital. E

At the end of the last war, the league decided as a definite part of its policy to acquire a house of no little architectural merit at 7, Albemarle Street in the West End of London, and to use it not only as the headquarters of the league but also as club premises, providing in some degree what would be understood as club amenities. A brochure attached to the Special Case, the actual date of the first distribution of which does not appear, has been referred to in argument. It states that the league is a fellowship of booklovers, and it contains a section headed: F

"Your club: 7, Albemarle Street. The house at 7, Albemarle Street, London, W.1, gives the facilities of a club to members and their friends from many parts of the country and from overseas." G

It observes that during certain hours use may be had of a reading room, a drawing room, and a licensed bar and restaurant. In such a publication it is not to be expected that the authors would understate the amenities which are offered, though it has been not unfairly pointed out that, considering the total membership of over ten thousand, the amenities are strictly limited in fact. However, the feature is made prominent in this pamphlet that at this house, 7, Albemarle Street, there is provided in some sense what is called "Your club". But, as counsel for the league pointed out, there is no obligation to continue to provide these amenities. Under the terms of the regulations of the league, those responsible for its management could at any time discontinue those amenities altogether and no doubt they would do so if they found "the club" was not successful. H
I

A special resolution of the league, i.e., of the members, was passed on Dec. 6, 1951. Up to that time the minimum subscriptions payable by individual members, as distinct from corporate members, were one guinea in the case of London members and 10s. 6d. in the case of country members. The resolution was as follows:

"That on and from Jan. 1, 1952, the annual subscription payable by ordinary individual members . . . be increased from £1 1s. to £1 10s. and

A from 10s. 6d. to 15s. respectively (except in the case of such members who renewing their membership up to and including Aug. 31, 1952, enter into deeds of covenant to remain members and to pay their annual subscriptions at the existing rates for at least seven years)."

This again was part of the policy of those responsible for the management and for using 7, Albemarle Street as the league's headquarters.

B The chairman of the league then addressed a letter to the existing members, which starts, "Dear member," and after saying that it is "the generous support of you and your fellow members" that has enabled the league to carry on, states that the league has been given the privilege of being received among the company of those established for charitable purposes only. That, says the chairman, greatly enhances our status. He continues:

C "Lack of money puts of course a most grievous brake upon our development. We have hitherto been utterly dependent upon the financial support of our public membership. We still are, but there is this difference and it affects vitally every member of the National Book League. Previously the burden of income tax has pressed equally upon us and upon our members. Our new status now enables us to reclaim from the Revenue the tax already paid by you upon your subscription."

D That is not entirely an accurate statement, but its meaning is not in doubt, and indeed it is stated in the following paragraph:

E "This means, in effect, that the value of your annual subscription to the league is almost doubled without any further cost to you. All that you have to do in order to benefit the league in this way is to covenant to remain a member for a period of seven years."

Then he sets out the figures which show what the result would be in pounds, shillings and pence of recovering tax in respect of various contributions by members. Then he states:

F "Of even greater importance to you as an existing member of the league is the fact that the signing of this covenant will insure you against any increase in the league's subscription rates which may take place during a period of seven years."

He states what the rates have been, and refers to the special resolution which I have read, and continues: "so by signing the covenant you can obtain considerable financial advantage." Then, omitting the paragraph which refers to the form of covenant, he concludes:

H "May I ask you most earnestly to support the work we are doing by taking this step. The incidental benefits of membership are considerable and you will be sharing in work which needs most urgently to be done and which has now received, as I have already said, the highest official recognition",

a reference to the fact that the Board of Inland Revenue had conceded to it the status of a body established for charitable purposes.

I As a result of that letter a large number of members executed these covenants. For the purposes of the present appeal, I think that we must assume that all the covenanted income with which we are concerned was income paid under covenants entered into in response to that letter or similar letters addressed to members. Other covenants may have been executed by members in favour of the league since and there may be more hereafter, and as to such other covenants I say nothing. I confine myself to such covenants as must be taken to have been executed in response to that request. The deed of covenant is in perfectly normal form, and makes no reference to any corresponding promise by the league, or indeed to the fact of the sum paid being taken as a subscription. But it cannot be doubted that those who entered into these covenants in response

to that letter must have done so in the faith that the sums paid, £1 ls. and 10s. 6d. according to their place of residence, would be accepted as payment in full of their subscriptions for seven years, notwithstanding the increases in the subscription rates to the rest of the members. It follows, therefore, that these covenantors may be said to have been promised and to have obtained two advantages. In the first place, they were able to continue members at the lower, pre-December, 1951, subscription rates, and they had a promise or assurance that during the seven years their subscription rates would not be raised, whatever might happen to other persons' subscription rates; secondly, they had the advantage that paying the lower, pre-existing, rates they would continue to enjoy, like other members who paid the greater rates, the so-called club amenities of 7, Albemarle Street. A B

The Crown contended that, as a result particularly of the chairman's letter on the one hand and of the execution of the deed of covenant on the other, certain specific contractual rights arose. It was said that the league was contractually bound to every covenantor not to increase his subscription beyond his particular rate during the seven years his covenant lasted. I need not pursue the position of a covenantor who lived in Edinburgh when he signed the covenant and three years later came to London, but, without stating any conclusion as to the precise legal result, I am disposed to agree with the Crown's contention that the league had put itself in a position in which it could not without breach of an obligation of some kind to the covenantors increase the appropriate subscription rates above the covenanted net sums for the period of the covenants. It was also said that the league had entered into some contractual obligation or stipulation in regard to the so-called club amenities. Again without expressing any final view, as at present advised, I should not so conclude. I cannot see in these transactions any contractual promise to provide any particular amenities; but, so long as the covenantor was entitled to treat himself as a member, notwithstanding that his subscription rate was lower than that of other members, like other members, he would be entitled to enjoy whatever amenities were available from time to time at 7, Albemarle Street, or elsewhere. C D E F

As I see it, therefore, the question turns first on this: looking at the substance and reality of the matter, did those who entered into these covenants pay the sums covenanted without conditions or counter stipulations? On the whole I have come to the conclusion that they did not. Against the special background of this case, and having regard to the terms of the letter, it seems to me that there was here, in a real sense, a condition or counter stipulation on the part of the league against which the covenant was entered into. I must guard against saying that, whenever a covenantor in favour of a charity is allowed certain privileges, it therefore follows that he can no longer say that he has paid without conditions or counter stipulations. If, as I think, the test is whether in all the circumstances, and looking at the substance and reality of the matter, these covenantors can be treated as donors of the covenanted sums to the charity, I have come to the conclusion that the answer must be in the negative, subject to the point to which I will now come as to the extent of the conditions or counter stipulations. As I follow the Case Stated and the judgment of VAISEY, J., the aspect of the matter with which I have so far dealt does not appear to have taken at all a prominent part in the argument before the matter was debated in this court. The case seems rather to have been dealt with before the Special Commissioners and before the learned judge solely on the question whether the privileges which the covenantor members admittedly obtained were of so illusory and negligible a character as to be properly disregarded on the principle of *de minimis non curat lex*. G H I

Junior counsel for the Crown observed that, in the Case and the arguments there recorded, the particular point that the privileges or amenities offered

A were trifling and illusory—in the words of the Special Commissioners—was not ever put forward by those responsible for the league, and I can appreciate his point that it would hardly lie in the mouth of those responsible for the league so to contend. But undoubtedly the Special Commissioners decided this case on the view they formed that they

B “were so trifling as to justify us in describing them as affording no advantage of a substantial character.”

It was on the question whether that decision could be sustained that the matter went before VAISEY, J., and he came to the conclusion that on the evidence such a conclusion could not be justified in law.

C I think that whether particular advantages or promises can be dismissed on the principle of *de minimis non curat lex* must be a matter for the lawyer rather than for the person who has to find facts, and on the facts here I am unable to see any justification for the Special Commissioners' conclusion. The covenantors did get at least a clear promise from which the league could not draw back without gross breach of faith and, as I am inclined to think, without also a breach of contract, that they would continue to have advantages of membership at a lower subscription rate than other persons, and that they would be immune from the possibility of increase of subscription rates during the whole period of the covenant. It seems to me impossible to dismiss that matter as being trifling and illusory and to disregard it on the principle of *de minimis non curat lex*. On this point, I am therefore unable to accept the argument of counsel for the league that it is a pure question of fact on which the conclusion of the Special Commissioners must be found. On that matter I agree entirely with the conclusion of VAISEY, J., to which indeed I cannot usefully add anything.

D Taking that view, and also concluding that in the circumstances the league failed to establish that the sums paid under the covenants could be regarded as pure income profit within Case III of Sch. D, to use again LORD GREENE, E M.R.'s phrase, and such as to entitle the league to recover the tax under s. 447, F I would dismiss the appeal.

MORRIS, L.J.: The National Book League, being a charity, claims under s. 447 (1) (b) of the Income Tax Act, 1952, that it should have exemption from income tax chargeable for the years 1951-52 and 1952-53 on payments received by the league by virtue of deeds of covenant which were made by certain G members of the league in 1952. Those members, some 2,821 in number, availed themselves of an opportunity which was given to them by the terms of a special resolution passed on Dec. 6, 1951. The 2,821 were at that time all members of the league, which is a company limited by guarantee whose name is the National Book League. The subscriptions of the ordinary individual members of the league were then being raised. The increase could be avoided by members H who, renewing their membership up to and including Aug. 31, 1952, entered into deeds of covenant to remain members and to pay their annual subscriptions at the then existing rates for at least seven years. So it came about that the covenants were entered into.

The question arises whether the payments made pursuant to the covenants can be said to be annual payments within the scope of Case III of Sch. D. I LORD REID, in his speech in *Inland Revenue Comrs. v. City of London Corpn.* (1) ([1953] 1 All E.R. 1075) said (*ibid.*, at p. 1087):

“ . . . I think it well to consider certain annual payments, not related to any benefit to the payer, which, in my opinion, are clearly within the scope of Case III. That most relevant to the present case is an annual subscription under covenant to a charity by a donor who gets no advantage to himself in return for it. If the charity is not trading or carrying on anything in the nature of a trade, I cannot see how such a payment can

be excluded from the scope of Case III. What reason can there be for excluding it? Charities are not excluded from the scope of the Income Tax Acts: certain provisions entitle them to certain particular exemptions from tax . . ."

The question arises whether the payments can be said to be pure gifts to the charity. In the terms of a phrase which has been used, can the payments be said to be pure income profit in the hands of the charity? If the payments were made in such circumstances that the league was obliged to afford to the covenantors such amenities and such benefits of membership as would at any particular time be offered to all members, and if those amenities and benefits were appreciable and not negligible, then I do not think that the payments were pure income profit in the hands of the charity.

In approaching this case I share the admiration which was expressed by VAISEY, J., for the objects and purposes of the league, and I would have been happy if my view of the facts and the law could have led to a result which was financially satisfactory for it, but I have come to the same conclusions as those reached by the learned judge. I have little doubt that members of the league were motivated by a desire to give financial support to its work; but, in order to stimulate and encourage their support, inducements were offered in the form of attractive advantages to be enjoyed by members. These are set out in the Case Stated, and have been referred to by my Lord, and I need not now further detail them. The fact that advantages are possessed, including, though in quite limited and modest form, certain club facilities, is reflected in the circumstance that the amounts of the subscriptions are decreed, though, of course, payments voluntarily made at higher rates would be welcome. But, in the case of subscriptions for a good cause, it is not ordinarily the case that there is any fixation of amount nor indeed any differentiation in rates between persons living in London and persons living in the country. Nor would it happen that those advancing the interests of a good cause would write to advise the subscribers as to a way of protecting themselves against paying more than they were paying.

In my judgment, the invitation to the existing members of the league in the early part of 1952 was an invitation to sign covenants so that they would pay subscriptions for the ensuing seven years at the then existing rates and so avoid the newly prescribed rates. Members were reminded that, though by paying they were promoting good work, they were themselves also receiving in that they were receiving the incidental benefits of membership which were quite fairly described as considerable. Though these benefits might in fact be availed of by few, they were available for all, and they cannot be ignored as being minimal and negligible. In the result, therefore, I cannot regard the subscriptions as being pure income profit. I would dismiss the appeal.

PEARCE, L.J.: I agree.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Field, Roscoe & Co.* (for the league); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

A

HINDLEY v. HINDLEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), June 5, 1957.]

Injunction—Divorce—Interlocutory injunction to restrain dealings with property constituting alleged settlements—Jurisdiction.

B

Variation of Settlement—Ante-nuptial and post-nuptial settlement—Transfers of money before and after marriage—No element of periodicity—Transactions completed—Whether they constituted settlements for the purpose of anticipatory protection by injunction—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 25.

C

The parties met in 1951 and were married in 1955. During the period 1952 to 1955, i.e., before the marriage, the husband gave to the wife the sum of £45,000 being half the profits received by him from certain dealings on the Stock Exchange. After the marriage the wife received the sum of £68,000 from the trustees of a fund in which the husband was interested but over which he had no control, the trustees having an absolute discretion to pay the whole or part of the fund to a certain category of persons, which category included the wife. In April, 1957, the husband petitioned for divorce on the ground of the wife's cruelty. In May, 1957, the husband gave notice of application for, inter alia, variation of what was alleged to be the ante-nuptial settlement of £45,000 and the post-nuptial settlement of £68,000. The husband then applied for an injunction to restrain the wife from disposing of either fund pending determination of the application to vary the settlements.

D

E

Held: (i) where property is undoubtedly the subject of a settlement which the court has power to vary under s. 25 of the Matrimonial Causes Act, 1950, there is jurisdiction to grant an injunction for the protection of the settled property pending the decision being made whether the settlement should be varied, but

F

(ii) an injunction would not be granted in the present case since, without deciding whether the transaction relating to the £45,000 or the transaction relating to the £68,000 constituted a settlement within s. 25, each appeared prima facie not to constitute such a settlement as each lacked the requisite element of periodicity and appeared to be a gift that was made and finished.

G

Observations of ROMER, J., in *Bosworthick v. Bosworthick* ([1927] P. at p. 72) and of PEARCE, J., in *Parrington v. Parrington* ([1951] 2 All E.R. at p. 920) applied.

[As to what is a settlement, see 12 HALSBURY'S LAWS (3rd Edn.) 452, para. 1017, note (c); and for cases on the subject, see 27 DIGEST (Repl.) 645, 6089, 6090.

For the Matrimonial Causes Act, 1950, s. 25, see 29 HALSBURY'S STATUTES (2nd Edn.) 412.]

H

Cases referred to:

(1) *Scott v. Scott*, [1950] 2 All E.R. 1154; [1951] P. 193; 27 Digest (Repl.) 84, 632.

(2) *Chalmers v. Chalmers*, (1892), 68 L.T. 28; 27 Digest (Repl.) 645, 6089.

(3) *Hubbard (otherwise Rogers) v. Hubbard*, [1901] P. 157; 70 L.J.P. 34; 84 L.T. 441; 27 Digest (Repl.) 645, 6090.

I

(4) *Gulbenkian v. Gulbenkian*, [1927] P. 237; 96 L.J.P. 53; 136 L.T. 800; 27 Digest (Repl.) 646, 6092.

(5) *Gunner v. Gunner & Stirling*, [1948] 2 All E.R. 771; [1949] P. 77; [1948] L.J.R. 1904; 27 Digest (Repl.) 647, 6102.

(6) *Parrington v. Parrington*, [1951] 2 All E.R. 916; 27 Digest (Repl.) 648, 6105.

(7) *Melwill v. Melwill & Woodward*, [1930] P. 159; 99 L.J.P. 65; 143 L.T. 206; 27 Digest (Repl.) 646, 6095.

(8) *Bosworthick v. Bosworthick*, [1927] P. 64; 95 L.J.P. 171; 136 L.T. 211; 27 Digest (Repl.) 645, 6091.

Summons.

The parties were married on Oct. 14, 1955. On Apr. 2, 1957, the husband presented a petition for divorce on the ground of the wife's cruelty. On May 28, 1957, the husband filed notice of application for ancillary relief as follows:

"(i) For an inquiry as to ante-nuptial and post-nuptial settlements made on [the wife] and in particular as to (a) an ante-nuptial settlement consisting of sums totalling about £45,000 paid to [the wife] between 1952 and 1955 the result of certain stock exchange transactions financed by the [husband]; (b) a deed of covenant made on May 7, 1954, between [the husband] and [the wife] and whereunder [the wife] received the monthly sum of £83 6s. 8d. less income tax; and (c) a post-nuptial settlement of £68,000 upon [the wife] made in or about December, 1955.

"(ii) Variation of the same by striking out all rights, interests and powers of [the wife] in and over (a) (b) and (c) as though [the wife] were dead at the date of the decree absolute to be pronounced in this suit and as to (a) and (c) directing that the same be applied for the benefit of [the husband] absolutely.

"(iii) Alternatively, settlement of [the wife's] property in (a) and (c) on [the husband]."

In support of his application the husband filed an affidavit which read as follows:

"1. I met [the wife] in 1951 when I was a widower and [the wife] had divorced her husband. I was very much attracted by [the wife] and I desired to marry her. 2. I gave [the wife] a fur coat and jewellery to the value of about £8,000 and expended money on clothes for her. I also spent substantial sums of money on furnishing and redecorating her flat in London. 3. Between 1952 and 1955 there were a series of stock exchange transactions which I financed and which resulted in substantial profits. I directed the stockbrokers to pay half the profit from these transactions to [the wife] and [the wife] received from this source in all about £45,000. 4. When the said payments were made to [the wife] the relationship between us was that she permitted me to have intercourse with her and gave me to understand that she would become my legal wife but she was evasive as to when and she raised objections to living in the North of England. 5. My intention in causing the said payments to be made to [the wife] was not to make an absolute gift of the same to her but to make some continuous provision for her on the footing that she would become my wife, to show her that, though I was much older than she, I would make proper provision for her if I predeceased her and to give her some compensation for giving up her London life and friends and living with me in Yorkshire and I expected that as her husband I would derive some joint benefit from the same. 6. On May 7, 1954, I executed a covenant to pay [the wife] the monthly sum of £83 6s. 8d. less tax. 7. The circumstances in which I executed the said deed were that [the wife] had told me that she had received a proposal from another man. I asked [the wife] whether if I made the said provision for her it would finally resolve her to marry me and [the wife] said that it would. 8. Very shortly after my marriage to [the wife] she raised the question of a marriage settlement. I was myself unable to make any further settlement but there was in existence a trust fund over which I had no control but whereof the trustees had power to appoint funds to [her] as my wife, and in November, 1955, the said trustees paid to [the wife] the sum of £68,000 with which investments were purchased for her which have considerably augmented in value. [A copy of the settlement was exhibited.] 8. I gave her after the marriage jewellery to the value of about £4,000. [The wife] did not bring any funds into settlement. 11. There is no issue

A of my marriage with [the wife]. 12. I respectfully ask this Honourable Court to vary all three of the said settlements by striking out all interest of [the wife] in the same as from the decree absolute to be pronounced in this cause and as to the two said funds by directing that the same be applied for my benefit absolutely. 13. Alternatively, if it be found that [the wife] has a proprietary interest in the said funds I respectfully ask that the same may be settled."

B The husband then issued a summons for the wife to show cause why she should not be

C "restrained by injunction from disposing of funds representing an ante-nuptial settlement of about £45,000 and £68,000 representing a post-nuptial settlement pending the determination of this suit, [the husband] having applied to vary the said settlements."

D The husband filed a further affidavit in which he stated that the wife had told him that she was proposing to leave England and go to the United States of America and that in the circumstances he feared that the wife might be taking steps to remove from the jurisdiction of the court the funds representing the two settlements. On June 4, 1957, the husband swore a further affidavit in which he stated:

E "1. From information which has come before me in my capacity as a director of British Home Stores Ltd. [the wife] has executed transfers of 2,000 ordinary shares and 15,000 A ordinary shares in that company which have been stamped with a nominal duty of 10s. each. 2. By reason of the foregoing I fear [the wife] may be disposing of other investments prior to the trial of the issue in this suit."

D. A. Fairweather for the husband.

Victor Williams for the wife.

F DAVIES, J.: This is a very interesting and difficult case. It arises out of a petition filed in this court on Apr. 2, 1957, by the husband. The parties were only married as recently as Oct. 14, 1955. The husband was a widower sixty-seven years of age and the wife was forty-eight years of age; she had been previously married, but her previous marriage had been dissolved. So far, the wife has entered an appearance, time for her answer has expired, and nothing else has happened, though I was told by learned counsel that when on Feb. 26, 1957, the husband's application to present his petition within the statutory three years was before COLLINGWOOD, J., who gave leave, it was said that the suit was going to be fought, and indeed that has been repeated by learned counsel for the wife in this court, he being instructed on behalf of the wife by solicitors different from those who, I understand, were acting for the wife at the time of the initiation of the suit.

H The petition having been set on foot, the husband served notice of application for ancillary relief. The first part of that application was made under s. 25 of the Matrimonial Causes Act, 1950, which provides:

I "The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit . . ."

There are no children in the present case. Section 24 (1) which covers the second limb of the application, reads:

"If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery,

desertion or cruelty of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them."

It is pointed out that although orders of that kind cannot effectively be made until after the decree, nevertheless, as the law now stands, the application for such an order may be made at any time after the suit has commenced. The present application was made on May 28, 1957. That application having been made, the husband took out a summons, returnable today, calling on the wife to show cause why she should not be restrained by an injunction from disposing of funds representing an ante-nuptial settlement of £45,000 and a post-nuptial settlement of £68,000 pending the determination of this suit, the husband having applied to vary the said settlements. The way that those sums of money came into existence is set out in an affidavit by the husband. The wife has not replied to it. There may be, no doubt, various matters in dispute between the parties; but for the purpose of the present application, I naturally take the husband's evidence as being substantially accurate.

[HIS LORDSHIP read the husband's affidavits and continued:] I have to decide a twofold question, viz., whether I ought to grant an injunction against the wife restraining her from dealing in any way either with this £45,000 or with this £68,000. It is not, of course, suggested that any injunction should be granted in connexion with the covenant to pay £1,000 a year less tax. It is submitted on behalf of the wife, first, that, whatever view I take about the matter, the court has no power to grant such an injunction: secondly, that there is very little evidence in this case of any action, or threatened action, by the wife which would justify the court in granting such an injunction if it were to come to the conclusion that it has jurisdiction; and thirdly that these are not settlements of the kind which the court has power to vary. The third point is really the first in order of logic. I have come to a firm conclusion that the court has power to grant an injunction in a matter such as the present. I need not refer to the general power of the court to grant injunctions; but it is said that the decision of the Court of Appeal in *Scott v. Scott* (1) ([1950] 2 All E.R. 1154) is authority for the proposition that the court cannot exercise that power in a case such as the present. *Scott v. Scott* (1) decided that it was an established principle that the courts would not grant a wife an injunction to restrain her husband from removing any of his assets out of the jurisdiction of the courts unless there had been and remained a subsisting order for the payment of a sum of money, and that that principle still applied where an application had been made to the High Court under s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949 (now s. 23 of the Matrimonial Causes Act, 1950), for maintenance on the ground that the husband had been guilty of wilful neglect to provide reasonable maintenance for the wife and the infant children of the marriage.

That decision of the Court of Appeal is binding on me and there are other authorities to the like effect. It really amounts to this: that unless and until the order has been made against the husband that he should pay sums of money to his wife, the court will not prevent the husband from dealing with his properties or his assets.

That, in my judgment, is directed to an entirely different state of affairs from that in the present case. In the present case it is said on behalf of the husband that these two sums of money which have passed into the wife's hands are not in fact her own unfettered property but are property which is subject to a settlement and which the court may take away from her. That is different from property out of the whole or part of which a party may have to satisfy any order that is made. We are not concerned in the present case with an

A attempt to prevent the wife from dealing with assets that admittedly are hers, as in the case of a husband against whom an order for permanent maintenance or alimony may be made. In a case where undoubtedly there had been a settlement and there was evidence that one of the parties was making away with any of the assets comprised in the settlement in such a way that the power of the court to deal with it would be interfered with and impaired, it would be
B absurd to suggest that the court would not exercise its summary remedy or power of granting an injunction to prevent its own jurisdiction from being stultified in that way. Therefore, if I were to come to the conclusion that this was a proper case in which to grant an injunction, I should have had no doubt about my powers to do so.

Is it a proper case to grant an injunction? The main question on that,
C though there is a subsidiary question, seems to me to be whether there is a prima facie case that either or both of these transactions are settlements, namely, the successful stock exchange speculation and the payment of the share of the profits of the amount said by the husband to be £45,000 (though there appears to be some dispute about the provenance of these funds) and the payment by the trustees of £68,000. I am not now trying the question whether or not
D these are settlements which are capable of being varied. I must not be thought to be expressing any decided opinion on the matter at all. I am not. It is inevitable, however, that I should, in deciding whether to exercise the jurisdiction that I am asked to exercise, consider whether prima facie these strike me as being settlements to such an extent that I ought to interfere, at this stage, to prevent the wife from doing whatever she is doing, or she is about to do,
E with these sums of money.

The £45,000 is said by the husband to have been half the profits which he made in speculating on the stock exchange between 1952 and 1955, and he says that he told the stockbrokers to pay her this sum when she was his mistress. He says that he was hopeful that she would marry him; there was no agreement to marry; she was evasive about it; and he wanted to make provision for her on the footing that she would become his wife. With regard to the £68,000,
F he says that after the marriage she said: "What about a settlement?" He apparently had not a lot of free capital but he was interested in a very large settlement under which the trustees had an absolute discretion to pay sums of money to various specified persons, or class of persons, one class of person being the wife of the husband. The relevant clause in the deed is this:

G "Notwithstanding any of the trusts and provisions in these presents the trustees may in their absolute discretion at any time or times hereafter transfer or pay any part or parts of the trust funds to any one or more exclusive of the others or other of the persons mentioned or referred to in cl. 3 hereof who has or have at the time of such transfer or payment attained the age of twenty-one years for his or her absolute use or benefit."

H The wife is included in the specified category. The next part of the clause has nothing to do with the present case; it only means that the trustees are not bound to take any such step. Acting under that clause, as is, I gather, not disputed, the trustees paid to the wife the sum of £68,000, and that payment presumably was in the exercise of their power to make payment to her for her absolute use or benefit. It is said by counsel for the husband that the only
I capacity in which she could get that money was as the wife of the husband, and that, as she received that money in the capacity of the wife, it must be treated as a post-nuptial settlement, just as, by the same token, the £45,000 which she received before the marriage was paid to her in her capacity as a wife to be. Therefore, it is said, each of these transactions falls within s. 25 of the Act of 1950, as to which there is abundant authority in many cases, quite a number of which have been referred to today, that it must be widely construed and that the power of the court must not be narrowly applied.

I am not going to go through all of the interesting authorities and arguments that have been cited and advanced today. Two cases to which counsel for the wife referred in particular were a decision of SIR FRANCIS JEUNE, P., in *Chalmers v. Chalmers* (2) ((1892), 68 L.T. 28), and a subsequent decision of the Court of Appeal in *Hubbard (otherwise Rogers) v. Hubbard* (3) ([1901] P. 157), where the facts were these:

"A husband executed a deed by which he assigned to a trustee a leasehold house and some furniture, upon trust to assign the same at once to the wife absolutely, and the trustee assigned the same accordingly. The wife afterwards obtained a decree of nullity of marriage. Held, reversing the decision of [SIR FRANCIS JEUNE, P.] that the assignment was not a 'settlement' within s. 5 of the Matrimonial Causes Act, 1859, and that the court had no jurisdiction to vary its provisions."

Section 5 of the Act of 1859 corresponds to s. 25 of the Act of 1950. Counsel for the husband, on the other hand, has cited to me a number of authorities of which the principal ones were *Gulbenkian v. Gulbenkian* (4) ([1927] P. 237); *Gunner v. Gunner & Stirling* (5) ([1948] 2 All E.R. 771), which is a decision of WALLINGTON, J., and *Parrington v. Parrington* (6) ([1951] 2 All E.R. 916) and also an earlier case, *Melville v. Melville & Woodward* (7) ([1930] P. 159).

It is difficult indeed to find any real test as to what is a settlement. One almost feels, so difficult is the question, that in some of the cases one is being told there is a settlement when something is settled, but that does not help one very much unless one knows what is the meaning of "settled". I am bound to say that in seeking to follow the authorities that have been cited I was struck particularly (as I ventured to say to learned counsel in the course of the argument) by two passages. The first was the observation of ROMER, J., in *Bosworthick v. Bosworthick* (8) ([1927] P. 64), quoted by WALLINGTON, J., in *Gunner v. Gunner* (5) ([1948] 2 All E.R. at p. 776). ROMER, J., sitting in the Court of Appeal in the former case, said ([1927] P. at p. 72):

"We have had numerous authorities cited to us going as far back as 1861, and amongst them an authority which is binding on this court, and in my judgment those authorities establish that where a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections*. That may appear to be a very liberal construction of the sections, but I think that it is no more liberal a construction than should be given to them having regard to the obvious purposes for which they were enacted by the legislature."

The learned judge was there emphasising that one of the matters which is relevant in considering whether or not it is a settlement is: is there something in the nature of periodical payments? It is in accordance with that sort of principle, I suppose, that the insurance policy cases, some of which have been cited today, were decided.

Again, in one of the most recent cases on the subject, *Parrington v. Parrington* (6) ([1951] 2 All E.R. 916), PEARCE, J., after reviewing the authorities, referred to *Hubbard (otherwise Rogers) v. Hubbard* (3) and said ([1951] 2 All E.R. at p. 920):

"In *Hubbard (otherwise Rogers) v. Hubbard* (3) the husband had assigned a house to a trustee for the wife and the trustee had assigned it to her absolutely. But in the case before me the wife will, for some years to come, have to make

* Section 5 of the Matrimonial Causes Act, 1859, and s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925.

- A payments under the bond and the husband will remain liable as guarantor in respect of the wife's obligations under the mortgage, if she should make default. I do not think it can properly be said that the transaction is wholly over and done with on either side and that the original post-nuptial settlement constituted by the purchase of the hotel has ceased to exist."
- B In the present case I bear in mind that the last thing I want to do is to be thought to be attempting to decide whether or not these are settlements; I am merely considering whether they strike me as being *prima facie* settlements which ought in the circumstances to be given the anticipatory protection of an injunction. There is, as I can see it, no element of periodicity either with regard to the £45,000 (which strikes me I confess as something more in the nature of a present to a mistress than anything else) nor in the case of the £68,000.
- C And when one asks in regard to each transaction whether anything remains to be done or whether it is over and done with, the answer, as I think, is that it is over and done with. The wife has had this money and, as I ventured to suggest in the course of argument, I cannot see what wrong she would have done, although she might have been foolish and improvident, if having had the money she had thrown it away or put it on a horse. I am quite unable to see,
- D having given the best consideration to it that I can, that with regard to these two transactions, the £45,000 transaction and the £68,000 transaction, there is such a likelihood of them being held to be in the one case an ante-nuptial settlement or in the other case a post-nuptial settlement that I ought to exercise the jurisdiction which is invoked, namely, to prevent the wife from dealing with whatever may be left of either sum of money in whatever form the sum of money may now be. The evidence as to her threat to make away with the money or take it abroad is not perhaps very strong; but I do not base myself on that ground. I base myself on the other ground, namely, that I am not satisfied at this stage that the case is one in which I ought to grant the injunction which is asked for. Accordingly, this summons fails and must be dismissed.
- E

Order accordingly.

Solicitors: *Barnard, Taylor & Douglas-Mann* (for the husband); *Withers & Co.* (for the wife).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

THE NORSEMAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION. Lord Macmillan, F. J. May 21, 22, May 22, June 5, 1957.]

Shipping—Collision—Damages—Interest—Right to deduct income tax on interest—Notification to payee of deduction—Income Tax Act, 1952 (13 & 14 Geo. 6 & 1 Eliz. 2 c. 10), s. 169, s. 170.

Income Tax—Interest—Interest as damages—Award of interest on damages in Admiralty Court—Right to deduct income tax on interest—Notification to payee of deduction—"Interest of money"—Income Tax Act, 1952 (13 & 14 Geo. 6 & 1 Eliz. 2 c. 10), s. 169, s. 170.

Interest awarded by the Admiralty Court on damages for collision, and included in the total award of damages, is "interest of money" within s. 170 (1) (and, *semble*, within s. 169 (1) in an appropriate case) of the Income Tax Act, 1952, with the consequence that deduction of income tax at the standard rate must (or, under s. 169, may be) made from the amount of the interest (see p. 662, letter I, to p. 663, letter A, and p. 664, letter L, to p. 665, letter A, post).

Riches v. Westminster Bank, Ltd., [1947] 1 All E.R. 469, applied.

On payment into court, in Admiralty, of an aggregate sum in respect of damages and interest there should be notification of the intention to deduct income tax at the standard rate (see p. 665, letters H and I, post).

Taylor v. Taylor ([1937] 3 All E.R. 571); *Harcourt v. Harcourt* ([1946] 2 All E.R. 117), and *Johnson v. Johnson* ([1946] 1 All E.R. 573) applied.

[Editorial Note.] The deduction of the income tax that was originally thought to be exigible in this case was a deduction under s. 170 of the Income Tax Act, 1952. That enactment imposes a positive obligation on the payor to deduct tax (see s. 170 (1)) and does not merely give him the power to deduct (as does s. 169 which provides, by sub-s. (1) (c), that he shall be entitled to make the deduction). The distinction is stressed in the passage from the opinion of VISCOUNT SIMON quoted at p. 665, letters D and E, post. The three decisions, grouped together above, concerning the obligation of the payor to notify the payee of the deduction, were decisions on the enactment which was superseded by s. 169 of the Act of 1952. The present decision, therefore, seems to extend that principle to a payor under s. 170, although he is by statute under a mandatory duty to make the deduction. Any obligation to give notice of intention to deduct tax when the deduction is to be made under s. 170 is, however, under consideration in the present case by reason only of the consequences with regard to costs subsequent to payment of money into court in Admiralty to meet damages that include interest. The decision is confined to that subject-matter.

As to interest awarded as part of damages in collision cases, see 30 HALSBURY'S LAWS (2nd Edn.) 863, para. 1142, note (b); and for cases on the subject, see 41 DIGEST 812, 813, 6737-6745.

For the Income Tax Act, 1952, s. 169, s. 170, see 31 HALSBURY'S STATUTES (2nd Edn.) 162, 165.]

Cases referred to:

- (1) *Riches v. Westminster Bank, Ltd.*, [1947] 1 All E.R. 469; [1947] A.C. 390; [1948] L.J.R. 573; 176 L.T. 405; 28 Tax Cas. 159; 2nd Digest Supp.
- (2) *The Joannis Vatis* (No. 2), [1922] P. 213; 91 L.J.P. 196; 127 L.T. 494; 41 Digest 813, 6742.
- (3) *The Northumbria*, (1869), L.R. 3 A. & E. 6; 39 L.J. Adm. 3; subsequent proceedings, L.R. 3 A. & E. 24; 41 Digest 812, 6739.
- (4) *Allchin v. Coulthard*, [1943] 2 All E.R. 352; [1943] A.C. 607; 112 L.J.K.B. 539; 107 J.P. 191; sub nom. *Allchin v. South Shields County Borough*, 169 L.T. 238; 25 Tax Cas. 445; 2nd Digest Supp.

- A (5) *Taylor v. Taylor*, [1937] 3 All E.R. 571; [1938] 1 K.B. 320; 107 L.J.K.B. 340; Digest Supp.
- (6) *Hemsworth v. Hemsworth*, [1946] 2 All E.R. 117; [1946] K.B. 431; 115 L.J.K.B. 422; 2nd Digest Supp.
- (7) *Johnson v. Johnson*, [1946] 1 All E.R. 573; [1946] P. 205; 175 L.T. 262; 110 J.P. 188; 2nd Digest Supp.

B **Motion.**

C The plaintiffs were the owners of the motor vessel *Norseman* and claimed damages against the defendants, the British Transport Commission, in respect of an accident for which the defendants admitted liability. The plaintiffs claimed £1,772 5s. 1d. with interest at four per cent. per annum from Feb. 25, 1953, the date of payment of the repair bill. On Nov. 23, 1956, the Admiralty registrar decided that the plaintiffs were entitled to the sum of £852 19s. 5d. as damages, and he reserved his decision of the questions of interest and costs. At the adjourned hearing on Jan. 18, 1957, it appeared that by letter dated Feb. 15, 1955, the defendants' solicitors had offered to pay to the plaintiffs the sum of £900 such sum to include interest, and that on the refusal of the plaintiffs' solicitors to accept the offer, the defendants' solicitors on Apr. 1, 1955, had paid £900 into court in satisfaction of the plaintiffs' claim. The registrar decided

D "that the plaintiffs are entitled to interest at four per cent. per annum on £852 19s. 5d. from Feb. 25, 1953, to Feb. 15, 1955, together with the whole of their taxed or agreed costs to and including Feb. 15, 1955, and half their taxed or agreed costs incurred after Feb. 15, 1955."

- E Both parties filed notice of motion in objection to the registrar's decision of Jan. 18, 1957. The defendants objected that on the basis that the defendants had offered a sum which would have satisfied the plaintiffs' claim, the registrar wrongly exercised his discretion in ordering the defendants to pay to the plaintiffs half their taxed or agreed costs incurred after Feb. 15, 1955. The plaintiffs objected that the registrar

F "failed to allow interest at four per cent. per annum from Feb. 15, 1955, until Jan. 18, 1957, or until payment of the amount due from the defendants and further failed to allow the plaintiffs the whole of their costs as taxed or agreed incurred after Feb. 15, 1955, and further wrongly found . . . that the defendants were entitled to deduct income tax at the appropriate rate from interest at four per cent. per annum on £852 19s. 5d. from Feb. 25, 1953, to Feb. 15, 1955."

G *P. T. Bucknill* for the plaintiffs.

S. Knox Cunningham for the defendants.

Cur. adv. vult.

- H June 5. LORD MERRIMAN, P., read the following judgment: This appeal from the Admiralty registrar concerns the sufficiency of a payment into court by the defendants to satisfy the principal sum of damages and interest thereon in respect of a casualty sustained by the plaintiffs' motor vessel *Norseman*, for which the defendants were admittedly liable. The point at issue relates to the deductibility of British income tax on the interest payable.

- I On Oct. 13, 1952, the *Norseman*, a Norwegian vessel registered at Oslo, and owned by Norwegian nationals, lying in West Hartlepool old harbour in severe weather, carried away her ground moorings and took ground in the southern part of the harbour. In an action by the ship against the British Transport Commission the defendants filed an admission of negligence and, through counsel, on a summons heard on Apr. 9, 1954, admitted that the vessel had suffered some damage. The particulars of the damages claimed amounted to £1,772 5s. 1d. plus interest from Feb. 25, 1953, to the date of payment. It has been common ground throughout that the interest would run from the date mentioned, this

being the date of the payment of the repair bill, and that it would be at the rate of four per cent. on the principal sum awarded. The registrar having disallowed the chief item of £430 for deferred repairs, and making considerable reductions in the other items, awarded on Nov. 23, 1956, the principal sum of £852 19s. 5d. The detail is irrelevant as there is no appeal about quantum. The whole of the first day's hearing having been occupied in the determination of the amount of the claim, the registrar adjourned to another day the question of interest and costs.

The defendants had paid into court the sum of £900. The registrar, of course, was unaware of this fact when he made his award, and there is a conflict of recollection about whether the details contained in letters in the agreed bundle which are marked "without prejudice" were before him on the later occasion. However that may be, the privilege was waived before me, and I was invited by both counsel to consider the letters. Suffice it to say that the round sum of £900 was clearly tendered in an attempt to buy peace and the only particulars given were that it included a principal sum of £733 8s. 8d. as being the total estimated by the defendants to be due under the various heads of claim together with interest on that sum for two years quantified in the gross sum of £58 13s. 6d. The plaintiffs complain that there was no intimation that the specific sum included as interest in the sum offered in satisfaction was offered subject to the deduction of tax payable thereon. The registrar ruled that there was no obligation on the defendants to notify this fact. I will recur to this point later.

The position on the final hearing before the registrar on Jan. 18, 1957, was as follows. If the plaintiffs were entitled to recover the interest up to the date of the offer and the consequent payment into court at four per cent. without any deduction in respect of tax they would have recovered £921 2s. 9d.; namely, £852 19s. 5d. in respect of damages, together with interest thereon £68 3s. 4d.: and the payment into court of £900 would therefore be insufficient in any event. On the other hand, on the assumption that the interest claimed is "interest of money" within the meaning of the Income Tax Act, 1952—with which I will deal separately—it is argued that in paying the interest the defendants were either entitled or obliged to deduct the tax under the provisions of s. 169 or s. 170 of the Income Tax Act, 1952, which replaced r. 19 and r. 21 of the All Schedules Rules in Sch. 1 to the Income Tax Act, 1918. It was admitted as a matter of fact that the defendants would pay the interest out of moneys which were not brought into charge to tax, with the result that s. 170 would apply, whereby they would be bound to deduct tax at the standard rate, and to account to the Inland Revenue forthwith for the amount deducted. The amount of this tax was stated to be about £26; but the precise amount is immaterial. The contention is that after deducting the tax from the interest the plaintiffs would only recover between £890 and £900, so that the £900 paid into court would, it is argued, be more than sufficient to satisfy the plaintiffs' claim, with the usual consequences. It is important, however, to note that in fact no such deduction and account has been made at all. The result contended for is purely notional.

The questions are: whether or not the interest on the damages is "interest of money" within the meaning of the Income Tax Act; and, if so, what is the effect on the payment into court of the alleged deductibility of tax on payment of the interest. Since it is now clear, as will be seen later, that the tax is not deductible at all on this particular interest, I am conscious that these questions have become academic. But, as the argument on them occupied by far the greater part of the hearing, I feel that I ought to express my opinion on them, if only because of the effect on costs. The defendant submitted that the interest on the damages is interest of money within the meaning of the Income Tax Act. The registrar gave effect to this submission, holding that the case was covered by the decision of the House of Lords in *Riches v. Westminster Bank, Ltd.* (1) ([1947] 1 All E.R. 469). In that case it was decided that a sum of money

A awarded under the powers conferred by s. 3 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, as interest and included in the total sum for which judgment is given is "interest of money" within the meaning of Sch. D to the Income Tax Act, 1918, so that the judgment debtor, when paying the judgment debt, is entitled to deduct income tax on the amount of the award of interest and the judgment creditor must "allow such deduction" on receipt of the balance.

B Counsel for the plaintiffs disputed this ruling, on the ground that the decision did not apply to the interest awarded in the Admiralty Court. He agreed that the Act of 1934 applied to Admiralty cases, but contended that the Act did not alter or curtail the principles on which the Admiralty Court had long acted in awarding interest. In other words, he said that the jurisdiction under the Act of 1934 was merely supplementary to that which had long been established in the Admiralty Court, and was expressly preserved by s. 1 (1) of the Administration of Justice Act, 1956. For a statement of the nature of the rule he relied on a passage in the judgment of SIR HENRY DUKE, P., in *The Joannis Vatis* (No. 2) (2) ([1922] P. 213 at p. 223):

D "In this jurisdiction a rule exists with regard to interest upon damages which is well established and proper to be taken into account. The registrar and merchants include in their computation of damage by collision interest upon the items of claim from the time of accrual of the damage until the date of the assessment."

E He relied in particular on the interest being included in the "computation of damage", but it is to be observed that in the preceding sentence SIR HENRY DUKE referred to the existence of a rule "with regard to interest upon damages".

In my opinion the origin and nature of the rule is nowhere better stated than by SIR ROBERT PHILLIMORE in *The Northumbria* (3) ((1869), L.R. 3 A. & E. 6), the headnote in which reads as follows:

F "The owners of a ship claiming in the Court of Admiralty to have their liability limited, in respect of damages occasioned by collision, to an aggregate amount not exceeding £8 for each ton of the ship's tonnage, are liable to pay interest on such aggregate amount from the date of the collision."

G The contention of the owners of the wrong-doing vessel being that the addition of interest to the amount limited would necessarily infringe the Act of Parliament whereby liability was limited to the sum of £8 per ton, it was manifestly necessary to lay down the principle on which interest on damages is allowed in Admiralty. SIR ROBERT PHILLIMORE, after referring to certain authorities relating to the common law, said (*ibid.*, at p. 10):

H "But it appears to me quite a sufficient answer to these authorities to say, that the Admiralty, in the exercise of an equitable jurisdiction, has proceeded upon another and a different principle from that on which the common law authorities appear to be founded. The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee when payment was not made, *ex mora* of the obligor; and that, whether the obligation arose *ex contractu* or *ex delicto*."

I I do not think that SIR HENRY DUKE in *The Joannis Vatis* (No. 2) (2) was saying anything inconsistent with the fuller statement of the rule by SIR ROBERT PHILLIMORE.

I do not think that it is necessary to go very fully into the decision of the House of Lords in *Riches v. Westminster Bank, Ltd.* (1). With reference to the contention that the additional sum, though awarded under a power to add interest to the amount of the debt, and though called interest in the judgment, was not really interest such as attracted income tax, but was damages, VISCOUNT SIMON said ([1947] 1 All E.R. at p. 470):

"The short answer to this is that there is no essential incompatibility between the two conceptions. The real question, for the purpose of deciding whether the Income Tax Acts apply, is whether the added sum is capital or income, not whether the sum is damages or interest . . . The added amount may be regarded as given to meet the injury suffered through not getting payment of the lump sum promptly, but that does not alter the fact that what is added is interest."

And (*ibid.*, at p. 471) he said:

"If damages are increased by adding interest on a principal sum, that does not prove that such interest is not liable to tax."

In conclusion, he likened the interest to the accumulated fruit of a tree which the tree produces regularly until payment. LORD WRIGHT (*ibid.*, at p. 472) also rejected the contention that money awarded as damages for the detention of money is not interest and has not the quality of interest. Again, after a reference to the common law as it stood before Lord Tenterden's Act*, LORD WRIGHT said (*ibid.*, at p. 473):

". . . a common law court in awarding damages was not entitled to award interest in addition in the absence of express or implied contract or statute. The Admiralty Court, however, claimed and exercised that right. The court of equity also, when making a money decree, held itself entitled to award interest for the period between the time when the money was due and the date of the decree, when it thought that proper in order to effect a *restitutio in integrum*."

He said (*ibid.*) that in his opinion there was no incompatibility in connexion with the Act which charges "all interest of money" between interest proper and interest by way of damages. And (*ibid.*, at p. 474), after distinguishing cases in which payments on capital account were estimated in terms of interest, he said that the relevant distinction between capital and income depends on substance and not on the mere name.

LORD SIMONDS said (*ibid.*, at p. 476):

"Here the argument is that, call it interest or what you will, it is damages and, if it is damages, then it is not 'interest in the proper sense' or 'interest proper', expressions heard many times by your Lordships. This argument appears to me fallacious. It assumes an incompatibility between the ideas of interest and damages for which I see no justification."

LORD SIMONDS expressed his concurrence in what LORD NORMAND was about to say about the cases decided by the Court of Session. LORD NORMAND in turn agreed with LORD SIMONDS' opinion. After saying (*ibid.*, at p. 479) that the interest awarded is sometimes spoken of as damages both in England and Scotland, LORD NORMAND said (*ibid.*):

". . . in Scotland, at least, it would, I think, be more appropriately described as compensation. This matter of terminology is, however, of no great importance, for the liability of a payment to income tax does not depend on whether or not it is a payment of damages, but on whether or not it is received as income."

In conclusion he said (*ibid.*, at p. 480):

". . . but while there may be difficulty in deciding in particular cases whether a payment described and calculated as interest is not in truth a capital payment, it is now settled that interest awarded *ex mora*, whether it is to be regarded as damages or not, is income of the creditor."

Thus we are back again at what SIR ROBERT PHILLIMORE said about interest in Admiralty actions in *The Northumbria* (3). In my opinion the registrar was perfectly correct in deciding that as regards the question of interest there is no

* Civil Procedure Act, 1833,

A distinction between the present case and *Riches v. Westminster Bank, Ltd.* (1).

I now return to the question of the deductibility of tax on the interest, and the supposed effect on the sufficiency of the payment into court. In *Allchin v. Coulthard* (4) ([1943] 2 All E.R. 352), the scheme of collection of income tax embodied in r. 19 and r. 21 was summarised as follows (ibid., at p. 354) in the speech of VISCOUNT SIMON, L.C., with which LORD WRIGHT and LORD RUSSELL

B OF KILLOWEN expressly concurred:

“(a) A person liable to pay any yearly interest of money, annuity or any other annual payment to a recipient is not entitled to deduct this payment in arriving at his profits or gains to be assessed and charged with income tax. If the amount is payable and paid out of his profits or gains, he is assessed on a sum which includes such payments, while the recipient is not directly assessed in respect of the amount at all. Consequently, the Crown gets from the payer both the tax at the standard rate which would otherwise be due from the recipient of the annual payment and the tax due from himself in respect of what is left of his profits and gains after the payment is made.

C
“(b) If the annual payment is payable and paid out of his profits and gains, the payer is entitled to deduct from the payment he makes to the recipient income tax at the current rate, and the recipient is bound to allow the deduction upon receipt of the residue and to treat the payer as acquitted of liability to him in respect of the amount thus deducted. By this means, the payer recoups himself for the tax which he has paid or will pay on the annual payment.

D
“(c) If and in so far as the annual payment is not payable and paid out of profits or gains brought into charge, the person making the payment is bound to deduct from it income tax at the current rate and to account to the Crown for the amount deducted. In effect, the payer in such a case acts as collector for the Crown of the tax due from the recipient. The requirement that the recipient must allow the deduction and treat the payer as acquitted of liability in respect of this amount is not repeated in r. 21, but must be implied.”

E
F This summary applies with equal force to the corresponding provisions of s. 169 and s. 170 of the Income Tax Act, 1952, including, in my opinion, the implication of the requirement just mentioned, which appears in s. 169 (1) (d) as follows:

G
“the person to whom the payment is made shall allow the deduction on receipt of the residue of the payment, and the person making the deduction shall be acquitted and discharged of so much money as is represented by the deduction, as if that sum had been actually paid.”

The wording is almost identical and the substance is the same as the corresponding provision in r. 19.

H
I Seeing then, that the payor is discharged as if the sum deducted had actually been paid, it would appear to follow that the payee must be taken to have received the whole, including the amount deducted. After all, the interest is the payee's income, and in spite of what LORD SIMON truly called “the scheme of collection” it is the tax due from the payee on that income that the payer collects and hands over to the Inland Revenue. Moreover, it has been held that in order to exercise the right of deduction the payor must ascertain the amount of the deduction, and notify the payee of the deduction and pay him the residue: see *Taylor v. Taylor* (5) ([1937] 3 All E.R. 571), *Hemsworth v. Hemsworth* (6) ([1946] 2 All E.R. 117), and *Johnson v. Johnson* (7) ([1946] 1 All E.R. 573). If he pays without any such notification the payor will be taken to have made the payment without deduction. I see no reason why the same principle should not apply to a payment into court, in connexion with which it would be quite simple to make it clear that what was being paid into court in cash was the residue after deduction of tax on the interest. In the present case it is clear that there was no notification on making the payment in of an intention to deduct tax. In fact,

as is conceded, the suggestion that the deductibility of the tax on the interest came into the question had not then occurred to anybody. It was first mentioned at the second day's hearing before the registrar, when it was apparent that interest on the principal sum would make the total exceed the amount paid into court. I am unable, therefore, to agree with the registrar that the defendants were under no obligation to notify the deduction of tax.

In the circumstances it is unnecessary to consider further the question whether, assuming the deduction of tax to be real and not notional, the plaintiffs would be deemed to have recovered not only the cash residue but the total sum, including the tax. However this may be, it is now clear beyond doubt that no tax is deductible on this particular sum of interest. [His LORDSHIP referred to a letter from the Office of the Inspector of Foreign Dividends dated May 13, 1957, and accompanying documents, which showed that by virtue of double taxation arrangements with the Kingdom of Norway the plaintiffs were entitled to exemption from income tax and that the interest awarded as part of the damages ought to be paid without deduction of tax. The statutory instruments were the Double Taxation Relief (Taxes on Incomes) (General) Regulations, 1946 (S.I. 1946 No. 466)*, particularly reg. 3 (2) and the Double Taxation (Taxes on Income) (Norway) Order, 1951 (S.I. 1951 No. 1798)*. His LORDSHIP continued:] There is no longer any question of the notional satisfaction of the plaintiffs' claim by the payment into court. The basis of the defendants' case in this respect is now shown to be without foundation. Although counsel for the plaintiffs conceded that, if it had been held that the defendants had satisfied the claim by the payment into court, the plaintiffs would have been unable to recover any further interest thereafter, I am satisfied that he never admitted that the claim for interest should be limited to two years, and that the plaintiffs have never abandoned their claim to further interest accruing after the failure of the defence. On the other hand, counsel for the plaintiffs did not press for an award of interest beyond the date of the final hearing before the registrar—namely, Jan. 18, 1957. I think that, in the circumstances, that is the proper date to which the interest should run, and I give judgment accordingly.

As to the costs, both sides appeal against the registrar's order. I am bound to say that I have been unable to understand why, having held the defendants to have succeeded in respect of their payment into court, the registrar ordered them to pay half the plaintiffs' costs after the date of the payment in. However that may be, I must deal with the costs on the footing that, in my judgment, the plaintiffs are in the right and the defendants in the wrong as regards the payment into court. But there has been a certain amount of confusion on both sides. The point on which the defendants have failed was an after-thought, which, as I have said, had no relation to the calculations on which the payment into court was based. Admittedly the point took the plaintiffs by surprise; but it is their business to know their own position in relation to United Kingdom taxation. If they could not put it correctly before the registrar, if necessary by an adjournment for the purpose, they should certainly have been ready to deal with it much earlier in the appeal. Moreover, as I have already indicated, the unsuccessful attempt to distinguish *Riches v. Westminster Bank, Ltd.* (1) occupied a great deal of the hearing. In all the circumstances, I think that the plaintiffs should recover two-thirds of their taxed costs here and below.

Order accordingly.

Solicitors: *Hedley & Thompson* (for the plaintiffs); *M. H. B. Gilmour* (for the defendants).

[Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.]

* S.I. 1946 No. 466 was made under s. 53 of the Finance (No. 2) Act, 1945, and S.I. 1951 No. 1798 was made under s. 51 of that Act. Both are continued in force by s. 528 (2) of the Income Tax Act, 1952, and have effect under s. 350 and s. 347 of that Act respectively.

STATON v. NATIONAL COAL BOARD.

[QUEEN'S BENCH DIVISION (Finnemore, J.), June 18, 19, 1957.]

Master and Servant—Liability of master—Liability to third person for acts of servant—Act done on way to collect wages but after day's work completed—Servant bicycling on master's premises to collect wages at required time—Collision with fellow-servant while servant making detour across bus park—Fellow-servant killed—Whether servant acting in the course of his employment.

T., who was employed by the defendants as a first-aid attendant at their colliery, was required to collect his week's wages from the pay office on the defendants' premises on a Friday afternoon. On the Friday afternoon concerned T., having finished his day's work, was bicycling along a road on the defendants' premises which led to the pay office, in order to collect his wages. Adjoining the road and also on the defendants' premises there was a bus park where several buses were standing; T., having travelled some way along the road, decided to ride across the bus park but when he was some way across it he turned down a gap between two of the buses in order to rejoin the road, and as he came along the gap he collided with one S., an employee of the defendants who had just left one of the buses. S. was killed as a result of the collision and his widow now brought an action against the defendants for damages for the negligence of their servant T. The court having found that S.'s death was wholly caused by T.'s negligence, the question arose whether T. was acting in the course of his employment when the accident occurred so as to make the defendants vicariously liable.

Held: T., being actually on his employers' premises and being required by them to go to a particular place on their premises in order to draw his wages, was acting in the course of his employment at the time of the accident, although he had finished his work, and, therefore, the defendants were vicariously liable for T.'s negligence.

Lowry v. Sheffield Coal Co., Ltd. ((1907), 24 T.L.R. 142) and *Riley v. William Holland & Sons, Ltd.* ([1911] 1 K.B. 1029) followed.

Per CURIAM: if a servant is not on the master's premises, but, e.g., is on the Queen's highway on the way to his place of employment to get his wages, it could be argued, I should think with success, that he was not in the course of his employment (see p. 671, letter E, post).

[As to the liability of a master in tort for acts of a servant in the course of employment, see 22 HALSBURY'S LAWS (2nd Edn.) 226, para. 405; and for cases on the subject, see 34 DIGEST 127-129, 981-991.]

Cases referred to:

- (1) *Jefferson v. Derbyshire Farmers, Ltd.*, [1921] 2 K.B. 281; 90 L.J.K.B. 1361; 124 L.T. 775; 34 Digest 144, 1134.
- (2) *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*, [1942] 1 All E.R. 491; [1942] A.C. 509; 111 L.J.P.C. 138; 167 L.T. 404; 2nd Digest Supp.
- (3) *Crook v. Derbyshire Stone, Ltd.*, [1956] 2 All E.R. 447.
- (4) *Brydon v. Stewart*, (1855), 2 Macq. 30; 34 Digest 194, 1583.
- (5) *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716; 81 L.J.K.B. 1140; 107 L.T. 531; 34 Digest 129, 991.
- (6) *Tunney v. Midland Ry. Co.*, (1866), L.R. 1 C.P. 291; 34 Digest 209, 1717.
- (7) *Lowry v. Sheffield Coal Co., Ltd.*, (1907), 24 T.L.R. 142; 1 B.W.C.C. 1; 34 Digest 283, 2377.
- (8) *Riley v. Holland (William) & Sons, Ltd.*, [1911] 1 K.B. 1029; 80 L.J.K.B. 814; 104 L.T. 371; 4 B.W.C.C. 155; 34 Digest 283, 2376.

Action.

This was an action brought by Audrey Elizabeth Staton suing as widow and administratrix of the estate of Thomas Frederick Staton (referred to hereinafter as the deceased), for damages under the Fatal Accidents Acts, 1846 to 1903, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the National Coal Board, the defendants, for the negligence of their servant or agent on Nov. 12, 1954, causing the death of the deceased at Bilsthorpe Colliery, in the County of Nottingham, which was occupied and managed by the defendants, on Nov. 13, 1954. Letters of administration to the deceased's estate were granted to the plaintiff on Apr. 20, 1956.

The facts relating to the deceased's death were as follows. On Friday afternoon, Nov. 12, 1954, at about 3.25 p.m., the deceased, who was employed as a miner at the defendants' colliery, having finished his shift, had mounted one of several buses drawn up in a bus park on the defendants' premises in order to go home. Along one side of the bus park there was a road which ran over a level crossing, past the office of the National Union of Mineworkers and other buildings, and went along to the defendants' pay office, which was the proper place for the defendants' employees to go to collect their wages. One Townsend, who was employed by the defendants as a full-time first aid attendant, on the afternoon concerned, having finished his day's work was bicycling down the road towards the pay office to collect his wages which he was required to collect on Friday afternoons between 1 p.m. and 5 p.m. Either because there was a number of people about, or because he was short of time, Townsend, after going a certain way along the road, decided to ride across the bus park. The buses were parked facing the road, and at the time of the accident there were two buses drawn up side by side, a gap allowing room for another bus, and then three more buses. Townsend, having cycled behind the first two buses, turned down the gap intending to rejoin the road, and as he did so, the deceased, who had remembered something which required him to get off his bus and cross the road to a nearby office, came round the front of the bus and he and Townsend collided. The deceased was knocked down and died from the injuries he then received. The plaintiff claimed that the accident was caused by Townsend's negligence for which the defendants were vicariously liable as his employers. The defendants denied that Townsend was negligent, and alleged contributory negligence against the deceased. It was admitted that Townsend was riding slowly. Further, the defendants denied that Townsend was acting in the course of his employment when the accident occurred, and it is on this question that the case is reported. FINNEMORE, J., found Townsend was negligent, for in the circumstances prevailing at the time he should have got off his bicycle and walked; and found, further, that the deceased's death was wholly due to Townsend's negligence.

The evidence in the case was heard by FINNEMORE, J., at Nottingham Assizes, but at the request of counsel the argument was adjourned to be heard in the High Court in London.

G. R. Swanwick, Q.C., and *W. W. Stabb* for the plaintiff.

Richard Elwes, Q.C., *G. A. J. Smallwood* and *I. C. R. McCullough* for the defendants.

FINNEMORE, J., having stated the facts and having found that the deceased's death was wholly caused by the negligence of Townsend, the defendants' employee, continued: I now come to the question which has been very fully argued before me, and I am indebted to counsel for their full arguments. They will not misunderstand me if I say that ultimately the issue is a very short one. I will not say that it is one on which one makes up one's mind on first impression, and that would be discourteous or disrespectful to the lengthy arguments to which I have listened; but ultimately I think that it depends on how one's mind works on a very short point, and that is simply this. Is a man, after he has finished his actual work, still in the course of his employment when

A he goes to get his wages, using the words "in the course of his employment" not in a vague kind of way but to mean in the course of his employment so that he is still so acting that, if he acts negligently and causes damage, he makes his employer responsible for him.

None of the cases, leaving aside for the moment the workmen's compensation cases, covers this point; and that is obvious, because, if any case did, we should not be here discussing it. All the cases which have been cited to me, going back a long way, are illustrations of the sort of case which the courts have held make the master responsible for the tort of his servant, and cases which the courts have held do not create that liability on the part of the master. I have had cited to me *Jefferson v. Derbyshire Farmers, Ltd.* (1) ([1921] 2 K.B. 281), *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board* (2) ([1942] 1 All E.R. 491), the much more recent case of *Crook v. Derbyshire Stone, Ltd.* (3) ([1956] 2 All E.R. 447), the older case of *Brydon v. Stewart* (4) ((1855), 2 Macq. 30), *Lloyd v. Grace, Smith & Co.* (5) ([1912] A.C. 716), *Tunney v. Midland Ry. Co.* (6) ((1866), L.R. 1 C.P. 291), and other cases, all of which add something by way of illustration to the problem which has to be decided; but none of them is quite this case. Most of them deal with an entirely different position; for example, they deal with the point whether what the workman was doing at the time was work which he was employed to do but which he did in a negligent way, or the point whether he was doing something he was not employed to do at all or something he was merely permitted to do, or something he was doing for his own purpose. As to the general principle, it is clear, first of all, that for the doctrine of vicarious responsibility to apply there must be the relationship of master and servant. That is not in dispute in this case, because Mr. Townsend was employed by the defendants, the National Coal Board. The second point is that the servant, when he commits the tort, must be acting in the course of his employment. It is on that second limb that the argument and discussion have taken place in this particular matter. The master is not responsible for a wrongful act done by a servant unless it is done in the course of his employment. Most of the cases deal with the point that an act is presumed to be in the course of the workman's employment if it is, first of all, a wrongful act authorised by the master—that does not apply to this case—or a wrongful, though unauthorised, mode of doing some act which was authorised by the master. Various other tests have been suggested; it is not enough, for example, that the negligence was committed at a time when the servant was engaged on the master's business; it must be committed in the course of that business, so as to form a part of it, and not merely to be coincident in time.

The answer to a lot of the arguments on both sides in this case is, I think, as it so often is in the law of this country, that there is no one test which is conclusive or exhaustive or exclusive by which this particular problem can be solved. For example, it is argued for the defendants that Mr. Townsend was engaged to give first-aid to men who got injured; that was his full-time employment. The defendants say that he cannot have been the first-aid man doing the work that he was employed to do when all that he was doing was to go to draw his wages, and they say that collecting his pay is not a mode of doing his work. If that were a final test, this argument would be no doubt perfectly sound; and counsel for the defendants, in developing his case, said that Mr. Townsend was not doing what he was employed to do; he was not committing a tort while at work like the driver who drives negligently; it is quite true that he was riding a bicycle on his master's land, but not in the course of his employment, because he was the first-aid man. Counsel for the defendants also argued that to go and draw wages was not something so incidental to Mr. Townsend's employment—that is, to his first-aid work—as to make it indistinguishable, but that it was a distinct and separate act; all that he was doing was going to draw his money and that was a matter for himself alone quite apart from his work, and, therefore, could

not be said to be in the course of his employment or to bring his master into responsibility for his negligence on his way to draw his money. A

Counsel for the plaintiff argued that Mr. Townsend was acting in the course of his employment because he was about business which equally concerned the master and the servant; it is in the interests of the master as well as the servant for the servant to draw his wages and that the master should pay them; otherwise no work would be done. He says, therefore, that it is in the interests of both of them, although "interests" perhaps is a bad word to use, because it does not really matter from one point of view; but he says that it is part of the business of both of them, and he also argues that it was the duty of Mr. Townsend to go and collect his wages. It is quite true that the general rule of this country is that the debtor must seek out his creditor to pay him, and it has always been accepted that, so far as the collection of wages is concerned, particularly in a big concern, there is a proper place to which the workman goes. It is in his interest and for his advantage, and also in the interest of the employer and for his advantage. Counsel for the plaintiff says that we have a case here where it is, at all events, partly the duty of the employee, in this case Mr. Townsend, to go to the pay office to draw his money, and it was partly at least the business of the master, who had to pay the wages and who found it convenient to pay them in this way and at that place. Counsel for the plaintiff says further that in any event it was something reasonably incidental to the business of the employer and to the employment in which the servant was actually employed. As I have said, none of the cases, excluding the workmen's compensation cases, ever dealt with this point, nor was it even thought about, that is, whether a man who had completed his manual work and was on his way, on his employer's premises, to the employer's pay office is still in the employer's employment. That is the question which falls to be decided in the present case. B C D E

I think one has to approach questions of this sort in a sensible and common-sense way and a realistic way. I confess, for my own part, apart from any authority, that I should say that clearly a man is still in the course of his employment when he goes to collect his wages on his master's premises. It seems to me to be wholly unrealistic to say that a man who has finished the manual work he is employed to do and is walking across his master's premises to collect the wages which the master had contracted to pay him and for which he has done the work, has ceased to be in the course of his employment; and, without any authority, that is the view to which I would venture to come. There has been nothing to break the course of his employment. He has not gone off on any frolic of his own; he has not begun to do something solely for his own interest, for it is in the interest of the employer as well as the employee that a workman should receive his wages and receive them at a convenient place and at a convenient time. I do know that in the famous case of *Lloyd v. Grace, Smith & Co.* (5) ([1912] A.C. at p. 736), it was said that the term "course of employment" ought to be liberally construed; and in the much older case of *Brydon v. Stewart* (4), LORD CRANWORTH, L.C., said (2 Macq. at p. 35): F G H

"I quite adopt the argument of the Solicitor-General, that a master is only responsible while the servant is engaged in his employment; but then we must take a great latitude in the construction of the phrase 'being engaged in his employ'."

Then he adds (*ibid.*, at p. 36): I

"But whatever the man does in the course of his master's employ, according to the fair interpretation of these words *eundo, morando, redeundo*, the master is responsible."

It is quite true, as counsel for the defendants has pointed out, that that is a case which was dealing with the responsibility of the employer to the workman in the workman's interest. On the other hand, it was also a case where the workman

A was leaving his work wholly for a purpose which was his own and was not, I think, a permitted purpose.

There was next the case of *Crook v. Derbyshire Stone, Ltd.* (3) ([1956] 2 All E.R. 447), which was the most recent case. It is a judgment to which I naturally pay the greatest possible deference, but I think that the facts are really quite different. The man there was driving a lorry; he parked his lorry with a view to going away for lunch, and, having parked his lorry, he then went across the public street to get refreshment at a café; and an accident happened while he was doing that. The learned judge, PILCHER, J., found that, although it was perfectly proper for a driver so soon as he had parked his lorry to walk across the public highway in order to get his lunch in a café and although the employer knew that that sort of thing was done, yet the driver had temporarily ceased to be in the course of his employment and was going to the café for his own purposes. I concede (and I say so with great respect) that there could be a good deal of argument on that point; but, accepting that decision and not for the moment throwing any doubt on it (which I do not intend to do) it is quite different from the present case, unless it can be held that, when a man goes for his wages, he is doing something which is no longer a part of his employment and in which the master has no interest, and is doing something purely for his own concern. To my mind, that argument seems a quite impossible one and I find myself quite unable to take the view that an employee on his master's premises going to get his wages ceases to be in the course of employment by his master.

I have considered all the other cases that were cited and we have discussed them together. I do not think that there has been any case among those which have been cited which helps me any further. We have to consider the general principles. Applying them to this case, which is a matter of degree, I think that Mr. Townsend was acting in the course of his employment. Clearly there must be a limit and, speaking for myself, it is plain that, when a servant is off the master's premises—for example, when he is on the Queen's highway on the way to his place of employment to get his wages—it could be argued, I should think with success, that he was not in the course of his employment; but it is not for me to decide that. When, however, a servant is actually on his employer's premises going to the place which the employer has said is the place to which he is required to come in order to draw his wages, it would be a very unreal and strange state of affairs if he were no longer in the course of his employment.

Two cases were cited by counsel for the plaintiff that were decided under the Workmen's Compensation Act. I can appreciate the feeling, to put it no higher, that the test of "the course of employment" under the Workmen's Compensation Act might not always be of final and binding authority when one is dealing with the vicarious liability of the master for the tort of his servant; but here are two cases, on the facts almost exactly in point with the present case, where the Court of Appeal had to decide, under the Workmen's Compensation Act, the meaning of the phrase "in the course of his employment" as applied to a man who was going to collect his wages. *Loury v. Sheffield Coal Co., Ltd.* (7) ((1907), 24 T.L.R. 142), is perfectly plain. If it is a binding authority in this case, then the whole matter becomes quite unarguable, because the facts are so very similar. The collier in that case was required to go to the pay office to get his wages, as in this case. He left work at 5 a.m. on the Saturday morning and he went back at 12.30 p.m., which is almost exactly what happened in this case with slightly different hours, and he was going along for his wages when he was injured by an engine on a line; and exactly the same arguments were put forward in that case. As now, he had finished his work; he was not going to resume work until the following Sunday night. Indeed, the learned county court judge was persuaded by that argument. He said (*ibid.*, at p. 142) that "the accident happened on or about the premises" of the employers, "but that

it did not arise in the course of and out of his employment". COZENS-HARDY, A M.R., gave a very short judgment, and he said (24 T.L.R. at p. 142):

"It was admitted that it was part of the contract of employment that the company should pay this man at their pay office and that he should go there to get his wages. While going to the pay office to get his wages he met with an accident on the company's premises. In these circumstances the court was asked to say that the accident did not arise in the course of his employment. In his Lordship's view it was just as much part of his employment to go to the pay office on that day at that hour as it was to go down the pit on the following Sunday night. The appeal must be allowed."

If that is a binding case on this present case, there is an end of the matter, but whether it is or not I entirely agree with what the Master of the Rolls said (and it was the unanimous judgment of the court), that it was as much part of the employment of the collier to go to the pay office as it was to go down the pit or to do whatever work he was employed to do, as in this case I think it was as much Mr. Townsend's duty and as much part of his employment to go to collect his wages where his employer said he had to collect them as it was to go and do his first-aid work day by day. It was most clearly an act essentially incidental to his employment.

There is no need to do more than mention *Riley v. William Holland & Sons, Ltd.* (8) ([1911] 1 K.B. 1029) where that same case was extended to the case where a woman's employment had come to an end altogether on the Wednesday and she went back for her wages on the Friday in accordance with the practice at that work-place, and it was held that she was still in the course of her employment when she was at the mill at which she had been employed and to which she had gone on the Friday, according to the arrangement, to get her wages due the previous Wednesday when her work had actually come to an end.

In my view, Mr. Townsend, going to get his wages on his employers' premises at the place to which they had decided that he should go, was acting in the course of his employment and, therefore, the employers, in my view, would be responsible for the unfortunately negligent way in which he proceeded when he rode his bicycle in the circumstances which I have indicated.

[HIS LORDSHIP then considered the question of damages. The plaintiff was twenty-two years old and her dependency was about £500 per annum. The deceased also was twenty-two and there was a child of their marriage, aged about ten months. Damages were assessed at £5,000 with a further £51 19s. special damage. £250 of the £5,000 was allocated to damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and £850 was allocated to the infant's share, to be transferred to the appropriate county court.]

Judgment for the plaintiff.

Solicitors: *Hopkin & Son*, Mansfield (for the plaintiff); *Lawrence C. Jenkins*, Arnold, Notts. (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A
GRICE AND ANOTHER v. DUDLEY CORPORATION.

[CHANCERY DIVISION (Upjohn, J.), June 3, 4, 5, 6, 7, 1957.]

B *Compulsory Purchase—Notice to treat—Validity—Whether notice is an exercise of power of compulsory acquisition—Abandonment of notice—Acquisition of land for purpose other than that contemplated by the order—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 123.*

C In 1937 the D. corporation made a compulsory purchase order (approved by the Minister of Transport and incorporating enactments of the Lands Clauses Consolidation Act, 1845, including s. 123*) for purposes of road widening and building a market hall within the borough. In January, 1939, notice to treat was served on K., an owner of shop premises subject to compulsory acquisition under the order. In July, 1939, compensation was agreed, except compensation for loss of trade and disturbance. A draft contract was submitted by K. but the purchase did not proceed owing to the war of 1939 to 1945. In 1951 the corporation had under consideration plans for the development of the area, but the proposed development differed substantially from that proposed in 1937. In 1951 and 1952 negotiations took place for the acquisition by the corporation of a part of K.'s premises comprised in the notice to treat; these proceeded on the basis of acquisition by agreement, but agreement was not reached. In 1954 the corporation considered another scheme of development of the area; this did not involve a market hall and involved very much less road widening than was intended at the time of the order of 1937. In 1955 another proposal for development, differing greatly from that of 1937, was considered by the corporation. No scheme was finally settled, but whatever scheme might ultimately be adopted by the corporation, it would need to acquire K.'s premises. The corporation having intimated that it desired to complete purchase of K.'s premises under the order of 1937 (and therefore at the prices then current) the plaintiffs, the personal representatives of K. who had died, claimed that the notice to treat of January, 1939, was no longer valid and that the corporation had no longer power to acquire the land compulsorily under the order of 1937.

F **Held:** (i) the notice to treat was no longer effective and the corporation had no longer power to acquire the land under the order of 1937 because
G (a) on the evidence the corporation had abandoned the order, and (b) the order was made for the acquisition of land for specific development and could not now be used by the corporation to compel the acquisition of land for a general development which as yet was undefined but apparently was different.

H *Richmond v. North London Ry. Co.* ((1868), L.R. 5 Eq. 352) and *Tiverton & North Devon Ry. Co. v. Loosemore* ((1884), 9 App. Cas. 480) applied.

(ii) service of the notice to treat was an exercise of a compulsory power of acquisition within s. 123 of the Lands Clauses Consolidation Act, 1845 (which precluded the exercise of such a power after the expiration of three years from the date of the enactment conferring the power) and s. 123, therefore, did not operate to render the power invalid.

I *Salisbury (Marquis) v. Great Northern Ry. Co.* ((1852), 17 Q.B. 840) applied.

[**Editorial Note.** The compulsory purchase order in this case was made under the Public Works Facilities Act, 1930, which ceased to have effect by virtue of the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 1 (6). The speedy means of acquisition provided by the Act of 1930 was temporarily superseded by s. 2 of the Act of 1946 which was repealed by the Statute Law Revision Act, 1953.

* The terms of s. 123 are printed at p. 678, letter B, post.

As to the limit of time for the exercise of powers of compulsory acquisition, see **A** 10 HALSBURY'S LAWS (3rd Edn.) 20, 21, para. 29; and as to the waiver of rights under a notice to treat, see *ibid.*, 67, para. 105.

For the Lands Clauses Consolidation Act, 1845, s. 123, see 3 HALSBURY'S STATUTES (2nd Edn.) 950.]

Cases referred to:

- (1) *Salisbury (Marquis) v. Great Northern Ry. Co.*, (1852), 17 Q.B. 840; 21 **B** L.J.Q.B. 185; 18 L.T.O.S. 240; 117 E.R. 1503; 11 Digest (Repl.) 231, 958.
- (2) *Tiverton & North Devon Ry. Co. v. Loosemore*, (1884), 9 App. Cas. 480; 53 L.J.Ch. 812; 50 L.T. 637; 48 J.P. 372; 11 Digest (Repl.) 231, 954.
- (3) *Guest v. Poole & Bournemouth Ry. Co.*, (1870), L.R. 5 C.P. 553; 39 L.J.C.P. **C** 329; 22 L.T. 589; 11 Digest (Repl.) 183, 501.
- (4) *Re Usbridge & Rickmansworth Ry. Co.*, (1890), 43 Ch.D. 536; 59 L.J.Ch. 409; 62 L.T. 347; 11 Digest (Repl.) 190, 572.
- (5) *Richmond v. North London Ry. Co.*, (1868), L.R. 5 Eq. 352; *affd.* C.A., (1868), 3 Ch. App. 679; 37 L.J.Ch. 886; 33 J.P. 86; 11 Digest (Repl.) 185, 519.
- (6) *Ystalyfera Iron Co. v. Neath & Brecon Ry. Co.*, (1873), L.R. 17 Eq. 142; **D** 43 L.J.Ch. 476; 29 L.T. 662; 11 Digest (Repl.) 185, 520.
- (7) *Rolls v. London School Board*, (1884), 27 Ch.D. 639; 51 L.T. 567; 11 Digest (Repl.) 119, 117.
- (8) *A.-G. v. Hanwell Urban Council*, [1900] 2 Ch. 377; 69 L.J.Ch. 626; 82 L.T. 778; 11 Digest (Repl.) 122, 141.
- (9) *A.-G. v. Teddington Urban Council*, [1898] 1 Ch. 66; 67 L.J.Ch. 23; 77 **E** L.T. 426; 61 J.P. 825; 11 Digest (Repl.) 122, 140.

Action.

This action was brought by the personal representatives of Norah Kendall, deceased, claiming against the Dudley Corporation (i) a declaration that a notice to treat dated Jan. 4, 1939, was of no validity or legal effect; (ii) a declaration **F** that the corporation had no power under or by virtue of the Dudley Hall Street (Compulsory Purchase) Order, 1937 (made by the corporation under the Public Works Facilities Act, 1930, s. 2) compulsorily to acquire the plaintiffs' premises or any part thereof; (iii) an injunction restraining the corporation itself or by its servants or agents from entering on the plaintiffs' premises or taking any of the steps specified in or putting into operation any of the provisions of **G** the Lands Clauses Consolidation Act, 1845, s. 76 and s. 77 in respect thereof; and (iv) an order directing that the registration of the notice to treat as a land charge be vacated.

For some fifty years before her death Mrs. Kendall, who died on Dec. 28, 1942, carried on the business of poulterer and fishmonger at her premises, No. 19, Hall Street, Dudley. In 1937 the Corporation of the County Borough of Dudley, **H** acting by the council, proposed to develop an island site within the borough. This area of development included No. 19, Hall Street, as the island site was bounded by Hall Street, Castle Street, Fisher Street and Birmingham Street. In December, 1937, the corporation, acting by the council, made the Dudley Hall Street (Compulsory Purchase) Order, 1937, which is called in this report the "order of 1937", under the Public Works Facilities Act, 1930. A public **I** inquiry in relation to the order was held by an inspector appointed by the Minister of Transport on May 27, 1938, and, with some immaterial modifications, the order was confirmed by the Minister on Dec. 2, 1938. The order provided, so far as is relevant, as follows:—

"1. Subject to the provisions of this order the council [*viz.*, the council of the county borough] are hereby authorised to purchase compulsorily for the purpose of widening, enlarging and improving Hall Street, Castle Street,

A Fisher Street and Birmingham Street, in Dudley aforesaid, and for the improvement and development of the lands abutting on or adjacent to the said Hall Street, Castle Street, Fisher Street and Birmingham Street, the lands which are described in Part 1 of the Schedule hereto and also subject to the provisions of this order the above-named council are hereby authorised to purchase compulsorily for the purpose of providing a Market Hall in
B Dudley aforesaid the lands which are described in Part 2 of the Schedule hereto, all which said lands are defined and coloured on a map marked 'Dudley Hall Street (Compulsory Purchase) Order, 1937' and sealed with the common seal of the council and deposited at the offices of the council situate at the Council House, Dudley. Provided that the said map shall be disregarded and that for references thereto in this order there shall be
C substituted references to a map marked 'Dudley Hall Street (Compulsory Purchase Order), 1937' and signed by P. Wilson, an Assistant Secretary of the Ministry of Transport and deposited at the offices of the council.

"2. Subject to any necessary adaptations the provisions of (a) the Lands
D Clauses Acts (except s. 92 and s. 127 to s. 132 of the Lands Clauses Consolidation Act, 1845); (b) the Acquisition of Land (Assessment of Compensation) Act, 1919, and . . . are hereby incorporated in this order, and the provisions of those Acts shall apply accordingly."

The property of Mrs. Kendall was numbered 11 on the map and was specified in both Parts 1 and 2 of the order of 1937. Part 2 of the Schedule was headed "Lands required for the provision of a market hall". The map signed "P.
E Wilson" showed the one island site previously mentioned. The intention apparent from the map, as was found by the court, was that there was to be an improvement line which was marked, and the shops and buildings to the south-west of that line were to be pulled down so that Hall Street would be greatly enlarged; there was to be a line of shops behind the improvement line, and behind that was the area which was then intended to be the market hall, and on
F the Fisher Street side there were certain shops which were to be pulled down and re-erected.

On Jan. 5, 1939, the corporation served notice to treat, dated Jan. 4, 1939, on Mrs. Kendall in respect of her premises, No. 19, Hall Street. The notice was registered as a land charge in the land charges register under the Land Charges Act, 1925. On Mar. 3, 1939, Mrs. Kendall's solicitors delivered particulars of her claim for compensation. Negotiations ensued and, as was admitted between
G the parties to the action, it was agreed in or about July, 1939, between Mrs. Kendall and the corporation that the compensation for her premises should be £5,700 and for the fixtures and fittings therein £300 and that in addition she should be paid compensation for and in respect of loss of trade and disturbance and the charges and expenses of her surveyors and solicitors. On Sept. 13, 1939,
H Mrs. Kendall submitted a draft contract, but in view of the war the matter did not proceed further at that time. In July, 1951, provisional layout plans showing future development in the Hall Street, Fisher Street and Birmingham Street re-development areas, were before the planning and development committee of the council and it was resolved that the town clerk should arrange for negotiations for the acquisition of the property (which included the Hall Street property before-mentioned) to be opened. That plan showed that the corporation's
I views on the development of the island site had substantially changed. There was to be no widening of Hall Street. The shops would remain in situ except that there was to be an arcade in about the centre of the street. Behind the shops, however, there was to be a new service road and to the north-east of that there was to be a covered market much smaller than that envisaged by the order of 1937. To the north-east of that market there was to be a new feature, a large car park. On the south side there were to be four shops; and this plan thus necessitated the acquisition of the rear portion of No. 19, Hall Street, partly for the new service

road and partly for the erection of a shop. There was no formal approval of this plan by the corporation, but application was made for loan sanction for the improvement and was refused by the Minister in November, 1951. A

In November, 1951, the plaintiffs' solicitor at the request of the mayor attended an interview at which, among other persons, the borough engineer was present and at which it was explained that the corporation was anxious to effect improvements near to a roundabout at the rear of the Hall Street properties, and that this would involve the acquisition of a portion of "Kendall's" property and that the corporation were anxious to know whether some agreement could be reached at an early date. At this interview nothing was said about the order of 1937, or about widening Hall Street, or about providing a market hall, or about purchasing any part of the property except that at the rear which was required for the new proposed service road and the shops. The object of the interview was to acquire the rear part of No. 19, Hall Street, so as to tidy up the Birmingham Street frontage and have two shops facing that street. Subsequently a plan was sent to the plaintiffs' solicitor showing the corporation's proposal. This plan showed Mrs. Kendall's property coloured green and the area required for improvement cross-hatched in green, being an area of about ninety-six square yards. Negotiations and correspondence ensued but no conclusion was reached. The whole of the negotiations proceeded as an endeavour to reach an agreement, and the court found it inconceivable, on the evidence, that anyone could have thought at that time that the corporation was still maintaining that the order of 1937 was on foot. B C D

In 1954 another and considerably modified development scheme was considered by the council for the improvement of the island site. This proposal did not involve any market hall. That feature was superseded by providing for two bus loading bays, one in Fisher Street and the other in Birmingham Street, and the centre of the site intended previously for the market hall appeared to be an open space. There was still to be a service road behind the Hall Street properties as formerly, and there was still to be a proposed arcade; but there was only to be a very small widening of Hall Street. This scheme never received the approval of the council. E F

On Aug. 27, 1954, it was suggested on behalf of the corporation to the plaintiffs that the purchase of No. 19, Hall Street, pursuant to the order of 1937 should be completed. Negotiations ensued and ultimately the town clerk threatened to use the powers conferred by s. 76 and s. 77 of the Lands Clauses Consolidation Act, 1845*, which enable an acquiring authority to pay compensation into court and to execute a deed-poll vesting the property in the acquiring authority on the footing that there has been neglect to make title to or to convey the property. It was subsequently conceded that these sections were inapplicable, because the compensation had not been completely assessed so that the amount to be paid into court was not known. G

In September, 1955, the re-development of the Hall Street and Castle Street area was again under consideration by the council. The plan submitted to a meeting of the council on Oct. 4, 1955, showed a new approach. Hall Street, as distinct from the pavement in that street, was no longer to be widened, but the street was to be used as a service road. North of that on the island site there was to be an open space, largely consisting of a car park, and there were to be some shops placed in an irregular, but not displeasing manner, and there were to be plantations and trees. On Nov. 1, 1955, it was resolved that the borough architect should amend the scheme and re-design a model and that the proposal should be further considered. Thus the proposals then under consideration by the corporation for the development of the island site were different proposals from those contemplated at the time of the order of 1937, and were not yet finalised or approved by the corporation. It was not in dispute, however, that H I

* 3 HALSBURY'S STATUTES (2nd Edn.) 920.

A the corporation bona fide required the plaintiffs' property for the development and improvement of the site.

On Mar. 13, 1956, the plaintiffs issued the writ commencing this action. It was conceded by the corporation that at that date the corporation had not in mind the using of the plaintiffs' property for the purpose of widening Hall Street, as distinct from the pavement or footway, or for the purpose of providing a market hall.

Percy Lamb, Q.C., and G. A. Grove for the plaintiffs.

Geoffrey Cross, Q.C., and H. E. Francis for the defendant, the Dudley Corporation.

C UPJOHN, J., after stating the facts and reviewing the evidence in the course of which he intimated that the real issue was whether the plaintiffs' premises were to be acquired under a new scheme at present-day prices or whether they were to be acquired under the existing notice to treat which would result in the premises being valued as at the date of that notice, continued: Those being the facts, the contentions put forward are these. First, the plaintiffs say that the service of the notice to treat is not, in itself, an exercise of compulsory powers of acquisition of land and, it being conceded that no other step to exercise such powers has been taken within the three years from the date of the special Act (i.e., the order of 1937*), no exercise of the power can now be valid having regard to s. 123 of the Lands Clauses Consolidation Act, 1845. Secondly, if, contrary to the plaintiffs' submission, service of the notice is an exercise of such compulsory powers, it is no longer enforceable because (i) the notice to treat has been abandoned, or (ii) the corporation is precluded from enforcing it by reason of its laches and acquiescence and of the provisions of the Limitation Act, 1939, or (iii) by reason of its having led the plaintiffs to suppose that the notice would not be acted on. Estoppel is also pleaded, but counsel for the plaintiffs does not rely on common law estoppel.

F On the first point, provision is made for the service of the notice to treat by s. 18 of the Act of 1845, but the operation of a notice given under that section is now so well settled that I need not read s. 18. It may have any one of the following effects: First, the landowner may be a willing vendor and the parties may agree on the price or compensation and enter into a binding agreement of sale and purchase whence the usual results flow as in the case of any other contract of sale and purchase. Secondly, the landowner may be a willing seller but the parties may fail to agree on the price, in which case either party can proceed to have the compensation payable assessed by the appropriate authority; originally it was assessed by arbitration or by summoning a jury; subsequently it was assessed by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 1 (1), and, finally, it is now assessed by the Lands Tribunal. There is a limited right to withdraw the notice to treat on seeing the claim for compensation delivered by the landowner (see the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 5 (2)). The third position is that the landowner may be entirely hostile, in which case the acquiring authority can proceed to have compensation assessed, and if the landowner refuses or neglects to make title, or to convey the land, can pay the compensation money into court and execute a deed-poll vesting the property in itself: that is the effect of s. 76 and s. 77 of the Act of 1845.

I The relationship between the parties thus created by the service of the notice to treat has sometimes been described as a quasi-contract. Where the parties have agreed on the compensation, or it has been assessed, but not before, the remedy of specific performance is open to either side: see FRY ON SPECIFIC PERFORMANCE (6th Edn.), p. 62. That state of affairs has sometimes been referred to as a parliamentary contract.

* This is set out so far as necessary at p. 674, letter I, to p. 675, letter D, ante.

That, then, is the nature of the legal relationship created by the parties, and the question is whether the giving of such a notice is the exercise of compulsory powers of acquisition of land for the purposes of s. 123 of the Lands Clauses Consolidation Act, 1845, which is in these terms:

"And be it enacted, that the powers of the promoters of the undertaking for the compulsory purchase or taking of lands for the purposes of the special Act shall not be exercised after the expiration of the prescribed period, and if no period be prescribed not after the expiration of three years from the passing of the special Act."

There was, of course, no prescribed period in the special Act (i.e., the order of 1937).

Apart altogether from authority, I should be of opinion that the service of a notice to treat is an exercise of a compulsory power, because it enables the acquiring authority to proceed to acquire the land whether the owner likes it or not. However, it has been strenuously argued before me that the authorities compel me to come to the contrary conclusion, and some authorities on either side have been cited to me.

First of all in point of date is *Marquis of Salisbury v. Great Northern Ry. Co.* (1) ((1852), 17 Q.B. 840), a decision as long ago as 1852. That decision is directly in favour of the view that the service of a notice to treat is, for the purposes of s. 123, an exercise of a compulsory power. That case was mentioned in the speeches of four of the law lords in *Tiverton & North Devon Ry. Co. v. Loosemore* (2) ((1884), 9 App. Cas. 480), although they were dealing with a slightly different point, viz., whether entry on land was an exercise of a compulsory power; nevertheless, it seems clear that the earlier decision received their general approval.

On the other hand, the plaintiffs relied strongly on two cases, both in the Court of Appeal. The first is *Guest v. Poole & Bournemouth Ry. Co.* (3) ((1870), L.R. 5 C.P. 553). In that case a notice to treat was served by the company on a landowner. The action was for mandamus, to compel the company to issue a warrant of compensation pursuant to the notice which was given, but the company demurred and pleaded s. 16 of the Act of 1845. That section provides that it shall not be lawful to put in force any powers relating to the compulsory taking of land until the whole capital is subscribed, which in that case, apparently, it had not been. It was held that s. 16 was inserted for the protection of landowners and that the issue of a notice was a neutral proceeding. It was said that it might be an amicable proceeding or a hostile proceeding, or there might be an intermediate case where the parties were willing to buy and sell but did not agree on the price. It was held that, for the purpose of s. 16, the notice to treat was not an exercise of compulsory powers and the plaintiff was entitled to his writ of mandamus. Much to the same effect is the subsequent case of *Re Uxbridge & Rickmansworth Ry. Co.* (4) ((1890), 43 Ch.D. 536), where, however, the actual point turned on the rather complicated provisions of the Uxbridge and Rickmansworth Railway (Abandonment) Act, 1888.

I see no difficulty in reconciling these authorities. A notice to treat may, for the purposes of some sections of the Lands Clauses Consolidation Act, 1845, be an exercise of compulsory powers and yet, for the purpose of other sections and in certain circumstances, may not be an exercise of compulsory powers. I say "in certain circumstances" for it seems clear, for example, that if in *Guest v. Poole & Bournemouth Ry. Co.* (3) the plaintiff had been entirely hostile the notice to treat would have been an exercise of compulsory powers (see the judgment of BRETT, J.) and, accordingly, unenforceable having regard to the failure to comply with s. 16. In my judgment, for the purposes of s. 123, the service of a notice to treat is, for the reasons given in *Marquis of Salisbury v. Great Northern Ry. Co.* (1), an exercise of compulsory powers and, therefore, the powers were exercised within the required period.

- A So far, therefore, the result seems to me to be that the corporation served a valid, effectual notice exercising compulsory powers which led to the creation of a legal relationship between the parties which I have already described. Once that notice was served, s. 123 was out of the picture and no further period is laid down by statute within which the next step to acquire the property must be taken. In my judgment, however, the authorities (to which I shall refer in a
- B moment) establish the following propositions: First, the acquiring authority exercising statutory powers must proceed to enforce its notice in what, in all the circumstances of the case, is a reasonable period. If the authority sleeps on its rights, it will be barred if the delay is not explained. If it is explained, the acquiring authority will be allowed to enforce the notice providing that it is equitable that it should do so in all the circumstances of the case. However,
- C the oppression on the owner of land in respect of which a notice to treat has been given cannot be wholly disregarded however sound the reason for not proceeding to enforce it. Secondly, the acquiring authority may evince an intention to abandon the rights given to it by the notice to treat, in which case the owner is entitled to treat those rights as abandoned. Thirdly, this court has an inherent jurisdiction to control the exercise of statutory powers if, but
- D only if, the court can see that the powers are being exercised not in accordance with the purpose for which the powers were conferred. In such a case the court has the power, and the duty, at the instance of the Attorney-General on behalf of the public or of a person damnified, to restrain the further exercise of those powers not in accord with the special Act. These three propositions are, in point of law, distinct, but, in practice, they tend to merge one into the other,
- E more particularly the first two, for unequivocal acts of abandonment seldom arise. The authorities which I am going to quote show how closely connected these three propositions are.

In support of the first proposition I must refer to *Richmond v. North London Ry. Co.* (5) ((1868), L.R. 5 Eq. 352). LORD ROMILLY, M.R., said (*ibid.*, at p. 358):

- F “It is also, I think, clear that the notice [to treat] given by the railway company to the landowner cannot operate for an indefinite time: it must be acted upon within a reasonable time or it must be deemed to be abandoned. The difficulty is to determine what period of time is to be considered to be reasonable.”

He then discusses the hardship on a landowner who has a notice to treat hanging over him for an indefinite time, and he says (*ibid.*, at p. 359):

- G “It is obvious that the notice is not to be operative for ever: it follows, therefore, that some limit must be put to the time within which it is to be operative: it further follows that this limit of time must be a reasonable limit of time: and that again resolves itself into the answer to be put to the question, with which the courts of law have so often and in such a variety
- H of cases to deal—what is a reasonable limit of time as applicable to the class of cases in question?”

In the case before LORD ROMILLY there was a period set for the time within which the works must be completed, and he held that in those circumstances the time limit for the completion of the works was the end of a reasonable time. But the observations which I have just quoted are all perfectly general in application and apply equally to a case where, as here, there is no time limit for completing the work, although it may be found, perhaps, more difficult to ascertain what, in all the circumstances of the case, is a reasonable time. LORD ROMILLY, M.R., continues (L.R. 5 Eq. at p. 360):

“It is obviously inequitable to permit the railway company for an indefinite time to keep this notice over the head of the landowner, fettering his enjoyment of his property, and it is no answer to say that the landowner might insist on the railway company ascertaining the price, for if that were

true the rule of the court, if it can be laid down, ought to apply to every case, and would include that of the landowner who desires to keep his land, and not to part with it for any price, if he can help it."

I read that because in a subsequent case, *Ystalyfera Iron Co. v. Neath & Brecon Ry. Co.* (6) ((1873), L.R. 17 Eq. 142) SIR GEORGE JESSEL, M.R., seems to have taken a rather different view. He says (*ibid.*, at p. 149):

"Now I have been unable to follow the argument as to the notice to treat being got rid of by mere lapse of time. I do not say that no lapse of time will be evidence of abandonment. It must not be forgotten that the landowner can always force the company on; it is not as if it was all on one side, and the landowner may choose to do nothing, or may force on the company."

Then he deals with the facts of that case and refers to *Richmond v. North London Ry. Co.* (5).

I prefer the view of LORD ROMILLY to that of SIR GEORGE JESSEL. Even in the last century when values were reasonably steady it seems hard to put it against the owner who does not want to be dispossessed that he has the right to force the company to dispossess him; but in these days of inflation, it surely cannot possibly be put against an owner that he has the right to compel the company, the acquiring authority, to go to arbitration. That is the very thing which the plaintiffs in this case are trying to avoid. If they send the matter to arbitration they are merely inviting the corporation to purchase their property at a pre-war price. It seems to me, therefore, that the circumstance that an unwilling vendor can compel completion of the purchase is not a matter which ought to weigh against the vendor and in favour of the acquiring authority.

Much the same principle was stated by EARL CAIRNS in *Tiverton & North Devon Ry. Co. v. Loosemore* (2). He said (9 App. Cas. at p. 489):

"There have been cases in which a railway company has given a notice to a landowner to treat for the purchase of land and no further step has then been taken, either by the company or the landowner, and the extended period for completing the works has expired, and the question has been raised, could the company in that state of things proceed with its notice to treat, and assess the compensation under the Lands Clauses Act? Were such a case now to arise, I should be disposed to think, as I was disposed to think in *Richmond v. North London Ry. Co.* (5), that, if nothing more was done, and the company have slept upon their rights, and certainly if the delay cannot be explained, they should be held to be disabled from going on with any compulsory purchase and in such a case the landowner should, as I think, be held to be disabled also. Both parties have been content to let the time run out."

When *Richmond v. North London Ry. Co.* (5) went to the Court of Appeal and came before LORD CAIRNS, L.C. (3 Ch. App. 679) he dealt with the matter rather on the basis of the third proposition which I have enunciated, and I shall deal with that subsequently.

With regard to the second proposition, no authority really is required as the proposition is self-evident. SIR GEORGE JESSEL, M.R., in *Ystalyfera Iron Co. v. Neath & Brecon Ry. Co.* (6) recognises abandonment as a possible way of terminating the promoter's rights. The only difficulty is what acts evince an intention to abandon. It is a question of fact in each case.

On the third proposition LORD CAIRNS, L.C., said in *Richmond v. North London Ry. Co.* (5) (3 Ch. App. at p. 681):

"One of the best established objects of the jurisdiction of this court is to take care that companies exercising powers under their Acts shall not exercise them otherwise than for the purposes of the Act, and when there is any ground for supposing that the powers are to be exercised for any

- A other purpose, the court should see whether the company is really misusing its powers. Great latitude must be given to the company and great faith to their statements as to the land which will be required for any particular work, and the court will not try the question with any great minuteness, and must place much reliance upon what the officers of the company may say."
- B Much to the same effect are the observations of CHITTY, J., in *Rolls v. London School Board* (7) ((1884), 27 Ch.D. 639 at p. 642). In that case the learned judge pointed out that, on the whole, local authorities are treated more tenderly than railway companies who may be, or at any rate in those days were, expected to work at a profit.
- C The proposition is, further, well illustrated by the case of *A.-G. v. Hanwell Urban Council* (8) ([1900] 2 Ch. 377). In that case the property had been actually conveyed to the urban district council but they were restrained from appropriating the property which they had acquired for one purpose (to make a sewage works), to an entirely different purpose, namely, a hospital, and they were restrained at the suit of the Attorney-General and his co-plaintiff, who was also damnified. It appears from *A.-G. v. Teddington Urban Council* (9) ([1898] 1 Ch. 66) that if a promoter acquires property which he does not immediately require for the purpose for which it was acquired, he can use it temporarily for other purposes, provided those purposes are not inconsistent with the authorised or permitted use. It is clear, however, that the property must be kept so that it may ultimately be used for the purpose for which it was acquired. Those two cases, I think, illustrate well the general proposition. The effect of the last two cases should, however, be taken now subject to the alteration in law by the Local Government Act, 1933, s. 163*.
- E Finally, LORD BLACKBURN combined all these propositions in one statement in *Tiverton & North Devon Ry. Co. v. Loosemore* (2) when he said (9 App. Cas. at p. 496):
- F "I do not think that the analogy between an actual contract and a quasi-contract is complete; but I think it is so thus far, that neither side can by its laches or misconduct take away from the other its right to enforce the performance of the contract or quasi-contract, or claim compensation for its non-fulfilment; but either side may by its laches or misconduct deprive itself of all right to enforce the contract or quasi-contract against the other.
- G And I do not see anything unjust or contrary to principle in holding that if a company delays completing a compulsory quasi-contract for purchase, till it can no longer exercise the powers for the sake of which it was entrusted with the power of compulsory purchase, that quasi-contract should, at least at the option of the landowner, be at an end. This was the opinion of LORD ROMILLY in *Richmond v. North London Ry. Co.* (5), and though on appeal LORD CAIRNS did not think it necessary to decide this, he did not, I think, expressly dissent from it."
- H

Applying those principles to the present case, we have to consider what powers were granted to the promoters by their special Act, and that, of course, depends on the true construction of the Dudley (Hall Street) Compulsory Purchase Order of 1937 and, in particular, art. 1.

- I Counsel for the corporation submitted that the powers conferred in relation to the properties described in Part 1 of the Schedule were wide and could be exercised quite generally in relation to the improvement of Hall Street regardless of the provisions of Part 2. I am not satisfied that that is correct. This was one scheme for the development of a whole site, and it seems to me that it must be

* 14 HALSBURY'S STATUTES (2nd Edn.) 441; s. 163 of the Local Government Act, 1933, confers power to appropriate land to purposes other than that for which it was acquired.

looked on as a whole. At every stage the proposals referred to a deposited plan the first edition of which the Minister refused to sign as it did not expressly refer to the proposal to provide a market hall. It is not, however, necessary for me finally to decide that point. This matter can be decided on a rather broader basis. The fact remains—and the evidence seems to me to be quite clear and is admitted—that no one now is proposing to erect a market hall and no one now is proposing to widen Hall Street. The original scheme is dead and the proposals now are quite different. There is going to be a large car park. I do not know what would have been said by the Minister of Transport had he been asked to sanction a car park in 1937. It seems to me that, looking at all the circumstances of this case, the corporation has abandoned the order, and simply is not proposing to carry it out. A B

That is very much reinforced by the negotiations which took place starting in 1951 when the corporation endeavoured to acquire, by agreement, the rear portion only of the plaintiffs' property. Accordingly, as it seems to me, on the facts this order has been abandoned. C

If it cannot be put as high as this, what is the corporation doing? The corporation seems to be endeavouring to acquire the plaintiffs' property for some purpose other than that for which they were authorised to exercise compulsory powers by the compulsory purchase order. What that purpose is is not yet finally established. A number of different plans have been put before the corporation. We do not know what is going to be done with the island site. If that is the true state of affairs, as I venture to think that it must be, then, surely, the corporation cannot, consistently with the principles which I have enunciated, compel an owner to submit to a notice to treat issued under a compulsory purchase order, conferring powers for certain specific and detailed matters set out in the order. The corporation is endeavouring to acquire these properties in order that it may have an opportunity for general re-development. That shows that it is going entirely outside the order and, if that be so, then it must be restrained from doing so. D E

I do not have to consider the effect of mere delay. Had the case been that when the limited loan sanction was permitted in 1955 the corporation was proposing to go on with the compulsory purchase order of 1937, different considerations might have applied. Whether the corporation would now be entitled to go on with it I do not decide, because the evidence is that it is not now proposing to go on with it. If I am wrong on the facts and the corporation have not abandoned the order of 1937 technically, I suppose, the corporation could revert to it, yet it would, in my view, be most inequitable to allow the corporation after this long delay any further time to retrace its steps, even if the corporation should desire to do so. F G

I want to make it plain that the bona fides of the corporation is not in doubt. No criticism can be directed against it because it is taking a long time considering what is the best development for an important site in the heart of the borough. I do, however, criticise the corporation for trying to acquire, under powers which, in my judgment, are now dead or, at all events, unenforceable, property at pre-war prices. H

Accordingly, on those various grounds, it seems to me that the corporation can no longer be permitted to treat the notice as being valid or operative. I propose to make a declaration that the notice to treat is no longer of validity or legal effect, and I shall declare that the corporation has no powers under, or by virtue of, the compulsory purchase order to acquire the plaintiffs' premises or any part thereof. I

With regard to the injunction, I do not for one moment suppose the corporation will defy this judgment, and it will be sufficient, I think, if I give the plaintiffs liberty to apply for an injunction. I must direct that the registration of the

A notice to treat as a land charge be vacated, and the costs must follow the event.

Order accordingly.

Solicitors: *Stafford Clark & Co.*, agents for *William Wright & Son*, Dudley (for the plaintiffs); *Lees & Co.*, agents for *Town clerk*, Dudley (for the corporation).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

TAMESHWAR AND ANOTHER v. REGINAM.

[PRIVY COUNCIL (Earl Jowitt, Lord Tucker and Lord Denning), April 30, May 1, June 18, 1957.]

Privy Council—British Guiana—Criminal law—Practice—View by jury—Presence of judge.

Criminal Law—View by jury—Presence of judge.

It is wrong for a view with witnesses to be had at a criminal trial in the absence of the judge (see p. 687, letter D, post).

R. v. Martin ((1872), L.R. 1 C.C.R. 378) considered.

At the trial of two prisoners in British Guiana on charges of robbery with aggravation the jury requested a view of the scene of the robbery and asked that five witnesses should attend. The view was held in the presence of the accused, a superintendent of police, counsel for the prosecution and counsel for one accused. The jury were checked by the judge before leaving for the view and were warned not to have any communication or to engage in any discussion or argument. The judge did not attend the view. At the view the four witnesses pointed out various places. In addition three other witnesses also were present. On the following day the trial was resumed. Evidence was given of what happened at the view and the witnesses were available for cross-examination. The prisoners were found guilty.

Held: (i) although there may be nothing wrong in a simple view, viz., a view of something without witnesses being present, being taken without the judge being present, yet a view with witnesses demonstrating was part of the evidence and of the trial and the absence of the judge was a defect which vitiated the trial.

(ii) the absence of the judge was not justifiable under s. 45 of the Criminal Law (Procedure) Ordinance, 1953*, of British Guiana since, although that enactment enabled the court to determine the terms and conditions on which a view might be held, yet the power that it conferred must be exercised in accordance with the fundamental principles of fair trial.

Appeals allowed.

[As to a view by a jury at a criminal trial, see 10 HALSBURY'S LAWS (3rd Edn.) 425, para. 783; and for cases on the subject, see 14 DIGEST (Repl.) 343, 3322-3327.]

Cases referred to:

- (1) *Hassan Mahamed v. Reginam*, (1954), C.C.A. No. 17 of 1954.
- (2) *R. v. Whalley*, (1847), 2 Car. & Kir. 376; 8 L.T.O.S. 559; 2 Cox, C.C. 231; 14 Digest (Repl.) 343, 3324.
- (3) *Goold v. Evans & Co.*, [1951] 2 T.L.R. 1189; 3rd Digest Supp.
- (4) *Buckingham v. Daily News, Ltd.*, [1956] 2 All E.R. 904; [1956] 2 Q.B. 534.
- (5) *Karamat v. Reginam*, [1956] 1 All E.R. 415; [1956] A.C. 256; 120 J.P. 136.
- (6) *R. v. Martin*, (1872), L.R. 1 C.C.R. 378; 41 L.J.M.C. 113; 26 L.T. 778; 36 J.P. 549; 14 Digest (Repl.) 343, 3325.

* The terms of s. 45 are printed at p. 687, letter E, post.

- (7) *R. v. Bertrand*, (1867), L.R. 1 P.C. 520; 16 L.T. 752; 31 J.P. 531; sub nom. *A.-G. of New South Wales v. Bertrand*, 4 Moo. P.C.C.N.S. 460; 36 L.J.P.C. 51; 16 E.R. 391; 14 Digest (Repl.) 348, 3387. A
- (8) *Ibrahim v. R.*, [1914] A.C. 599; 83 L.J.P.C. 185; 111 L.T. 20; 14 Digest (Repl.) 468, 4513.

Appeals.

Appeals by special leave *in forma pauperis* by Tameshwar and Seokumar from a judgment of the Court of Criminal Appeal in British Guiana (HOLDER, C.J., STOBY and PHILLIPS, J.J.), dated Apr. 4, 1956, dismissing the appellants' appeals from their convictions on Feb. 17, 1955, before MILLER, J., sitting with a jury in the Supreme Court of British Guiana of robbery with aggravation. The facts appear in the opinion of the Board. B

Bernard B. Gillis, Q.C., and *J. Lloyd-Eley* for the appellants.
J. G. Le Quesne for the Crown. C

LORD DENNING: At the close of the argument, their Lordships announced that they would humbly advise Her Majesty to allow the appeal and quash the convictions; and they now give their reasons for the advice which they tendered. D

The point on which special leave to appeal was granted was the fact that the jury had a view with witnesses *in the absence of the judge*. The question is whether that vitiates the trial. The judges in the Court of Criminal Appeal were divided in opinion. HOLDER, C.J., and PHILLIPS, J., thought that it would not warrant their holding that the trial was irregular. STOBY, J., held that the judge's absence was fatal. E

The material facts are these: At about 7.15 in the morning of Feb. 25, 1954, a postal apprentice named Sherry Browne, aged nineteen, was entrusted with a bag containing \$13,129.68 to carry to the Nigg Post Office. He was cycling towards the Post Office when two men stopped him at a bridge and pulled him off his cycle. One had a gun and the other a cutlass. They took the bag of dollars and ran away with it. It has never been recovered. Two men named Tameshwar and Seokumar were arrested and charged with the offence. At the trial Tameshwar was called accused "No. 1" and Seokumar accused "No. 2", and it is convenient here to do the same. Sherry Browne gave evidence of the robbery and identified accused Nos. 1 and 2 as his assailants. A boy scout, aged twelve, gave evidence that he saw two men running away and identified them as accused Nos. 1 and 2. A barber said he saw two men running away and identified accused No. 2 as one of them. A young married woman said that she saw accused No. 1 running with a bag over his shoulder. So did a carpenter. A police sergeant named Adams gave evidence of statements made by the two accused after they were arrested. Both, in their first statements, said they were not at the place at all; but accused No. 2 afterwards made a second statement, in which he said they were both there but he himself took no part in the actual robbery. He said: F

"Me get frighten and me run pon Nigg dam behind Tameshwar . . . Ah run behind Tameshwar and meself and them been ah shouting 'Hold he, hold he' ". G

Later accused No. 2 withdrew this second statement and said it was obtained from him by threats. The defence of each of them was an alibi. Accused No. 1 said he was in a boat going to the rice field. Accused No. 2 said he was in his hammock in his living quarters. H

At the end of the evidence taken in court, the jury made a request to visit the scene of the robbery, and asked that the postal apprentice, the boy scout, the barber, the young married woman and the carpenter should attend. They also wished to see the living quarters of the accused. I

- A On Tuesday, Feb. 15, 1955, the view took place. Before the jury left for the view, they were checked in the presence of the judge to see that all were there. The two accused men were there. So were the superintendent of police and counsel for the prosecution. The judge warned the jury not to have any communication or engage in any discussion or argument. The jury then left with the registrar, the marshal, counsel for the prosecution and counsel for No. 2 accused, and the police officers.
- B The two accused were present throughout. They went to the scene of the robbery. The postal apprentice indicated the spot where he said he was robbed, then the bridge where he said he saw the two accused standing. Police-sergeant Adams pointed out the Nigg Post Office and two dams which had been mentioned in evidence. The boy scout pointed out the spot where he said he was standing when he saw two men running south. The barber pointed out the spot where
- C he saw accused No. 2. The young married woman pointed out the house in which she lived at the time and the place where she was standing when she saw accused No. 1 going south. The carpenter showed the bridge on which he was standing when he saw accused No. 1. It appears that three other witnesses were present at the view. A witness for the defence, Hector Apadoo (who had given evidence in support of No. 2's alibi that he was in his hammock),
- D showed where Nos. 1 and 2 accused were living, and where he himself was living, and the communal latrine. A witness for the prosecution (who was an engine driver who lived on the same estate as the two accused), showed where he was living. A witness for the defence (who had given evidence in support of No. 1's alibi that he was in the boat) indicated the koker south of the estate. Sergeant Adams indicated the house where a witness for the prosecution, named
- E Bacchus, lived.

On the next day after the view, the trial was resumed before the judge in court. Sergeant Adams gave evidence of what happened at the view. Sherry Browne, the postal apprentice, was re-called so as to be offered for cross-examination by the accused. They declined the offer. The other witnesses were available also for cross-examination but counsel for the accused did not take advantage of it. Counsel made their speeches. The judge summed up. The jury found the prisoners guilty by a majority of eleven to one. Each was sentenced to ten years' penal servitude and six strokes by flogging.

- It is important to notice that there is no suggestion of impropriety on the part of the jury, or witnesses, or anybody else at the view or any irregularity apart from the absence of the judge. No complaint was made at the trial
- G about the absence of the judge, for the simple reason that in British Guiana for many years it has not been regarded as necessary for the judge to attend a view. It appears that in British Guiana many judges in the past have not accompanied the jury, and, in a case decided in 1954 (*Hassan Mahamed v. Reginam* (1)), the Court of Criminal Appeal in British Guiana had held that the absence of a judge on a visit to the place was not an irregularity.

- H The question for our consideration is whether the absence of the judge at the view is a fatal defect in the trial. In England, it is a rare thing for a jury in a criminal trial to view the place where the crime is said to have taken place. At one time it was never done at the assizes except with the consent of the prosecution. But, in a case in 1847, on a trial for rape, the defence wished the jury to have a view, in order to support the contention that it was so public
- I a place that it was unlikely for the offence to have taken place there. The prosecution did not consent, but, nevertheless, the judge allowed a view. It was regarded as a thing of such moment that the jury were accompanied by the under sheriff, the chief constable, twenty policemen and twelve javelin men; but the judge apparently did not go with them. Nor did the prisoner. It is to be noticed that there were no witnesses. (See *R. v. Whalley* (2) ((1847), 2 Car. & Kir. 376).) Such a view is on a par with the common case where a thing is too large or cumbersome to bring into court but is left in the yard outside.

It is everyday practice for the jury in such a case to be taken to see the thing. A
The judge sometimes goes with them. Sometimes he goes by himself. But
there are no witnesses and no demonstration. Their Lordships see nothing
wrong in a simple view of that kind, even though a judge is not present. In
a case of motor manslaughter, any member of the jury could go in the evening
and look at the place by himself if he wished, without being guilty of any
irregularity. B

It is very different when a witness demonstrates to the jury at the scene of
a crime. By giving a demonstration he gives evidence just as much as when
in the witness-box he describes the place in words or refers to it on a plan.
Such a demonstration on the spot is more effective than words can ever be,
because it is more readily understood. It is more vivid as the witness points
to the very place where he stood. It is more dramatic as he re-enacts the scene. C
He will not, as a rule, go stolidly to the spot without saying a word. To make it
intelligible he will say at least "I stood here" or "I did this", and, unless
held in check, he will start to give his evidence all over again as he remembers
with advantages what things he did that day*. But however much or however
little the witness repeats his evidence or improves on it, the fact remains that
every demonstration by a witness is itself evidence in the case. A simple D
pointing out of a spot is a demonstration and part of the evidence. Whilst
giving it the witness would still be bound by the oath which he had already
taken to tell the truth. If he wilfully made a demonstration, material to the
proceedings, which he knew to be false, he would be guilty of perjury.

In England, the Court of Appeal has clearly held in civil cases that a view,
coupled with a demonstration, is part of the evidence. So much so that, if it E
takes place in the absence of one party without his consent, the trial is bad;
see *Goold v. Evans & Co.* (3) ([1951] 2 T.L.R. 1189). Or again, it may of itself
outweigh all the other evidence in the case, so that the judge can found his
decision on it without more; see *Buckingham v. Daily News, Ltd.* (4) ([1956]
2 All E.R. 904). Their Lordships have held likewise, in a criminal case in an
appeal from British Guiana, that a view, at which witnesses give demonstrations, F
is part of the evidence; see *Karamat v. Reginam* (5) ([1956] 1 All E.R. 415).

Now if a view of this kind is part of the evidence—as their Lordships are
clear that it is—it would seem to follow that it must be held in the presence
of the judge. It is the very essence of a criminal trial that it must be decided
on the evidence before the court and not on any outside information; and
that the judge and jury must be present throughout the giving of the evidence G
and every part of it, so as to be able to appreciate it and assess its worth: and
throughout the speeches of counsel too. The summing-up of the evidence
by an impartial judge with a trained mind is an essential part of every criminal
trial; but it can only properly be done by a judge who has heard all the evidence
and seen all the demonstrations by witnesses. The judge, for instance, may
notice something at a demonstration which may be of vital import, but passes H
unnoticed by everyone else until he draws attention to it. His presence ensures
not only that the proceedings are properly conducted but also that no relevant
point on either side is overlooked.

Thus much has been said because there was a case in England, many years
ago, which at first sight suggests the contrary. It is *R. v. Martin* (6) ((1872),
L.R. 1 C.C.R. 378), where two men were charged with indecency in a urinal. I
Two policemen gave evidence of what they had seen through the bars in a wall.
After the judge had summed up, the jury asked to view the place so as to see
whether the policemen could have seen what they asserted. No objection was
made on behalf of the prisoners. The jury had a view. The judge did not
attend. Nor did the prisoners. On the return of the jury to the court, without

* See Shakespeare's *HENRY THE FIFTH*, Act 4, Part 3: "Old men forget, yet all shall be
forgot; but he'll remember with advantages what feats he did that day."

A any further direction from the judge, they found the prisoners guilty. Afterwards the court was informed that the two police witnesses had gone to the view and pointed out where they had stood at the time of the alleged offence and the position in which the prisoners were standing; and that the jury had then placed themselves in the same spot and looked through the bars. A Case was thereupon stated for the opinion of the court on the ground that there had
B been a mistrial in that (inter alia) the jury had at the view put questions to the witnesses and thus received evidence in the absence of the judge and the prisoners. The Court for Crown Cases Reserved refused to determine this point because there had been no examination in the court below into the facts of what took place at the view. The alleged reception of evidence out of court might be a mere rumour without foundation. The conviction was, therefore, affirmed.
C Their Lordships cannot regard that case as any warrant for a view to take place with witnesses in the absence of the judge. A reference to the report in 26 L.T. 778 shows that, during the argument, all the judges thought it was undesirable and some thought it was wrong; but they did not determine the point because the facts were not properly before them. Now that the point has arisen for decision, their Lordships have no hesitation in saying that it is not only
D undesirable but that it is wrong for a view to be had with witnesses in the absence of the judge.

Counsel for the Crown sought, however, to justify the practice in British Guiana by reference to the Criminal Law (Procedure) Ordinance of 1953* which re-enacts a provision to the like effect dating back to 1892. It says in s. 45—

- E “(1) Where in any case it is made to appear to the court or a judge that it will be for the interests of justice that the jury who are to try or are trying the issue in the cause should have a view of any place, person, or thing connected with the cause, the court or judge may direct that view to be had in the manner, and upon the terms and conditions, to the court or the judge seeming proper.
- F “(2) When a view is directed to be had, the court or judge shall give any directions seeming requisite for the purpose of preventing undue communication with the jurors: Provided that no breach of any of these directions shall affect the validity of the proceedings unless the court otherwise orders.”

Their Lordships think that the view primarily contemplated by that section is a simple view by a jury when no witnesses are present, such as a view of a van
G in the yard of the court, or of the cross-roads where a motor accident took place. But the section undoubtedly extends to cover a view when witnesses are present and demonstrate where they stood. Their Lordships so held in the recent case of *Karamat v. Reginam* (5). That case formed the basis for much of counsel for the Crown's argument. He said that the section applied alike to a view with witnesses as to a view without witnesses; and hence that if a judge need
H not be present at the one, he need not be present at the other. Their Lordships do not accept this contention. Section 45 enables the court or a judge to determine the terms and conditions on which a view may be held; but this power must be exercised in accordance with the fundamental principles of a fair trial; and one of these principles is that every piece of evidence given by a witness must be given in the presence of the tribunal which tries the case;
I and the tribunal is not the jury alone, but the judge and jury. Section 90 of the ordinance says that “the trial shall be had by and before a judge of the court and a jury”. If witnesses give demonstrations or answer questions at a view, that is undoubtedly part of the trial, and must be had before the judge and jury. These observations do not apply to a simple view without witnesses. It often happens that a jury have a simple view of a vehicle in the courtyard by themselves without the judge being present. It is rather like their examination of

* C. 11 of the Laws of British Guiana, 1953.

an exhibit or a plan in the jury room without the judge being present. But the judge usually sees it himself too. A

There remains the question whether the absence of the judge at this view vitiates the trial. Their Lordships are mindful of the principles on which they advise Her Majesty in criminal cases. Slow as their Lordships are to interfere, yet, if it is shown that something has taken place which tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future, then their Lordships may well think it necessary to advise Her Majesty to allow an appeal; see *R. v. Bertrand* (7) ((1867), L.R. 1 P.C. 520 at p. 530), *Ibrahim v. R.* (8) ([1914] A.C. 599 at p. 615, per LORD SUMNER). Their Lordships think it plain that if a judge retired to his private room whilst a witness was giving evidence, saying that the trial was to continue in his absence, it would be a fatal flaw. In such a case, the flaw might not have affected the verdict of the jury. They might have come to the same decision in any case. But no one could be sure that they would. If the judge had been present, he might have asked questions and elicited information on matters which counsel had left obscure; and this additional information might have affected the verdict. So here, if the judge had attended the view and seen the demonstration by the witnesses, he might have noticed things which everyone else had overlooked; and his summing-up might be affected by it. Their Lordships feel that his absence during part of the trial was such a departure from the essential principles of justice, as they understand them, that the trial cannot be allowed to stand. Counsel for the Crown argued that the conviction should not be set aside unless the absence of the judge was shown to have affected the result of the trial; but their Lordships do not think it should stand in any case. It is too disturbing a precedent to be allowed to pass. B C D E

Appeals allowed.

Solicitors: *Druces & Attlee* (for the appellants); *Charles Russell & Co.* (for the Crown).

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.] F

R. v. LOGAN AND OTHERS.

[COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Byrne and Devlin, JJ.), June 21, 1957.]

Court-Martial—Charge under statute commencing Jan. 1, 1957—Difference between standard local time and Greenwich mean time—Operative date to correspond with local time—Army Act, 1955 (3 & 4 Eliz. 2 c. 18), s. 70, s. 226—Army Act, 1955 (Commencement) Order, 1955 (S.I. 1955 No. 1805). Time—Statute—Commencement—Statute having extra-territorial operation brought into force on a designated date—Whether brought into force in all territories at the moment when it came into force in England. G H

The Army Act, 1955, which was brought into operation on an appointed day, viz., Jan. 1, 1957, came into operation in relation to British troops abroad on the day which was Jan. 1, 1957, in the place where the troops were.

[**Editorial Note.** The Statutes (Definition of Time) Act, 1880, s. 1, which relates an "expression of time" in an Act of Parliament to Greenwich mean time, applied, as originally enacted, only as regards Great Britain and Ireland. The references in s. 1 to those territories were subsequently repealed by the Time (Ireland) Act, 1916, but the territorial scope of the enactment would not have been extended by that repeal. See also s. 36 (2) of the Interpretation Act, 1889.

As to the commencement of a statute, see 31 HALSBURY'S LAWS (2nd Edn.) 510, para. 661; as to the different meanings of references to time, whether they refer to local time or Greenwich mean time, see 32 HALSBURY'S LAWS (2nd Edn.) 124, paras. 181, 182.] I

A Appeal.

The appellants, Corporal John James Logan, Sapper Terence David Logan, Sapper Edward McKinnon, and Sapper Malcolm Lloyd Calvert, all of the 24th Field Engineer Regiment, appealed against their convictions by a district court-martial sitting in Hong Kong for committing a civil offence contrary to s. 70 of the Army Act, 1955. The grounds of appeal were (i) that at the time of the offence in Hong Kong at 2.30 a.m. on Jan. 1, 1957, by Hong Kong standard time the Army Act, 1955, had not come into force because it was not then Jan. 1, 1957, by Greenwich mean time which was eight hours behind Hong Kong standard time; and (ii) that the Army Act, 1955, being an English Act could only come into force at one time, viz., that in England, although it applied outside the United Kingdom.

C *David A. Lloyd* for the appellants.
E. Garth Moore for the Crown.

LORD GODDARD, C.J.: The appellants were convicted before a district court martial at Hong Kong of the offence of

D “committing a civil offence contrary to s. 70 of the Army Act, 1955, that is to say, assault occasioning actual bodily harm, in that they at Hong Kong on Jan. 1, 1957, at about 0230 hours [that is 2.30 a.m.] Hong Kong standard time assaulted Jack Brighton thereby occasioning him actual bodily harm.”

E An ingenious solicitor who appeared before the court-martial persuaded them to put in the exact time, 2.30 a.m., and then he took the point that as Hong Kong time was some hours in front of Greenwich mean time the Army Act, 1955, was not in force in Hong Kong at the time this offence was committed. It was provided* that the Army Act should come into force on Jan. 1, 1957. The Army Act is not only effective in this country; it is effective also in any country where British troops are stationed. If troops are stationed in Hong Kong the Army Act, 1955, applies to them, and if an Act is said to come into force on Jan. 1, it comes into force on the day which is Jan. 1 in the particular place where the Act has to be applied. I can well understand that if an offence were committed in the Western Atlantic† or somewhere west of the British Isles the Army Act, 1955, might not have come into force there at the same moment as in London; the date might still be Dec. 31 where the offence was committed. The day of the offence was Jan. 1 in Hong Kong, and the fact that it became Jan. 1 a few hours before the clock would actually show Jan. 1 in England does not make any difference. The Act came into force in Hong Kong on the day which was Jan. 1 in Hong Kong. Therefore, this point fails and the appeal is dismissed.

Appeal dismissed.

H Solicitors: *Registrar of the Courts-Martial Appeal Court* (for the appellants);
Director of Army Legal Services (for the Crown).

[*Reported by T. J. KELLY, Esq., Barrister-at-Law.*]

I * The Army Act, 1955, was brought into force on Jan. 1, 1957, by the Army Act, 1955 (Commencement) Order, 1955 (S.I. 1955 No. 1805).

† For example, standard local time at Bermuda, lying to the west of Greenwich, is about four hours behind Greenwich mean time, so that, using the twenty-four hour clock, the beginning of Jan. 1, 1957, at Greenwich would be 20 hrs. on Dec. 31, 1956, at Bermuda. Standard local time at Hong Kong, lying far east of Greenwich, is about eight hours in advance of Greenwich mean time; accordingly the beginning of Jan. 1, 1957, at Greenwich would be 8 hrs. on Jan. 1, 1957, at Hong Kong by standard local time, and the beginning of Jan. 1, 1957, at Hong Kong by local time would be 16 hrs. on Dec. 31, 1956, at Greenwich.

MACDONALD v. MACDONALD.

[CHANCERY DIVISION (Roxburgh, J.), June 4, 5, 1957.]

Husband and Wife—Title to property—Family enterprise—Agreement by both spouses and wife's mother to buy, furnish and equip a house to live in—Initial payment for house by wife and wife's mother—Property conveyed to husband alone—Mortgage to husband alone.

Until 1935 a husband and wife lived with the wife's mother in a cottage of which the mother was tenant for life and the wife was remainderman. In 1935 the cottage was sold and the mother and the wife contributed out of the proceeds of sale £215 towards the purchase price (£715) of another dwelling-house, which was, however, without their agreement, conveyed to the husband alone, who also mortgaged the house, as sole mortgagor, in order to raise the rest of the purchase price. The furniture for the new house was provided by the wife and her mother, who died in September, 1935, intestate, leaving the wife beneficially entitled to her mother's estate.

The money borrowed on the security of the mortgage was repayable by instalments, which, with the interest, were met by the husband until 1939, when he entered the armed forces. Thereafter, until 1950, the husband made no payments under the mortgage. During the war of 1939 the wife paid the interest, and from July, 1948, until February, 1950, the instalments of principal and interest were paid by a lodger as part payment for his accommodation. In 1948 the wife divorced the husband, who re-married soon afterwards. From Feb. 15, 1950, the husband resumed the payment of the mortgage instalments, and they were paid after his death (which occurred in 1954) by his widow, who was sole administratrix of and absolutely beneficially entitled to the whole of his estate. At all times since it was purchased, the wife and the child of herself and the husband lived in the house, parts of which were let by the husband from and after February, 1950. On the question who was entitled to the house,

Held: the court was satisfied that the wife, the husband and the wife's mother had each had a substantial beneficial interest in the house, which was purchased as a joint family enterprise in order to provide a home, and, since no precise calculation of their interests was possible, they should be regarded as having been entitled beneficially in equal shares; therefore, as from the death of the wife's mother, the wife was entitled to a two-thirds share and the husband to a one-third share, and, in all the circumstances, the court would declare that on Feb. 15, 1950, the wife and the husband were beneficially entitled severally to the house in those shares and would give liberty to apply for an account of subsequent rents and out-goings.

Dictum of SIR RAYMOND EVERSHED, M.R., in *Rimmer v. Rimmer* ([1952] 2 All E.R. at p. 867) applied; *Re Rogers' Question* ([1948] 1 All E.R. 328) distinguished.

[**Editorial Note.** This case differs from the ordinary dispute regarding the ownership of property between husband and wife in that a third party is also beneficially interested. There is found to be a family enterprise under which all three agreed to buy, furnish and equip a house and to live in it together. To such circumstances the doctrine equality is equity is applied; and the trend of decisions concerning "family assets" towards equality, shown in *Cobb v. Cobb* ([1955] 2 All E.R. 696) and *Fribance v. Fribance* ([1957] 1 All E.R. 357) is again illustrated.

As to the maxim that equality is equity, see 14 HALSBURY'S LAWS (3rd Edn.) 527, para. 996; and for cases on the subject, see 20 DIGEST 239-243, 64-93.]

Cases referred to:

- (1) *Re Rogers' Question*, [1948] 1 All E.R. 328; 27 Digest (Repl.) 264, 2130.
- (2) *Rimmer v. Rimmer*, [1952] 2 All E.R. 863; [1953] 1 Q.B. 63; 3rd Digest Supp.

A Action.

The plaintiff and the original defendant (called below "the husband") were married in 1925 and for about five years both lived in the plaintiff's parents' home. In 1933 the plaintiff and her mother, Mrs. Tickner, became entitled as remainderman and tenant for life respectively under the will of the plaintiff's grandmother to the freehold property known as Briar Cottage in which the plaintiff, the husband and Mrs. Tickner had been living since about 1930. In February, 1935, the plaintiff and Mrs. Tickner sold Briar Cottage and on Feb. 23, 1935, Mrs. Tickner received £401 17s. 6d. from solicitors which represented the net proceeds of sale of the property. At about the same time the plaintiff, Mrs. Tickner and the husband orally agreed together to purchase the freehold property, No. 36, Milford Gardens, Edgware (hereafter called "the dwelling-house") for £715. Mrs. Tickner paid £215 towards the purchase price out of the proceeds of sale of Briar Cottage on behalf of herself and the plaintiff, and £500 was raised by means of a mortgage. Without the consent of either Mrs. Tickner or the plaintiff, the husband took the conveyance in his sole name, and he alone entered into the mortgage. When Mrs. Tickner discovered that the conveyance had been made to the husband alone, she upbraided him and said "we should have had a share". The husband replied that it was "not possible to have the property put in all three names". The court found that the transaction was not a partnership but a family enterprise, under which the three parties agreed to buy, furnish and equip the dwelling-house and to live in it together. All the money for the furniture was provided by the plaintiff and Mrs. Tickner. Although it was agreed to buy the dwelling-house in shares, there was no discussion what the shares were to be. The husband, the plaintiff and Mrs. Tickner all lived in the dwelling-house until Mrs. Tickner died in September, 1935, intestate, and thereafter the husband, the plaintiff and their child continued to live there until 1939 when the husband joined the armed forces. Until 1939 the instalments of the mortgage debt and interest were paid on behalf of the husband mainly out of his earnings. During the war of 1939-45 the husband was on active service and he made no attempt to pay the mortgage instalments. The plaintiff paid the interest, but repaid no part of the capital. On Apr. 2, 1948, the plaintiff divorced the husband, and on Apr. 29, 1948, the husband married the present defendant. Between July, 1948, and February, 1950, the mortgage repayments (principal and interest) were made by a lodger as part payment for his accommodation. On June 6, 1948, the husband was discharged from the army in Palestine but he was not heard of until Feb. 15, 1950, when he reappeared and informed the mortgagees that he was taking up once more his responsibilities in relation to the mortgage. On May 7, 1952, the plaintiff issued a writ against the husband. On July 3, 1954, the husband died intestate and on Oct. 7, 1954, letters of administration were granted to the present defendant. Since February, 1950, the instalments of principal and interest in respect of the mortgage had been paid by the husband, or (after his death) by his widow, the present defendant. An order to carry on the proceedings against the present defendant was made. By her amended statement of claim the plaintiff claimed: (i) a declaration that the present defendant as owner in fee simple of the dwelling-house held it on trust for the plaintiff or alternatively for the plaintiff and herself in such shares and proportions as the court might determine; (ii) if necessary, an inquiry in what shares and proportions the plaintiff and the husband provided the purchase money and mortgage instalments and in what shares and proportions the plaintiff and present defendant were entitled in equity to the dwelling-house; and (iii) an order on the present defendant to take all necessary steps to appoint the plaintiff to be trustee of the dwelling-house jointly with herself or alternatively to convey the dwelling-house to the plaintiff and herself as trustees for sale.

C. F. Fletcher-Cooke for the plaintiff.

B. James for the present defendant.

ROXBURGH, J., having stated the facts and reviewed the evidence, found that the evidence showed conclusively that neither of the two parties was beneficially entitled to the entire property exclusively of the other, and that there was no express agreement as to the shares in which the property was to be taken. His LORDSHIP intimated that the choice, therefore, lay between dividing the beneficial interest in proportion to the contributions made to the purchase money, or applying the maxim that equity is equality. His LORDSHIP continued: This case is quite different both from *Re Rogers' Question* (1) ([1948] 1 All E.R. 328) and *Rimmer v. Rimmer* (2) ([1952] 2 All E.R. 863), which are two cases one on each side of the line and both ultimately decisions of the Court of Appeal. There are circumstances in this case which make me think that it would be wholly improper to apply the principle in *Re Rogers' Question* (1). First, one has to remember that in this case there was a combined enterprise which involved the furniture. That is an important feature because the purpose was that there should be a home, and the home would have been just as useless without the furniture as the furniture would have been useless without anywhere to put it. The purchase of furniture was an integral part of the enterprise. I do not think, therefore, that it would be sensible to consider merely the proportions in which the purchase money of the house was provided without going into the question of the furniture, and that might result in some apportionment of the furniture. Nobody has asked for that, and the apportionment would involve an almost impossible calculation.

Then this case is very strongly differentiated from *Re Rogers' Question* (1) by a second point. The husband assumed the obligation to discharge the mortgage. If I were to apply the principle of fixing the proportions of the beneficial interest by reference to the provision of the purchase money, no doubt I could discount the £500, which was the amount of the mortgage. Alternatively, I could treat it as having been paid at the time on the footing that all the payments of mortgage money and interest thereon were to be paid by or debited against the husband. But it is quite plain that if this £500 raised on mortgage is to be regarded as his contribution to the purchase money then it was his sole obligation to discharge that. In other words, it was not part of the out-goings of the property. In fact, however, it has always been treated as out-goings of the property. From 1939, by paying the interest, the plaintiff contributed something towards the discharge of the mortgage. For this purpose, the amount is wholly immaterial. It indicates to my mind that the mortgage debt, and interest thereon, was not being treated as the husband's contribution to the purchase price. That becomes accentuated more and more as the case proceeds, because the husband never, between 1939 and 1950, made any attempt whatever to make provision for the payment of either the mortgage money or the interest.

I look at the transactions as a whole, and bear in mind in particular the two considerations which I have referred to and also the various considerations which are indicated in *Rimmer v. Rimmer* (2), although I do not take the view that the decisions on the Married Women's Property Act, 1882, s. 17, apply without any modification or reserve to cases in which third parties are concerned, as is this present case, and, therefore, I refer to those considerations only in passing. Looking at the matter in this way I find myself back in a well settled line of authority which does not depend on s. 17 of the Act of 1882 but is to be found summarised by SIR RAYMOND EVERSHEDE, M.R., in *Rimmer v. Rimmer* (2). He said ([1952] 2 All E.R. at p. 867):

"Where the court is satisfied that both the parties have a substantial beneficial interest and it is not fairly possible or right to assume some more precise calculation of their shares, I think that equality almost necessarily follows."

A He cites authority in support of that proposition. I am absolutely satisfied that each of the three parties interested in the property in this case had a substantial beneficial interest and I may say that there is really no possibility of taking a proper account, even if an account were thought to be the right remedy.

In my judgment, this is a case where equality in all the circumstances almost necessarily follows, but equality is a difficulty here because there is an unusual complication. I have already mentioned that the three original parties were Mrs. Tickner, the plaintiff and the husband. It has been argued that there was a joint tenancy created ab initio in the sense that the survivor of the three of them was to have the whole. That would be the result of an uncovered joint tenancy. I am quite certain, however, that nothing of that sort was agreed; and there is no presumption that anything of that sort was intended. When Mrs. Tickner said "We should have had a share", the husband said that it was not possible to have the property put in all three names. That shows that she meant three shares, not "one share for myself and my daughter". Of course, that does not conclude the question which I am now considering; but in these days, in a transaction which is approaching the confines of a partnership, and where the parties probably have never heard of the difference between joint tenancies and tenancies in common, and where nothing is expressly agreed, I should have thought that the natural inference to draw was that each was to have a several beneficial share. I draw that inference. I see no ground for thinking that I ought to impute to the parties any scheme in relation to survivorship. I stress the fact that Mrs. Tickner's death was unexpected. It might have been quite different if she had been moribund, or something of that sort.

If that be right—and that is really the crux of the case, subject to one matter which I must refer to presently—then on the death of Mrs. Tickner her share formed part of her estate. She died intestate, and by the law of intestate succession the share passed to the plaintiff. There is no question of estate duty, because the figures with which we are dealing are so minute. That being so, subject to what I am going to say, it seems to me that from the date of Mrs. Tickner's death the plaintiff had two-third shares and the husband one-third share.

That carries me to February, 1950. Very substantial repayments of the mortgage have been made by the husband or the present defendant. This action has been, in my judgment, most unduly prolonged, and I think it would be unfair to give the plaintiff in the circumstances two-thirds of the benefit of the payment of the mortgage money unless the husband or the present defendant has had substantial benefits in rent, as I believe that the husband and the present defendant have had. I believe that the truly equitable course, as distinguished from the humanly practical course, would be to say that on Feb. 15, 1950—when the dispute really broke out in an acute form, and when the husband asserted himself and took over the management which he had more or less allowed the plaintiff to conduct up to that moment—an account ought to be taken treating the parties as being entitled to the property in the shares that I have mentioned, two-thirds to the plaintiff and one-third to the present defendant.

In that account some extremely tiresome questions would arise. It is a curious fact that the plaintiff and her daughter are still living in the house in two rooms, notwithstanding that the husband has been managing it and letting it ever since 1950. That is to his credit. I am not complaining, but that means that they would have to be charged an occupation rent. Then, the husband and the present defendant had the benefit of the furniture, which now admittedly is not theirs. Therefore, they would have to be charged for the use of the furniture, which has no doubt considerably enhanced the rents of the premises. Then there would have to be an account of the rents and an account

of the out-goings, and when all that was done it may be that there would be no balance either way. I do not think that the difference would be very much. A

I propose to declare that on Feb. 15, 1950, the parties were entitled to these premises, the plaintiff two-thirds and the husband one-third, and to give liberty to apply if necessary so as to deal with the question whether there has to be some sort of account. I must also make a declaration that the plaintiff is entitled to the furniture exclusively. That has not been disputed before me. B

Order accordingly.

Solicitors: *Braund & Hill* (for the plaintiff); *Rowley, Ashworth & Co.* (for the present defendant).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*] C

R. v. GRANT, DAVIS, RILEY AND TOPLEY.

[COURTS-MARTIAL APPEAL COURT (Lord Goddard, C.J., Byrne and Devlin, JJ.), June 20, 21, 1957.]

Court-Martial—"Mutiny"—*Ingredients of offence*—*Not an individual offence*—*Collective "insubordination" or defiance or refusal to obey*—*Army Act, s. 7.* D

Mutiny is a collective offence which cannot be committed by one man. The true ingredients of the offence, under the Army Act of 1881, were collective insubordination, collective defiance or disregard of authority or refusal to obey authority. E

Observations on the distinction between disobedience and insubordination. Appeals dismissed.

[**Editorial Note.** The Army Act, 1955, which replaced the Army Act, came into force on Jan. 1, 1957. Section 31 of the Act of 1955, which enacts the offence of mutiny, differs considerably from the provisions of the former s. 7 of the Army Act and widens the scope of the offence. It contains in sub-s. (3) a statutory definition of mutiny as meaning "a combination between two or more persons subject to service law, or between persons two at least of whom are subject to service law", inter alia, to overthrow or resist lawful authority in Her Majesty's forces, to disobey authority in such a way as to undermine discipline during operations against the enemy or to impede the performance of duty by Her Majesty's forces. "Service law" is defined as military or air-force law and the Naval Discipline Act. F G

For the Army Act, s. 7, see 22 HALSBURY'S STATUTES (2nd Edn.) 265; and for the Army Act, 1955, s. 31, see 35 HALSBURY'S STATUTES (2nd Edn.) 471.]

Appeals against conviction by general court-martial.

The appellants, Corporal Keith Roland Grant, Corporal Peter John Davis, Private Trevor Riley and Private Brian Topley, all of the Royal Army Service Corps, were convicted before a general court-martial sitting at Nicosia, Cyprus, on Nov. 12, 1956, on a joint charge of mutiny at Platres, Cyprus, on Oct. 1, 1956. Grant was sentenced to twelve months' imprisonment and reduction to the ranks, Davis to eight months' imprisonment and reduction to the ranks, and Riley and Topley each to six months' imprisonment. H

It was alleged that after a bed-check on the evening of Oct. 1 at the hotel where members of the unit were billeted they went to the hotel roof, which was out-of-bounds to the troops, and held a meeting to discuss certain grievances. After the guard had been called out the regimental sergeant-major was called. At his suggestion the appellant Davis, acting as spokesman for his comrades, detailed a list of grievances of which they complained, and the sergeant-major said that he would see the commanding officer that evening and would arrange an interview with him next morning so that the matters of which complaint I

A was made could be considered. The regimental sergeant-major then ordered the troops present to go to bed and this order was complied with at once without further disturbance. Next morning a muster parade of all those who had attended the meeting on the roof was held and those who wished to complain were paraded individually before the commanding officer. Instead of being permitted to state their complaints they were charged with failing to report a mutiny. For the prosecution a warrant officer said in evidence that after the bed-check he ordered the men to go to bed, but instead some of them went to the roof. He followed and told them that if they had grievances they should follow the usual army procedure. His remarks were greeted with jeers and boos and someone whom he could not identify said "Throw him down from the top".

C The appellants appealed on two grounds: (a) that the finding of guilt against them involved a wrong direction on a question of law; and (b) that the finding of guilt was unreasonable and could not be supported by the evidence.

Joseph Dean for the appellants Grant and Davis.

K. D. E. Harington for the appellants Riley and Topley.

E. Garth Moore for the Crown.

D **LORD GODDARD, C.J.:** The appellants were convicted by a general court-martial held at Nicosia in Cyprus of the offence of mutiny, and they appeal to this court. Their petition on the ground that there was misdirection, and also on the ground that the conduct of which evidence was given on the night in question could not amount to mutiny was dismissed by the Army Council.

E The circumstances show that there was, at any rate, a very considerable disturbance on the night in question. The men concerned were all reservists, they had been called up for service and sent out to Cyprus on account of the Middle East crisis. The events which we are considering took place in October and November, 1956. The men had certain grievances—I have no doubt there were grievances or matters of which they were complaining—and on the night in question a very noisy outbreak took place in the barracks. It led, first of all, F to their surrounding the sentry post and then holding a meeting on the roof of the hotel at which they were stationed. Then they came down and were certainly guilty of riotous conduct because they proceeded to demolish the barber's shop. They received an order from a warrant officer to disperse, and they did not disperse. It is unnecessary for me to go through the whole of the long story of the events which took place because this court has no doubt whatever that on G a proper direction by the Judge-Advocate there was ample evidence on which a court-martial could find that there was a mutiny that evening.

The appellants were charged under the provisions of the Army Act, 1881, s. 7, because the Army Act, 1955, did not come into force till Jan. 1, 1957*. The Act of 1881 simply says this:

H "Every person subject to military law who commits any of the following offences; that is to say, (1) Causes or conspires with any other persons to cause any mutiny or sedition in any of His Majesty's military, naval or air forces . . . (3) Joins in, or being present does not use his utmost endeavours to suppress, any mutiny or sedition in any such force as aforesaid . . . shall, on conviction by court-martial, be liable to suffer death, or such I less punishment as is in this Act mentioned."

We need not consider the fact that the capital sentence may be imposed for a mutiny. Everybody knows that capital sentences may be imposed for mutiny, but no one supposes that this is a case into which such a consideration would enter. Death is the most severe sentence; but there is always power to order imprisonment or certain other punishments which are mentioned in the Act.

* The Army Act, 1955, was brought into operation on that date by Army Act, 1955 (Commencement) Order, 1955 (S.I. 1955 No. 1806).

The first question which we have to consider in this case and the question which has been principally debated here is: what is mutiny? There is no doubt that mutiny is a collective offence, that is to say, it cannot be committed by one man. There seem to be cases referred to in text-books of some degree of authority showing that in the Peninsular War soldiers were executed for mutiny though the acts were the acts of individuals and not a combination of individuals, but, whatever may have been thought in the days of the Peninsular War, there is no doubt now that mutiny is an offence which deals with collective insubordination, collective defiance or disregard of authority or refusal to obey authority. I think that view complies with the definition which is given in the OXFORD DICTIONARY and in other works of reference.

In the MANUAL OF MILITARY LAW (7th Edn.) at p. 15, which, since there was until very recently no Courts-Martial Appeal Court consisting of non-military judges, sets out the practice of courts-martial and directions of Judge-Advocates to courts-martial and the rulings of Judge-Advocates, the note to s. 7 is:

"... 'mutiny' implies collective insubordination, or a combination of two or more persons to resist or to induce others to resist military authority."

Then it goes on to deal with other matters which I need not read. In point of fact an offence of simple insubordination is not provided by any section of the Army Act, but everybody knows what insubordination means. It means a refusal to subordinate oneself to authority, and it does not follow that a mere failure to obey an order amounts to insubordination. One would not say either in military or civilian circles that that was so. A schoolboy might be told he was not to go to a certain place to buy sweets at a shop, and if he disobeyed the order it does not at all follow that he would be insubordinate or that it would be proper to call him insubordinate. So, too, if a soldier was told that he was not to go to a place described as out of bounds, he might disobey the order and be guilty of disobedience, but it could hardly be said he was insubordinate merely because he did it. If, however, he met an officer who said: "Turn back, you are going where you ought not to", and the soldier said: "I intend to go on and I will go on", then he is showing he will not subordinate himself to military authority and he becomes insubordinate.

The reason why this matter is of some importance in this case is because in the course of the address by counsel for Grant and Davis to the court-martial the Judge-Advocate said to counsel that he would have to direct the court that, under the Army Act, men could not be charged with joint insubordination, and—"You cannot charge men jointly with insubordination because it is mutiny". Counsel for Grant and Davis relies on that as a serious misdirection. It is not necessary for us to say more than that we could not regard that as a misdirection unless we thought it would lead the court-martial to consider that every act of disobedience, if committed by one or more men, would amount to mutiny. It is not one or more acts of disobedience which amount to mutiny. The question whether one or more acts of insubordination can amount to mutiny is quite a different matter. At any rate with regard to the actual statement we need not say more than that we do not think it could have led the officers who formed this court-martial to believe that a simple act of disobedience by two or more men at the same time could amount to mutiny. One has always to remember in these cases that before a court-martial is assembled or before the charges are preferred, the matter has had to go before a convening officer of high rank. It is left to him to decide what charge shall be preferred, and I have no doubt that it may often be the case that an offence could be brought into a more serious category, but the convening officer would say that the case was not serious enough for that. In this case the convening officer thought the facts which were laid before him on the summary of evidence did justify a charge of mutiny, and this court cannot say that the evidence did not disclose a state of

A affairs which could be found to be mutiny by the court-martial if they were properly directed.

I have stated the reasons why we do not think that the intervention by the Judge-Advocate during the speech of counsel for Grant and Davis can have misled the court-martial into thinking that mere disobedience would amount to mutiny. We then have to look at the summing-up. I desire to say that, in

B my view, the learned Judge-Advocate summed up this case with great clarity and with very great care. I think that it is a summing-up which deserves a great deal of credit. It was a long case which had taken a great many days. Reading through the summing-up as we have done during the hearing of this appeal, we are of the opinion that it shows in a very masterly manner a complete analysis of the evidence which had been given. The Judge-Advocate put forward the evidence without any bias, leaving it entirely to the court-martial to decide its value and what inferences they would draw from it. He concluded his summing-up with these words:

“ On that evidence, Sir, you have got to say whether you are satisfied that the purpose of these men was, as alleged by the prosecution, to get their grievances heard that night at all costs, no matter what authority were going to do about it, in which case you will probably hold that it amounted to a mutiny or whether you are satisfied that all it was was a rather disorderly prank done with no intention of defying authority, in which case you may take the more merciful view and hold that it was not a mutiny.”

E That, I think, put the matter as fairly as it could possibly be put and indeed very favourably to the defence. They were the last words of the Judge-Advocate which the court-martial would hear when they went out to consider their findings, and there are no words of the Judge-Advocate there which would lead the court to think that mere disobedience of an order would amount to mutiny. It was a question of whether there was a defiance of authority.

F I have not thought it necessary to take up time by going through the evidence in detail. The court is quite satisfied that there was evidence on which the court-martial could find on a proper direction that there was a mutiny, and it is not for us to criticise the finding provided there was evidence on which they could come to the decision they did. For the reasons which I have endeavoured to state as shortly as I can, the court is of opinion that there was no misdirection; that, although perhaps criticism could be made of the words the Judge-Advocate used when he made his interlocutory observation, there was a perfectly fair direction and nothing was said by the Judge-Advocate which could have misled the court-martial. Therefore, on all these grounds the appeals should, we think, be dismissed.

G

Appeals dismissed.

Solicitors: *Registrar of the Courts-Martial Appeal Court* (for the appellants);
Director of Army Legal Services (for the Crown).

[*Reported by T. J. KELLY, ESQ., Barrister-at-Law.*]

CARSON (INSPECTOR OF TAXES) v. PETER CHEYNEY'S EXECUTOR.

[CHANCERY DIVISION (Harman, J.), June 3, 4, 6, 1957.]

Income Tax—Profits—Death of taxpayer—Periodical payments under deceased's contracts received by executor—Author's royalty payments—Liability of payments to tax—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), Sch. 1, Sch. D, Cases II, III, VI—Income Tax Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), Sch. D, Cases II, III, VI.

An author entered into three contracts with publishers to write works for publication and into a fourth contract for the publication in the French language of an existing work of his. The royalties received by him under the contracts were assessed to income tax, admittedly correctly, under Case II of Sch. D to the Income Tax Act, 1918. After his death royalties under the contracts subsequently received by his executor were assessed to tax under Case III or alternatively Case VI of Sch. D to the Act of 1918 and of Sch. D to the Income Tax Act, 1952. On appeal,

Held: the royalties were not liable to tax, since they were all professional remuneration to the author for work done and not income from an income bearing asset, in the form of the copyright created by the author, and did not change their nature on his death so as to become assessable under Case III or Case VI.

Gospel v. Purchase ([1951] 2 All E.R. 1071) applied.

Bennett v. Ogston ((1930), 15 Tax Cas. 374) considered.

Appeal dismissed.

[As to the charge of professional earnings to tax under Case II of Sch. D, s. 123 of the Income Tax Act, 1952, ceasing on death, see 20 HALSBURY'S LAWS (3rd Edn.) 241, para. 443, text and note (e); as to the nature of payments charged under Case III of Sch. D, see 20 HALSBURY'S LAWS (3rd Edn.) 247, 248, para. 453; and as to the scope of Case VI of Sch. D, see *ibid.* 281, para. 508.]

For Cases III and VI of Sch. D of Sch. 1 to the Income Tax Act, 1918, and Cases III and VI of Sch. D to the Income Tax Act, 1952, see 12 HALSBURY'S STATUTES (2nd Edn.) 167, 173, and 31 *ibid.* 116, 132 respectively.]

Cases referred to:

- (1) *Gospel v. Purchase*, [1951] 2 All E.R. 1071; [1952] A.C. 280; 32 Tax Cas. 367; 3rd Digest Supp.
- (2) *Bennett v. Ogston*, (1930), 15 Tax Cas. 374; Digest Supp.
- (3) *Asher v. London Film Productions, Ltd.*, [1944] 1 All E.R. 77; [1944] K.B. 133; 113 L.J.K.B. 149; 170 L.T. 17; 2nd Digest Supp.

Case Stated.

The respondent, the sole surviving executor of the will of R. E. Peter S. Cheyney, deceased, appealed to the General Commissioners of Income Tax for Bromley, Kent, against assessments to income tax made on him under Sch. D to the Income Tax Acts, 1918 and 1952, for 1951-52 (totalling £10,000) and 1952-53 (totalling £18,000). The question for determination was whether sums paid to the executor after the death of Peter Cheyney as royalties under agreements entered into by him were assessable to tax under Case III or Case VI of Sch. D.

Peter Cheyney was a well known writer of detective fiction who died on June 26, 1951. During his lifetime he had entered into fifty or sixty agreements to write books or for the publication of books already written. Four of such agreements were put in evidence before the commissioners and it was agreed between the parties that the decision of the court as regards sums paid under those four agreements should apply to moneys paid under all other agreements, unless the court should distinguish one of the agreements from another. All

A the agreements made by Peter Cheyney from which royalties arose could be classified as regards form into one of the categories of which the four were representative. During his lifetime Peter Cheyney was assessed under Case II of Sch. D in respect of the royalties he received from the agreements, as being profits arising from the carrying on of his profession as an author, after deducting therefrom allowable expenses, and the Crown admitted that he was properly so assessed. For the purpose of computing the Case II tax liability, the rule consistently followed was to credit the copyright royalties as receipts on the day they fell due for payment under the agreements with the publishers.

B The assessments for the two years in question comprised sums received by the executor from contracts made by Peter Cheyney and also sums received by the executor from contracts which he had entered into with the publishers after C Peter Cheyney's death. The actual receipts of the executor were: Under contracts made by Peter Cheyney £11,725 19s. 10d. in 1951-52 and £12,026 0s. 5d. in 1952-53; and under contracts made by the executor £598 13s. in 1951-52, and £2,195 15s. 1d. in 1952-53. The executor admitted liability to tax under Sch. D in respect of sums received under contracts made by him, without prejudice to his alternative contention (ii) (a) as regards sums received under contracts D made by Peter Cheyney.

The executor contended: (i) that the sums received by him after Peter Cheyney's death arising from contracts made personally by Peter Cheyney were remuneration earned by Peter Cheyney during his lifetime in following his profession and, seeing that his profession had ceased on his death, such payments could not be taxable as annual payments under Case III or as annual profits or gains under Case VI of Sch. D; (ii) in the alternative, that (a) if the royalties were annual payments falling within Case III of Sch. D, no assessment could be made on the executor in so far as they were payable wholly out of profits or gains brought into charge to tax; (b) if the royalties were annual profits or gains falling within Case VI of Sch. D, they must be considered as accruing from day to day and be computed so far as concerned the year 1951-52 E by excluding such portions of the royalties as had accrued to the date of Peter Cheyney's death. The Crown contended that the sums were annual payments assessable under Case III of Sch. D or in the alternative were assessable under Case VI of Sch. D. The commissioners held that Peter Cheyney derived his remuneration during his lifetime from his professional activities as an author in writing books, that when he wrote them he created copyrights but that any F such copyright did not become an income bearing asset any more than a contract with publishers and that accordingly the sums were rewards for professional services of Peter Cheyney in his lifetime and their nature was not altered by his death so as to make them taxable under Case III or Case VI. They therefore allowed the appeal. The Crown appealed.

G *H. B. Magnus, Q.C., Sir Reginald Hills and A. S. Orr* for the Crown.
H *B. L. Bathurst, Q.C., and C. N. Beattie* for the executor.

Cur. adv. vult.

I June 6. **HARMAN, J.:** This is an appeal by the Crown from a decision of the General Commissioners of Income Tax in favour of the executor of the late Peter Cheyney arising out of receipts by him of large sums in the income tax years 1951-52 and 1952-53, representing periodical payments arising out of contracts made by Mr. Cheyney during his lifetime in the course of carrying on his profession as an author. The point may be shortly stated, though it is none the easier for that. It is whether these payments are to be regarded as remuneration for personal services or professional activities of the deceased received after the cesser of the professional activity, or whether they should be regarded as moneys arising from the exploitation of the author's property, namely, the copyrights in sundry of his books. The facts are stated in the Case to which are annexed four representative contracts, agreed to illustrate

all the contracts made by the author producing money in the years in question. There is, as it seems to me, a considerable difference between the first three agreements and the fourth, for the first three deal with works to be written, in which, therefore, no copyright or property could exist when the agreements were made, whereas the fourth agreement deals with the exploitation in the French language of an existing work, being itself the subject-matter of copyright, though the proposed translation would, when made, have copyright of its own.

It is the contention of the taxpayer that the decision of the House of Lords in *Gospel v. Purchase* (1) ([1951] 2 All E.R. 1071) which is, of course, binding on me, is indistinguishable from the present case. That case concerns receipts by his executors arising out of the professional activities of a film actor known as Leslie Howard, and certainly bears a strong resemblance to the present case. The actor there agreed to perform in and to produce certain film stories in consideration of remuneration which in part was dependent on the success of the films and the profits which might be derived from their exploitation. It was, as the House of Lords held, an agreement for personal services, the written contracts simply providing the machinery by which the services were to be remunerated. When the actor died, the results of his professional activities were still in course of being exploited. He had done everything which the contracts demanded of him, and the payments after his death were, as the House of Lords held, merely residual receipts arising out of his professional activities, and as such not the subject-matter of taxation. This principle is well stated by ROWLATT, J., in *Bennett v. Ogston* (2) ((1930), 15 Tax Cas. 374 at p. 378), and, as this is a classic statement on the subject, I think that I should read it again:

“When a trader or a follower of a profession or vocation dies or goes out of business . . . and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to income tax; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts.”

The subject-matter of each of the agreements in *Gospel v. Purchase* (1) was a film to be brought into existence. This it was which could be exploited and produce income and not the mere posturings of the actor. Nevertheless, the House of Lords held that the payments were not payments arising from the exploitation of the film, but payments for the services of the actor. So here it is said that, in the first three cases anyhow, the author agrees to bring into existence a book or books and to give the right of publishing to the publisher, being remunerated on a royalty basis, and the royalties are payments for the services rendered by the author in writing the book and are not to be treated as the income of property, namely, the copyright.

Again, it is agreed that during the professional life of the actor in *Gospel v. Purchase* (1) and during the professional life of the author in the present case the receipts from agreements of this sort were part of professional remuneration and were taxable under Case II of Sch. D accordingly. Now, the House of Lords held in *Gospel v. Purchase* (1) that the payments were mere professional remuneration and therefore could not be taxed under any but Case II, and, as it was admitted that taxation under that Case must cease when death caused the end of the professional activity, it followed that the Crown had exacted all the tax exigible and could not tax the same subject-matter again by having recourse to Case III or Case VI. The same is said to be true here. These royalties were not taxable under Case III or Case VI during the author's lifetime

- A because they were not what LORD GREENE, M.R., in *Asher v. London Film Productions, Ltd.* (3) ([1944] 1 All E.R. 77) styled "pure income profit": in other words, the expenses of carrying on the profession could be deducted before paying the tax. It is argued that the same subject-matter, namely, payments under these contracts which would have been taxable under Case II had the author lived, cannot change their nature and become taxable under Case III
- B because he is dead.

- The Crown on its side seeks to distinguish *Gospel v. Purchase* (1) and relies on *Bennett v. Ogston* (2). That was a case of a moneylender who, when he died, had outstanding promissory notes on which the debtors continued to pay interest, and it was held that his executors were liable to pay tax under Case III although in his lifetime the interest on the notes had been taxed under Case I as part of the profits of the moneylender's trade. Now, if this be right, and in spite of hesitation expressed by LORD SIMONDS in *Gospel v. Purchase* (1) ([1951] 2 All E.R. at p. 1074), I do not feel at liberty to say that it is not, it seems to show that at least one class of payment, namely, "interest of money", may be taxable under Case III after the trading activity had ceased, though taxed under Case I while a trade was in progress. It was easy to see in that case that debts outstanding at the moneylender's death earning interest by virtue of the promissory notes continued to be a taxable subject-matter. So, says the Crown, royalties outstanding at the death may be taxed under Case VI. The former is the result of a trade activity, namely, moneylending, and the latter the result of a professional activity, namely, the writing of books. The distinction seems to me to be an extremely fine one, and to be well expressed by JENKINS, L.J., in *Gospel v. Purchase* (1) in these words ([1951] 2 All E.R. at p. 1079), after discussing *Bennett v. Ogston* (2):

- "Applying these principles to the present case, I ask myself whether under each of the contracts A, B and C Mr. Howard is to be regarded as having rendered his professional services for remuneration consisting of a lump sum, or lump sums, plus the notional capital equivalent of a new source of income in the shape of the right to receive the shares of receipts or profits, or simply as having rendered those services for remuneration consisting of a lump sum, or lump sums, plus a further sum consisting of the share of receipts or profits, whatever it might amount to."

- Now, so far as the classes represented by the first three contracts here are concerned, I feel that the royalty payments ought to be regarded as professional remuneration to the author for his services to be rendered in writing the book contracted for. In these cases there was nothing in the nature of copyright in existence to be exploited like the money in the moneylender's case, and I think that they fall within the second category specified by the lord justice. I feel much more doubt about the fourth case because there was already at the date of the contract a subject-matter, namely, copyright, in existence which it may be said that the owner was exploiting. In other words, this was not a contract for services to be rendered, but a contract to receive payments for a licence to be given. On the whole, however, I feel that the distinction is too fine and that all the contracts should be looked at as part of the professional activities of the author. These should be taxed year by year, and, if the Crown did not take these potential receipts into account while the professional activities were continuing, it must be taken to have exacted all the tax exigible and cannot by appealing to another Case exact further tax for the same activity. It is to be observed that in at least one of the instances in *Gospel v. Purchase* (1) the scenario of the film (in itself the subject-matter of copyright) was in existence and was the actor's property, but this was held to make no difference.

I think that I ought, before concluding, to read the speech of LORD ASQUITH OF BISHOPSTONE in *Gospel v. Purchase* (1). His Lordship said this ([1951] 2 All E.R. at p. 1075):

"It seems quite clear that the payments the liability of which to tax is in issue were exclusively the fruit or aftermath of the professional activities of Mr. Leslie Howard during his lifetime. This was, as a matter of historical fact, their source, and their only source. The fact that he died before some of this fruit had been garnered or its amount could be ascertained cannot alter that historical fact. He, and he alone, had done everything necessary to provide the harvest."

He then cites the passage which I have already read from *Bennett v. Ogston* (2) and continues (*ibid.*):

"It is, however, contended by the Crown that in *Bennett v. Ogston* (2) the reason why the principle involving exemption did not apply was that when the moneylender died there was outstanding an income bearing asset (*viz.*, that part of the principal which was then unrepaid) which continued to earn income, as it were, in its own right. It was argued for the Crown that the same was the case here, the income bearing asset consisting of the contracts made by Mr. Leslie Howard whereunder the payments in question were posthumously made. There seems to me, however, to be a very clear distinction between 'income bearing assets' for the purpose of this type of case and the contracts in question. If Mr. Leslie Howard had stipulated for payment in blocks of shares or bonds, or any other instruments which by their independent vitality generate income, the dividends or interest might well have been taxable in the hands of his executors. The contracts in the present case enjoy, in my view, no such independent vitality. The consideration for what Mr. Howard was to do—to act or manage—was not the grant of a contract or contracts, but the payment of money under the terms of those contracts. Mr. Howard acted for money; he did not act for contracts. The contracts were mere incidental machinery regulating the measure of the services to be rendered by him, on the one hand, and, on the other, that of the payments to be made by his employers. They were not the source, but the instrument, of payment, and his death, in my view, did nothing to divest them of that character."

Every word of that could serve for a description of the present case, and I think that I am bound by it to hold that the conclusion which I ought to reach must be the same and to dismiss this appeal, which I do.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Frere, Cholmeley & Nicholsons* (for the executor).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

NOTE.

R. v. MOORE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and Devlin, JJ.), June 25, 1957.]

Criminal Law—Appeal—Abandonment of appeal—Application to withdraw notice of abandonment—No power to entertain application unless abandonment through mistake—Appeal deemed to be dismissed when notice of abandonment given—Criminal Appeal Rules, 1908 (S.R. & O. 1908 No. 227), r. 23.

[For the Criminal Appeal Rules, 1908, r. 23, see 6 HALSBURY'S STATUTORY INSTRUMENTS 50.]

Application.

The applicant, Leslie Arthur Moore, was convicted at Hertfordshire Quarter Sessions on Feb. 13, 1957, of shopbreaking, larceny and wounding, and was sentenced to five years' concurrent imprisonment on each of the three charges.

On Feb. 21, 1957, the applicant applied for leave to appeal but on Mar. 5 he gave notice of abandonment of his appeal. The applicant now applied for leave to withdraw the notice of abandonment.

The applicant did not appear and was not represented.

LORD GODDARD, C.J.: The court want to take this opportunity of saying what is their view with regard to withdrawal of notice of abandonment of appeal. The Criminal Appeal Act, 1907, says nothing about prisoners who have once abandoned their appeals having a right to apply for leave to withdraw the notice of abandonment. The Criminal Appeal Rules, 1908, which are statutory rules, provide (by r. 23) that on a notice of abandonment of appeal being given the appeal is deemed to be dismissed. This appeal, therefore, has accordingly been dismissed.

There have been from time to time, indeed from quite early days in the history of the court, applications for leave to withdraw a notice of abandonment, and it is exceedingly difficult to understand what power the court have to give leave to withdraw a notice of abandonment, considering that by the Rules of 1908, which have the force of a statute, the appeal has been dismissed. An examination of the cases* has shown that, except in one case at any rate, the court have only allowed notice of abandonment to be withdrawn if they are satisfied that there has been some mistake. No doubt if a case could be made out that a prisoner had in some way or another been fraudulently led or induced to abandon his appeal, the court in the exercise of their inherent jurisdiction would say that the notice was to be regarded as a nullity; but where there has been a deliberate abandonment of an appeal, in the opinion of the court there is no power or right to allow the notice of abandonment to be withdrawn and the appeal reinstated because, the appeal having been dismissed, the court have exercised their powers over the matter and are functus officio. Accordingly, the court will not entertain applications for the withdrawal of notices of abandonment unless something amounting to mistake or fraud is alleged, which, if established, would enable the court to say that the notice of abandonment should be regarded as a nullity. Though I do not wish to encourage prisoners to petition the Home Office, it seems to the court that once the appeal has been dismissed, as it is dismissed when a notice of abandonment is received, the only thing that a prisoner can do is to petition for the exercise of the prerogative or for the Home Secretary to take such steps as he thinks right.

* See, e.g., *R. v. Van Dyn*, (1932), 23 Cr. App. Rep. 150 and *R. v. Pitman*, (1916), 12 Cr. App. Rep. 14, where the court said that in the absence of "special circumstances" leave to withdraw notice of abandonment of appeal would be refused.

Therefore, this application is refused. There is no ground whatever here for saying that the notice of abandonment was given under any misapprehension or that the prisoner was misled into giving it. A

I think that a form of application, called form 9 (a), has been printed and used on which prisoners apply for leave to withdraw their notice of abandonment. That form has never been scheduled to the Rules of 1908, and therefore has no effect, because the rules provide for certain definite forms being used for certain definite purposes. This form which has been printed has no force whatever, and we have given instructions for the forms to be withdrawn. We feel that if a form is distributed to prisoners giving them an opportunity to apply to withdraw their notice of abandonment, they may think that they have some right under the Rules of 1908 or the Act of 1907 to make this application. There is no such right and there is no such rule, and there should be no such form. Accordingly, that form will be withdrawn from circulation. B C

Application dismissed.

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

R. v. MEDICAL APPEAL TRIBUNAL, *Ex parte* BURPITT. D

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Devlin, J.J.), June 28, 1957.]

Industrial Injury—"Organ of the body"—*Injury to finger*—*Previous injury to finger of other hand*—*Whether hands were two similar organs, the functions of which would be interchangeable or complementary*—*National Insurance (Industrial Injuries) (Benefit) Regulations, 1948 (S.I. 1948 No. 1372), reg. 2 (5).* E

Construing reg. 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, in accordance with the ordinary meaning of words, a person's hand is "an organ of his body which in a person whose physical condition is normal would be one of two similar organs, the functions of which would be interchangeable or complementary" for the purposes of that regulation. F

[As to disablement benefit, see SUPPLEMENT TO 34 HALSBURY'S LAWS (2nd Edn.) para. 1467; and for the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, reg. 2 (5), see 15 HALSBURY'S STATUTORY INSTRUMENTS 324.] G

Motion for certiorari.

The claimant, who had sustained a disabling injury to two fingers of his left hand while subject to disability due to a previous injury to a finger of the right hand, moved for certiorari to quash a decision of the Medical Appeal Tribunal at London, dated Oct. 15, 1956, that the old injury to the right hand was not to be taken into account in determining his disability benefit for the injury to the left hand. The facts appear in the judgment of LORD GODDARD, C.J. H

D. J. Turner-Samuels for the claimant.

Rodger Winn for the respondents, the Minister of Pensions and National Insurance and the Medical Appeal Tribunal at London.

LORD GODDARD, C.J.: Counsel moves on behalf of one William George Burpitt, the claimant, to bring up and quash a decision of the Medical Appeal Tribunal for the London District given on Oct. 15, 1956, under the National Insurance (Industrial Injuries) Act, 1946. The finding of the tribunal is in these terms: I

"The assessment by the medical board of three per cent. for life in respect of the injured left index and middle fingers is not in question. On behalf of the claimant, however, it has been submitted that the 'paired organs'

A principle should be applied because of a previous injury, eight years ago, to the right middle finger. We are unable to accept this submission. The two fingers concerned are not 'organs' in our opinion. Even could they be so regarded their functions are not interchangeable nor complementary."

B The matter arises in this way: The claimant, Mr. Burpitt, sustained an injury to his left hand involving his left index and middle fingers for which he was entitled to compensation*. He had some years ago sustained an injury to the right middle finger of his right hand—the exact nature of the injury does not matter—and he therefore contended that the two injuries should be aggregated and that he should be compensated on the footing that it was a more serious injury to him losing his fingers of the left hand because of the previous injury to his right hand.

C By reg. 2 (5) of the National Insurance (Industrial Injuries) (Benefit) Regulations, 1948, which are made under the Act of 1946, it is provided:

D "Where as a result of the relevant accident a claimant has suffered an injury to an organ of his body which in a person whose physical condition is normal would be one of two similar organs, the functions of which would be interchangeable or complementary, in assessing the extent of the disablement resulting from the relevant loss of faculty for any period during which the claimant may be expected to be subject to any disability resulting from that injury—

E "(a) any disability in respect of the other organ to which the claimant would in any case have been subject by reason of a congenital defect, or an injury or disease received or contracted before the relevant accident and not attributable to any accident against which he was insured under the Act, shall nevertheless be treated as having been incurred as a result of the relevant loss of faculty;

F "(b) subject as hereafter provided in this regulation, any disability in respect of the other organ to which the claimant would not have been subject but for some injury or disease received or contracted after the relevant accident and not attributable to that accident or any other accident against which he was insured under the Act, shall be treated as having been incurred as a result of the relevant loss of faculty."

G That, speaking colloquially, means that the two injuries are to be aggregated together to find the total disability from which the claimant suffered.

H The first question that arises is whether fingers are organs. A finger is part of a hand. I think we have to consider not only whether a finger is an organ but also whether a hand is an organ. This seems to me to be the most material thing because, if a hand is an organ, an injury to a finger is covered because the finger is part of the hand. I can understand that medical tribunals have had difficulties on this matter. I think that a layman, at any rate, would have thought of a hand as a limb and not as an organ; but we find the definition of "organ" in the most authoritative work, the OXFORD DICTIONARY, is

"a part or member of an animal adapted by its structure for a particular vital function, as digestion, respiration, excretion, reproduction, locomotion, perception, etc."

I The dictionary goes on to give various illustrations. Locomotion would seem to include legs or feet, but it is not necessary for us to decide that. We have to construe these regulations according to the ordinary meaning of words†.

* I.e., disablement benefit under the National Insurance (Industrial Injuries) Acts, 1946, s. 12 (1), 1953, s. 3 (1).

† During the course of the argument, when counsel referred to medical dictionaries for their definitions of "organ", DEVLIN, J., had indicated that such dictionaries would not assist the court because it was concerned with the ordinary meaning of the word.

We have to decide the question whether or not fingers, part of the hand, are an organ. A hand is an organ; it is an organ of the human body which enables grip to be applied to any article. The hand is the prehensile part of the arm; the hand is the organ of prehension. The fingers are part of the organ of prehension because they enable a man to grip, and if a man has no fingers, he has no grip. I think, therefore, that on the face of this award there is an error in the finding that the two fingers concerned are not organs. A B

Then the award goes on:

“ Even could they be so regarded their functions are not interchangeable nor complementary.”

Once it is established that hands are organs, it must follow that they are interchangeable or complementary because one hand is complementary to the other. Thus, if a person grips and lifts a weight too heavy for one hand to lift, he must use his other hand also to lift it. I do not think that “ complementary ” can be limited to such things as the eyes and kidneys, but once it is established that the hand, and fingers as part of the hand, are organs, it seems to me that there is a pair of them. One has a pair of hands in the same way as a pair of legs. I do not want to be taken as deciding in this case that legs are necessarily organs; that may have to be decided in some other case. We are concerned with hands and fingers. For the reasons which I have endeavoured to give the medical tribunal were in error and the opinion that should prevail is that fingers are part of an organ, the organ being the hand, and that hands are complementary organs. For these reasons the motion succeeds. C D

BYRNE, J.: I agree. E

DEVLIN, J.: I agree. The only doubt which I think that there may be about the point is that in ordinary language a hand would be considered as part of a limb, namely, the arm, rather than as an organ, and reg. 2 (5) makes no reference to limbs. I cannot help feeling that such an omission must be deliberate, because whoever framed the regulation must have been well aware that there are pairs of limbs as well as pairs of eyes and of other organs of sense, and it would have been natural to include the limbs specifically if that is what was intended. However, as my Lord has said, we have not here to consider the case of arms or legs, which might well be governed by different considerations, but the case of a hand and fingers, and, for the reasons which he has given, I agree that the hand should be regarded as an organ. F

Order for certiorari made. G

Solicitors: *W. H. Thompson* (for the claimant); *Solicitor, Ministry of Pensions and National Insurance* (for the respondents, the Minister of Pensions and National Insurance and the Medical Appeal Tribunal).

[*Reported by* HENRY SUMMERFIELD, Esq., *Barrister-at-Law.*]

A

THE FEHMARN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), June 6, 7, 1957.]

Admiralty—Jurisdiction—Damage to cargo—Contract providing for disputes to be judged by foreign court—Discretion to allow proceedings in England—Administration of Justice Act, 1956 (4 & 5 Eliz. 2 c. 46), s. 1 (1) (g).

B

Conflict of Laws—Stay of proceedings—Admiralty action—Damage to cargo—Contract providing for disputes to be judged by foreign court—Discretion to allow proceedings in England—Administration of Justice Act, 1956 (4 & 5 Eliz. 2 c. 46), s. 1 (1) (g).

C

A cargo was loaded at a Russian port by a Russian shipper on board the Fehmarn, a ship owned by the defendants, who were a German company. The cargo was, by the terms of the bill of lading, shipped in apparent good order and condition and was to be delivered at the port of London in like order and condition. The plaintiffs, an English company, purchased the cargo and became the holders of the bill of lading, thereby agreeing to be bound by its terms, one of which was that all questions and disputes should be determined in the U.S.S.R. At the port of London the cargo was discovered, according to the plaintiffs, to be contaminated and the damage was surveyed. The plaintiffs issued a writ claiming against the defendants damages for breach of the contract evidenced by the bill of lading. The only matter of evidence, so far as the plaintiffs' case was concerned, that did not arise in England was the condition of the goods when shipped, as regards which the bill of lading contained the statement mentioned above. The Fehmarn was a frequent trader to England. The defendants moved to set aside the writ for want of jurisdiction on the ground that by the contract the parties had agreed that all disputes arising under it should be judged in the U.S.S.R., and contended alternatively that all proceedings should be stayed.

D

E

Held: (i) the Admiralty court had jurisdiction, having regard particularly to the terms of s. 1 (1) (g) of the Administration of Justice Act, 1956*.

F

The Cap Blanco ([1913] P. 130) and *The Athenee* ((1922), 11 Lloyd's Rep. 6), applied.

G

(ii) although where the contract between the parties provided for disputes being referred to a foreign tribunal the court would *prima facie* stay proceedings in England, yet in the circumstances of the present case, and having regard to the fact that the ship did not belong to an organisation domiciled in the U.S.S.R., the plaintiffs had shown sufficient grounds to displace the *prima facie* rule and to entitle them to proceed in the Admiralty court in England.

H

[As to Admiralty jurisdiction in respect of actions for damage to cargo, see 1 HALSBURY'S LAWS (3rd Edn.) 63, para. 125, and 30 HALSBURY'S LAWS (2nd Edn.) 864, para. 1144, note (y); and for cases on the subject, see 1 DIGEST 146-148, 524-560.

As to a stay of proceedings in England where parties have agreed to submit disputes to a foreign tribunal, see 7 HALSBURY'S LAWS (3rd Edn.) 172, para. 308, note (m); and for cases on the subject, see 2 DIGEST 364, 329-331.

I

For the Administration of Justice Act, 1956, s. 1 (1) (g), see 36 HALSBURY'S STATUTES (2nd Edn.) 3.]

Cases referred to:

(1) *The Cap Blanco*, [1913] P. 130; 83 L.J.P. 23; 109 L.T. 672; 1 Digest 148, 547.

(2) *The Athenee*, (1922), 11 Lloyd's Rep. 6.

(3) *Bristol Corp'n. v. Aird (John) & Co.*, [1913] A.C. 241; 82 L.J.K.B. 684; 108 L.T. 434; 77 J.P. 209; 2 Digest 370, 367.

* For the terms of s. 1 (1) (g), see footnote, p. 709, post.

- (4) *Racecourse Betting Control Board v. Secretary for Air*, [1944] 1 All E.R. 60; A [1944] Ch. 114; 113 L.J.Ch. 129; 170 L.T. 29; 2nd Digest Supp.

Motion.

The defendants, the owners of the Fehmarn, moved to set aside the writ and to stay all subsequent proceedings in an action brought by the plaintiffs, as the owners of cargo lately laden on board the Fehmarn, claiming damages for breach of contract. The ground for the defendants' application was that the parties by the contract had agreed that all claims and disputes arising under it "shall be judged in the U.S.S.R.". The facts appear in the judgment.

D. H. Hene for the defendants.

H. V. Brandon for the plaintiffs.

WILLMER, J.: The plaintiffs claim under a bill of lading which acknowledges the shipment, by a Russian organisation called V/O Sojuzhimexport, on board the defendants' steamship then lying in the port of Ventspils (which I am told is the same as Windau), of 506,389 kilos of gum spirits of turpentine in apparent good order and condition, to be delivered at the port of London in the like good order and condition. The plaintiffs, as I understand their claim, have become the holders of that bill of lading. I am told that a charterparty is in existence; but the bill of lading makes no reference to it and, in those circumstances, it appears to me that the plaintiffs are strangers to the charterparty, and that the whole contract, as between them and the owners of the ship, is contained in the bill of lading. The bill of lading by its terms provides:

"The shipper, the receiver of goods and the holder of the bill of lading as well as any other person interested hereby expressly accept and agree to all printed, written or stamped provisions, terms and reserves of this bill of lading, including those on the back hereof."

On the back of the bill of lading is a very large assortment of terms, conditions and exceptions. Those which are important for the determination of this case are Nos. 25, 26 and 27. No. 25 provides that:

"General average shall be adjusted according to York-Antwerp Rules, 1924, and the average adjustment shall be prepared in the U.S.S.R."

No. 26 says:

"All claims and disputes arising under and in connexion with this bill of lading shall be judged in the U.S.S.R."

No. 27 says:

"All questions and disputes not mentioned in this bill of lading shall be determined according to the Merchant Shipping Code of the U.S.S.R."

The plaintiffs' claim, as I understand it, is founded on an allegation that the turpentine in question arrived in the port of London in a contaminated condition. It is in those circumstances that the plaintiffs instituted this action against the ship, claiming damages for breach of the bill of lading contract. For the defendants it has been contended that this court is without jurisdiction, having regard to the express terms of the contract, to which I have referred, and to which the plaintiffs, on becoming holders of the bill of lading, bound themselves. In such circumstances I am invited to set aside the writ for want of jurisdiction. It should, I think, be observed in that connexion that the defendants did in fact enter an appearance under protest and obtained leave to move the court to set aside the writ. In the alternative, as I understand the argument, it is contended that, even assuming that the court has jurisdiction, I ought in my discretion to refuse to exercise that jurisdiction having regard to the express terms of the contract between the parties. So far as any question of principle is concerned, I do not think that the case raises any difficulties. My difficulty is with regard to the facts of the particular case and as to the appropriate course to be taken having regard to those facts.

A So far as jurisdiction is concerned, in my judgment the defendants' contention that there is no jurisdiction is quite unarguable, having regard particularly to the terms of s. 1 (1) (g)* of the Administration of Justice Act, 1956. There is no doubt in my judgment that that sub-section gives the court Admiralty jurisdiction in respect of a claim such as this. I am fortified in arriving at that conclusion by the express decision in *The Cap Blanco* (1) ([1913] P. 130), where a similar point was taken, but the court decided that there was no question of want of jurisdiction, having regard to s. 6 of the Admiralty Court Act, 1861. I am also fortified in that conclusion by a study of the proceedings in *The Athenae* (2) ((1922), 11 Lloyd's Rep. 6), which was decided by the Court of Appeal, consisting of BANKES, WARRINGTON and ATKIN, L.JJ. I specifically name the three lords justices who took part in the hearing of that appeal, and

B I would like to couple with this the fact that it was argued by Mr. Langton and Mr. Balloch, both very formidable exponents of the law with regard to the jurisdiction of this court. It is clear from the report of that case that the whole discussion of the case, which raised a problem very similar to that in the present case, proceeded on the basis that there was jurisdiction. The question which was being debated was whether or not the judge in his discretion ought to stay the proceedings. BANKES, L.J., in giving judgment said (*ibid.*):

"It is not disputed that this contract is one of the class in which a judge of the courts of this country has a discretion as to whether he will or will not stay the action to enable the parties to go to the tribunal which they selected."

E ATKIN, L.J., remarked (*ibid.*):

"... such a bargain is treated as equivalent to an arbitration clause."

He then cited from the speech of LORD MOULTON in *Bristol Corp'n. v. John Aird & Co.* (3) ([1913] A.C. 241). Having regard to those authorities, and to the express provisions of the Act of 1956, I am satisfied that it is not open to me to say that there is no jurisdiction. In those circumstances I could not in any case set aside the writ.

F An extremely difficult question, however, arises, whether in my discretion I ought to stay these proceedings on the ground that the parties have by agreement selected a foreign tribunal. In the course of the argument a number of cases has been cited to me, in which similar questions have arisen, and which have been treated as analogous to cases in which there was an arbitration clause. I think that it is right, however, without expressing any opinion of my own on the matter, to refer to the remarks made by MACKINNON, L.J., in *Racecourse Betting Control Board v. Secretary for Air* (4) ([1944] 1 All E.R. 60), where the learned lord justice said (*ibid.*, at p. 65):

"It is, I think, rather unfortunate that the power and duty of the court to stay the action was said to be under the Arbitration Act, 1889, s. 4. In truth, that power and duty arose under a wider general principle, namely, that the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined. The Arbitration Act, 1889, s. 4, only applies this principle to one type of such an agreement."

I It is not, I think, necessary for me to express any opinion of my own whether the court in a case of this character has an inherent jurisdiction to be exercised on wide general principles, or whether it merely proceeds by way of analogy to cases where there is a submission under the Arbitration Act. Whichever

* Section 1 (1) of the Administration of Justice Act, 1956, provides:

"The Admiralty jurisdiction of the High Court shall be as follows, that is to say, jurisdiction to hear and determine any of the following questions or claims— . . . (g) any claim for loss of or damage to goods carried in a ship; . . ."

be the correct view it is well established that, where there is a provision in a contract providing that disputes are to be referred to a foreign tribunal, then, prima facie, this court will stay proceedings instituted in this country in breach of such agreement, and will only allow them to proceed when satisfied that it is just and proper to do so. That fairly states, I think, the principle to be applied, and counsel for the plaintiffs frankly admitted that the burden of proof was on him to displace the prima facie right of the defendants to have these proceedings stayed and to have the case tried by the chosen foreign tribunal. Where there is an express agreement to a foreign tribunal, clearly it requires a strong case to satisfy this court that that agreement should be overridden and that proceedings in this country should be allowed to continue. However, in the end it is, and must necessarily be, a matter for the discretion of the court, having regard to all the circumstances of the particular case. That being so, I do not think that it would be profitable to refer in detail to the numerous cases that were cited to me, where the principle as I have tried to state it has been stated over and over again, but the discretion of the court was exercised one way or other having regard to the circumstances of the particular case.

I must apply my mind now to the facts of this particular case. It is a case of cargo loaded at a Russian port by a Russian shipper on board a German ship, a ship which I should remark is said by the defendants themselves to be a frequent trader to this country. The cargo was ultimately bought by the present plaintiffs, an English company, who are the holders of the bill of lading. In taking over the bill of lading they did, of course, agree to be bound by its terms. It is the fact that the plaintiffs are persons domiciled in this country. The claim arises in this country. This is where the damage sued for was discovered. It is in this country that the cargo was surveyed and the damage ascertained. According to an affidavit by a member of the firm of solicitors acting for the plaintiffs, virtually all the evidence which would have to be called on behalf of the plaintiffs is to be found in this country; that is to say, such witnesses as may be necessary with regard to the plaintiffs' title to sue, such witnesses as can speak to the condition of the cargo on its discharge, and such witnesses as can speak to the condition of the ship, which is the subject-matter complained of. The only matter of evidence, so far as the plaintiffs' case is concerned, which does not arise in this country is with regard to the condition of the cargo on shipment at the Russian port. With regard to that the plaintiffs are, I suppose, in the first instance at any rate, entitled to rely on the representation in the bill of lading that it was shipped in apparent good order and condition. I say no more than that it may be that they will not desire to call any evidence on that aspect of the case. In those circumstances it is argued by the plaintiffs that far and away the most convenient place to try this dispute, in the events which have happened, would be in this country. Moreover, it is contended that that would be no hardship to the defendants, who are Germans, and, therefore, are equally foreigners in Russia and in this country. Reliance, however, is placed on the fact that the ship is said to be a regular trader to this country, so that, in so far as it is desired by the defendants to call witnesses from the ship, that could no doubt be done with convenience, in accordance with the usual practice of this court of fixing a date of trial at the convenience of the parties.

On the other side, stress was properly laid, in the first instance, on the fact that the parties to this contract have specifically agreed to take their disputes to the Russian court. Moreover, reliance was placed on the fact that there is reason for inferring that, wherever the dispute is to be tried, Russian law would be the proper law to be applied. So far as the ship is concerned, as I have already said, she is, so to speak, a neutral. It is no worse for the defendants to try the case in Russia than it is to try the case in England. Moreover, the defendants suggest, through their counsel, although this is not on affidavit, that they may desire to

- A adduce evidence to show that the railway wagons in which the cargo was delivered to the ship were contaminated, presumably for the purpose of showing that that was the reason for the contamination, and that it was not due to anything on board the ship. In those circumstances it is contended that it would be a hardship to the defendants to have the case tried here, when it might be that such a vital piece of evidence could only be obtained for them in Russia.
- B I have already said that I do not find this at all an easy matter to determine. One's natural inclination is to say that these parties have made their bargain and should keep to it. Moreover, I think that it is right to say that this court must assume, and I do assume, that equal facilities for trying the case exist in Russia as exist in this country, and that the parties will get just as fair a trial in Russia as they will get here. Having made all due allowances for that,
- C in the end I have come to the conclusion that the plaintiffs have shown sufficient grounds for displacing the *prima facie* presumption, grounds which are, in my judgment, sufficient to entitle them to take advantage of the undoubted jurisdiction of this court.

- Having read the solicitors' correspondence I am bound to say that I cannot fail to be left with the impression that the defendants do not really want this case to be tried in Russia. They have in the course of correspondence already expressed willingness, on certain terms, to have it disposed of in this country, and one is left with the suspicion that the principal object of the defendants is not to achieve a trial in Russia, but merely to make it more difficult for the plaintiffs to assert their claim. In making those observations I do not wish it to be thought that I am accepting the argument addressed to me on behalf
- E of the plaintiffs to the effect that the defendants have not acted *bona fide*. I do not wish it to be thought that I am making any observations on the *bona fides* of the defendants. They are entitled to fight their case with all the weapons at their disposal. The weapon which they have chosen in this motion is a perfectly legitimate weapon to use. It is, however, the fact that, if I were to stay these proceedings which have already been launched, I might be depriving
- F the plaintiffs of any remedy at all. It is not as though the defendants' ship was a Russian ship belonging to an organisation domiciled in Russia. There seem to be no possible guarantee that, if I ordered these proceedings to be stayed so as to enable the plaintiffs to start alternative proceedings in Russia, any judgment obtained would necessarily be of any value to them at all. It is equally true to say that the ship, being a German ship and not yet having been
- G arrested, may keep clear of this country so as to avoid arrest, and that in those circumstances there is no guarantee that a judgment obtained in this country would be enforceable. The fact is, however, that proceedings are at least under way in this country. If I stay them and leave the plaintiffs to start afresh in Russia costs will be thrown away, there will inevitably be delay, and I apprehend that, if the plaintiffs' witnesses have to go to Russia, there will be very considerable added expense in disposing of the case. All that, I think, is sufficient to justify me in the conclusion which I have already stated, namely, that the plaintiffs have discharged the burden of proof which is on them. In those circumstances not only do I not accede to the motion to set the writ aside, but also in my discretion I decline to stay the proceedings.
- H

Order accordingly.

Solicitors: *Bentleys, Stokes & Lowless* (for the defendants); *Clyde & Co.* (for the plaintiffs).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

WILLIAM LACEY (HOUNSLOW), LTD. v. DAVIS.

[QUEEN'S BENCH DIVISION (Barry, J.), Feb. 1, 4, 15, 1957.]

Contract—Quantum meruit—Work of estimating, exceeding the normal, done by building contractor after submitting tender in expectation of receiving contract—Estimates used for extraneous purposes—No contract concluded—Right to remuneration, as on a quantum meruit.

D., the owner of certain premises, which had suffered war damage, obtained tenders from three builders, including the plaintiffs, for the rebuilding of the premises as a shop with residential flats above. The plaintiffs' tender, which was received in January, 1951, was the lowest and the plaintiffs were led to believe that they would receive the contract. At the request of D.'s agents, they then calculated the timber and steel required for the proposed building for the purpose of obtaining the necessary licences, and they also submitted their estimate for the notional reconstruction of the building as it was before the war damage and a schedule of the basic prices on which their original tender was based, in order to enable D. to negotiate with the War Damage Commission the amount payable to him under the War Damage Act, 1943. A licence in respect of the original plans having been refused by the Ministry of Works, the plaintiffs were asked to submit a revised estimate in respect of new plans, although D. did not intend to decide on the type of house which he proposed to erect until the amount of his war damage claim had been agreed. The plaintiffs undertook a considerable amount of work in preparing their revised estimate, which was submitted in December, 1951, and they also provided further particulars required by D. for the War Damage Commission. As a result of the estimates and the other information provided by the plaintiffs, the amount receivable by D. from the War Damage Commission was substantially increased. After the commission's decision had been given in April, 1952, the plaintiffs were asked to submit another estimate in regard to revised plans and, later, to make still further amendments to the new estimate. After they had complied with these requests they were informed that D. intended to employ another builder to rebuild the premises. Subsequently D. sold the premises instead of having them rebuilt. In an action by the plaintiffs claiming (a) damages for breach of contract for the reconstruction of the premises, and, alternatively, (b) remuneration, as on a quantum meruit, in respect of the work done by them (with the exception of the work done on their original tender), the court found, on the first claim, that no binding contract was ever concluded between the parties. On the alternative claim,

Held: a promise should be implied on the part of D. to pay a reasonable sum to the plaintiffs for the services rendered by them in respect of which they claimed remuneration, because (a) the whole of the work fell right outside the normal work which a builder, by custom and usage, normally performed gratuitously when invited to tender for the erection of a building (see p. 716, letter F, post), and (b) the proper inference from the facts was that the work was done under a mutual belief and understanding that the building was being reconstructed and that the plaintiffs were obtaining the contract (see p. 719, letter I, post).

Per CURIAM: in its early history [the action for quantum meruit] was, no doubt, a genuine action in contract, based on a real promise to pay, although that promise had not been expressed in words and the amount of the payment had not been agreed. Subsequent developments have, however, considerably widened the scope of this form of action, and in many cases the action is now founded on what is known as "quasi-contract", similar, in

- A** some ways, to the action for money had and received. In these quasi-contractual cases the court will look at the true facts and ascertain from them whether or not a promise to pay should be implied, irrespective of the actual views or intentions of the parties at the time when the work was done or the services rendered (see p. 717, letter D, post).
- B** [**Editorial Note.** In recent years builders' estimates have served purposes other than the sole purpose of ascertaining the cost of a proposed erection or alteration; examples of such other purposes are the uses of estimates in relation to war damage claims or building licences (see p. 720, letter E, post). The present case illustrates that if estimates are obtained in reality for such purposes they should be paid for in default of agreement to the contrary, if the builder is not in fact employed to carry out the work whose cost he has estimated.
- C** As to payment to building contractors, see 3 HALSBURY'S LAWS (3rd Edn.) 471, 472, paras. 905-908; and for cases on the subject, see 7 DIGEST 373-375, 165-170.
- As to payment on a quantum meruit for services rendered, see 8 HALSBURY'S LAWS (3rd Edn.) 111, para. 192.]
- D** Cases referred to:
- (1) *Craven-Ellis v. Canons, Ltd.*, [1936] 2 All E.R. 1066; [1936] 2 K.B. 403; 105 L.J.K.B. 767; 155 L.T. 376; 9 Digest (Repl.) 559, 3696.
 - (2) *Re Allison, Johnson & Foster, Ltd., Ex p. Birkenshaw*, [1904] 2 K.B. 327; 91 L.T. 66; sub nom. *Re Allison, Johnson & Foster, Ltd., Ex p. Carlill, Birkinshaw & Ferguson*, 73 L.J.K.B. 763; 10 Digest (Repl.) 1050, 7280.
- E** (3) *Upton-on-Severn Rural District Council v. Powell*, [1942] 1 All E.R. 220; 2nd Digest Supp.
- (4) *Landless v. Wilson*, (1880), 8 R. (Ct. of Sess.) 289; 18 Sc.L.R. 206; 7 Digest 441, d.
- Action.**
- F** In this action the plaintiffs, William Lacey (Hounslow), Ltd., who carried on the business of builders, claimed (a) damages for breach of contract for the reconstruction of war-damaged premises, known as 47, Vanston Place, Fulham; and (b) alternatively, remuneration, as on a quantum meruit, in respect of work done by them in connexion with the reconstruction scheme. The original defendant, Mr. A. B. Davis, died after the commencement of the proceedings and his personal representatives were substituted as defendants.
- G** The premises had been bought by Mr. Davis with the benefit of a "cost of works" claim* under the War Damage Act, 1943, and he proposed to rebuild them as a shop with an office floor and residential flats above. To organise and supervise the work of reconstruction he employed a firm of surveyors, Messrs. Portal, Hyatt and Day, who obtained tenders from three builders, including the plaintiffs. The tenders were in respect of a more expensive scheme than that
- H** which Mr. Davis intended in fact to carry out. The plaintiffs' first tender was made on Jan. 15, 1951, and was based on properly prepared drawings and bills of quantities submitted to them. The tender, which amounted to a total sum of £9,114, was considerably lower than those of the other builders. The plaintiffs were informed of this fact and were led to believe that they would receive the contract. They were then asked to calculate the timber and steel requirements
- I** for the building, for the purpose of obtaining the necessary licences, and they did so. They were also asked to submit their estimate for the notional reconstruction of the building as it was before it was damaged and their schedule of basic prices on which their original tender was based, so as to enable Mr. Davis, through the surveyors, to negotiate a "permissible amount"† with the War Damage Commission in connexion with the war damage claim. This estimate, which amounted

* See s. 6, s. 7 and s. 8 of the War Damage Act, 1943.

† See s. 8 (2) of the War Damage Act, 1943; 26 HALSBURY'S STATUTES (2nd Edn.) 479.

to £7,650, and which had no connexion with any reconstruction scheme then contemplated by Mr. Davis, was submitted by the plaintiffs, together with a schedule of basic prices, on Apr. 6, 1951. A

In the meanwhile, in March, 1951, a licence for the original scheme was refused by the Ministry of Works, and Mr. Davis decided, tentatively, to rebuild the premises as a shop with three residential flats above it, although he did not propose to decide on the type of building which he intended to erect until the amount which he would receive in respect of the war damage claim had been agreed. In the autumn of 1951 the War Damage Commission assessed the "permissible amount" expendable on the construction of the building at the sum of £4,970. Towards the end of November, 1951, the plaintiffs were asked to submit a revised estimate in accordance with specifications supplied to them, and it was proposed to use the revised estimate in an endeavour to obtain from the War Damage Commission an increase in the "permissible amount". On receipt of this request the plaintiffs undertook a considerable amount of work, which included taking out their own quantities. At that time builders, under the rules of their federation, were not allowed to tender in competition for work costing more than £3,000 without being provided with bills of quantities, but the plaintiffs did not regard themselves as being in competition since they were satisfied that they had been chosen as the contractors. On being asked to make further alterations in order to reduce the price of the building, the plaintiffs, on Dec. 7, 1951, sent in their revised estimate of £6,996, and later provided additional particulars which were required from Mr. Davis by the War Damage Commission in March, 1952. B C D

In April, 1952, the War Damage Commission approved the plaintiffs' revised tender for £6,996 and increased the "permissible amount" to £5,320, with certain additional sums in respect of foundations and drains, which brought the commission's total contribution to £5,776, so that a substantial increase was obtained, partly, at least, as a result of the estimates and information provided by the plaintiffs. E

In or about the beginning of April, 1952, Mr. Davis suggested another amendment to the plans to provide for an enlargement of the ground floor of the building, and the plaintiffs submitted a new estimate, which was for £7,277. Amendments to this estimate were made from time to time as a result of further alterations proposed by Mr. Davis. In a letter dated June 13, 1952, the surveyors told the plaintiffs that they were hoping to be "able to prepare contracts, etc., for the works really to commence". The plaintiffs thereupon ordered the bricks required for the job, but in the middle of July, 1952, they were told that Mr. Davis was going to employ another builder to do the work. Mr. Davis did not in fact employ other builders, but sold the premises. F G

Although the plaintiffs received the requests and instructions in regard to the work which they had done through Mr. Day, a member of the firm of surveyors employed by Mr. Davis, and not directly from Mr. Davis himself, HIS LORDSHIP found, on the agreed correspondence submitted to the court, that Mr. Davis was kept in close touch with all that was going on and that Mr. Day was acting within the scope of his authority. H

In respect of their claim for breach of contract, the plaintiffs submitted that at one stage of the negotiations there was a concluded and enforceable contract between Mr. Davis and themselves to reconstruct the premises, in accordance with their amended specifications and plans, for a sum not exceeding £7,250, and that, in breach of this contract, Mr. Davis refused to allow them to carry out this work; and the plaintiffs, in consequence, claimed their loss of profit at the rate of ten per cent. on the sum of £7,250 as damages for the breach of contract. HIS LORDSHIP found on the facts that no binding contract had ever been concluded. The facts dealing solely with this claim are not included in the report, which deals only with the plaintiffs' alternative claim. I

A An itemised account for the work done by the plaintiffs and relied on in respect of their alternative claim was set out in a schedule delivered with the statement of claim. No charge was sought to be made in respect of the original estimate (i.e., for the tender made on Jan. 15, 1951), although its preparation involved a large amount of work. Item 1 of the schedule was in respect of the work involved in preparing the calculations for the timber and steel requirements. Item 2
B related to the work in connexion with the "notional reinstatement" for negotiating the "permissible amount" with the War Damage Commission. The remaining items in the schedule related to the revised plans: item 4, which was for a sum of £149 13s. 4d., was in regard to the work done on the revised estimate pursuant to the request made towards the end of November, 1951; items 5-10
C were for the cost of supplying further information pursuant to the request of the War Damage Commission in March, 1952; items 13 and 14 related to the estimate for £7,277, and items 15, 16 and 17 related to work involved by further amendments of that estimate; items 18-26 related to certain difficulties in relation to the ferro-concrete work required in the building.

J. S. Daniel for the plaintiffs.

D C. Lawson for the defendants.

Cur. adv. vult.

Feb. 15. BARRY, J., read a judgment in which, after stating the nature of the action and the facts relevant to the first part of the claim, he said that, on those facts, it was impossible to hold that a binding contract had ever been
E concluded between Mr. Davis and the plaintiffs. HIS LORDSHIP continued: The plaintiffs' alternative claim raises questions of much greater difficulty. In para. 6 of the statement of claim the plaintiffs put their case in this way:

"Alternatively between the months of April, 1951, and July, 1952, at the request of the defendant or the said surveyors on his behalf the plaintiffs carried out work in and about the alteration of the scheme for the recon-
F struction of the said premises and the preparation of further schemes and the making of certain calculations and estimates in that behalf for the defendant."

They then refer to the particulars set out in the schedule. Paragraph 7 of the statement of claim reads:

G "The said requests were made and the said work was carried out on the assumption by both parties that the plaintiffs would be employed by the defendant to execute the said works of reconstruction. In the premises there was a contract to be implied between the parties that if the defendant did not employ the plaintiffs to execute the said works then the defendant would pay the plaintiffs a reasonable remuneration for the
H work carried out in pursuance of the said requests."

In para. 8 they say that Mr. Davis

"... did not employ the plaintiffs to execute the said works of reconstruction and the plaintiffs are accordingly entitled to a reasonable remuneration as aforesaid which they say is £350 13s. 5d."

I In elaborating his argument, counsel for the plaintiffs rightly conceded that, if a builder is invited to tender for certain work, either in competition or otherwise, there is no implication that he will be paid for the work, which is sometimes a very considerable amount of work, involved in arriving at his price: he undertakes this work as a gamble, and its cost is part of the overhead expenses of his business which he hopes will be met out of the profits of such contracts as are made as a result of tenders which prove to be successful. This generally accepted usage also, as I think, applies to amendments of the original tender

necessitated by bona fide alterations in the specification and plans. If no contract ensues, the builder is, therefore, without a remedy. Counsel for the plaintiffs, however, contends that no such principle applies if the builder's tender is sought and used, not to ascertain the cost of erecting or reconstructing some genuinely contemplated building project, but for some extraneous or collateral purpose for which the building owner may require it. In such circumstances, counsel suggests that the builder is entitled to recover a reasonable payment for his work. A B

It may also happen—as it certainly did happen in the present case—that, when a builder is told that his tender is the lowest and is led to believe that the building contract is to be given to him, he, the builder, is prepared to perform other incidental services at the request of the building owner without any intention of charging for them as such. He is not, counsel suggests, rendering these services gratuitously, but is content to be recompensed for them out of the profit which he will make under the contract. If, without default on the builder's part, no contract supervenes then, says counsel, the law will imply a contract to pay a reasonable sum for these services. His contention is that, for one or other of these two reasons, the defendants are under a legal obligation to pay for all the work itemised in the schedule. C D

The answer of counsel for the defendants can be put quite shortly. He does not deny that a considerable amount of work was done by the plaintiffs, but he says that it was all done, on their own admission, in the expectation and hope that they would receive the building contract. They did not do so and, although the consequences to them are, of course, unfortunate, there can be no room for an implication that they were to be paid for services for which they never intended to charge. As an alternative, counsel for the defendants, somewhat tentatively, questioned the plaintiffs' allegation that their services were rendered at Mr. Davis' request and, further, he suggested that even if requests for these services were in fact made by Mr. Day*, Mr. Day had not authority from Mr. Davis to make any such requests. E

Having thus outlined the broad contentions of the parties, it is, I am afraid, necessary to examine the facts relevant to this alternative claim in some little detail. [HIS LORDSHIP stated the facts and continued:] On this evidence, I am quite satisfied that the whole of the work covered by the schedule fell right outside the work which a builder, by custom and usage, normally performs gratuitously, when invited to tender for the erection of a building. In the absence of any evidence called by the defendants, I can only find that the earlier estimates were given for work which it was never intended to execute. It is possible that, in the very latest stages, Mr. Davis was intending to erect the type of building for which the plaintiffs were giving their quotation, but having obtained, without charge, an initial estimate for a purely notional building, Mr. Davis could hardly expect the builders to go on giving free estimates when a state of reality was at last approached. The earlier estimates, as the correspondence shows, were in fact used, and used for some purpose, in Mr. Davis' negotiations with the War Damage Commission and, as an apparent result of the plaintiffs' efforts, not only were the reconstruction plans approved, but a much higher "permissible amount" was also agreed with the War Damage Commission. H It is perhaps justifiable to surmise that these facts, especially the reconstruction plans and the increase in the permissible amount, had at least some influence on the price of the damaged building which Mr. Davis obtained when it was ultimately sold by him. I

The work itemised in the schedule which does not relate to estimation, as I think, falls even more clearly outside the type of work which any builder would be expected to do without charge when tendering for a building contract. The

* A member of the firm of surveyors employed by Mr. Davis; see p. 714, letter H, ante.

A plaintiffs are carrying on a business and, in normal circumstances, if asked to render services of this kind, the obvious inference would be that they ought to be paid for so doing. No one could expect a business firm to do this sort of work for nothing, and again, in normal circumstances, the law would imply a promise to pay on the part of the person who requested the services to be performed. Counsel for the defendants, however, submits that no such promise can be implied, in the circumstances of the present case. The existence, he submits, of a common expectation that a contract would ultimately come into being, and that the plaintiffs' services would be rewarded by the profits of that contract, leaves no room for—and, indeed, wholly negatives—any suggestion that the parties impliedly agreed that these services would be paid for in any other way.

This, at first sight, is a somewhat formidable argument which, if well founded, C would wholly defeat the plaintiffs' alternative claim. If such were the law, it would, I think, amount to a denial of justice to the plaintiffs in the present case, and legal propositions which have that apparent effect must always be scrutinised with some care. In truth, I think that counsel's proposition is founded on too narrow a view of the modern action for quantum meruit. In its early history it was, no doubt, a genuine action in contract, based on a real promise to pay, D although that promise had not been expressed in words and the amount of the payment had not been agreed. Subsequent developments have, however, considerably widened the scope of this form of action, and in many cases the action is now founded on what is known as "quasi-contract", similar, in some ways, to the action for money had and received. In these quasi-contractual cases the court will look at the true facts and ascertain from them whether or not E a promise to pay should be implied, irrespective of the actual views or intentions of the parties at the time when the work was done or the services rendered.

The authority which perhaps best illustrates this modern view is *Craven-Ellis v. Canons, Ltd.* (1) ([1936] 2 All E.R. 1066), which was cited by counsel for the defendants for another purpose. In that case, the plaintiff was appointed managing director of a company by an agreement under the company's seal F which also provided for his remuneration. By the articles of association of the company each director was required to obtain his qualification shares within two months after his appointment. Neither the plaintiff nor the other directors obtained their qualification shares within two months or at all. The plaintiff, having done work for the company, claimed to recover the remuneration provided for in the agreement, or, alternatively, on the basis of a quantum meruit. It G was held that the fact that the plaintiff did the work under an agreement which was in fact void did not disentitle him from recovering on a quantum meruit. GREER, L.J., said (*ibid.*, at p. 1073):

"... the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the acceptance of service H ..."

Before referring to the judgment of GREER, L.J., at greater length, it is perhaps advisable to refer in a little greater detail to the facts. The plaintiff in that case was an estate agent who did certain work for the defendant company in connexion with the building of an estate. He later became a director of the company. I On Apr. 14, 1931, an agreement was executed under the seal of the company, purporting to be between the company and the plaintiff, stating the terms under which he was to act as managing director of the company. Thereafter the plaintiff's services were thought to be performed under the provisions of that agreement and for the remuneration specified in the agreement. In fact, the directors who affixed the seal of the company to the agreement, and, indeed, the plaintiff himself, were at the material time unqualified and were unable to bind the company. The agreement was, therefore, wholly void.

GREER, L.J., dealing with the services rendered by the plaintiff after the date of the supposed agreement, namely, Apr. 14, 1931, said ([1936] 2 All E.R. at p. 1071):

"As regards the plaintiff's services after the date of the contract, I think the plaintiff is also entitled to succeed. The contract, having been made by directors who had no authority to make it with one of themselves, who had notice of their want of authority, was not binding on either party. It was, in fact, a nullity, and presents no obstacle to the implied promise to pay on a quantum meruit basis which arises from the performance of the services and the implied acceptance of the same by the company. It was contended by Mr. Croom-Johnson on behalf of the respondents that, inasmuch as the services relied on were purported to be done by the plaintiff under what he and the directors thought was a binding contract, there could be no legal obligation on the defendants on a quantum meruit claim. The only one of the numerous authorities cited by Mr. Croom-Johnson that appears to support his contention is the judgment of a Divisional Court in the case of *Re Allison, Johnston & Foster, Ltd., Ex p. Birkenshaw* (2) ([1904] 2 K.B. 327)."

The learned lord justice then referred to a certain passage in that case ([1904] 2 K.B. at p. 330) and went on to say ([1936] 2 All E.R. at p. 1072) in relation to that passage:

"This passage appears to involve the proposition that in all cases where parties suppose there is an agreement in existence and one of them has performed services, or delivered goods in pursuance of the suppositious agreement, there cannot be any inference of any promise by the person accepting the services or the goods to pay on the basis of a quantum meruit. This would certainly be strictly logical if the inference of a promise to pay on a quantum meruit basis were an inference of fact based on the acceptance of the services or of the goods delivered under what was supposed to be an existing contract, but in my judgment the inference is not one of fact, but is an inference which a rule of law imposes on the parties where work has been done or goods have been delivered under what purports to be a binding contract, but is not so in fact."

Later in his judgment, GREER, L.J., said (*ibid.*, at p. 1073):

"In my judgment, the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the acceptance of service or goods. It is one of the cases referred to in books on contracts as obligations arising quasi ex contractu, of which a well known instance is claims based on money had and received. Although I do not hold that the decision of the court in *Ex p. Birkenshaw* (2) was wrong, I think that the passage I read from the judgment is not a correct statement of the law. I accordingly think that the defendants must pay on the basis of a quantum meruit not only for the services rendered after Dec. 31, 1930, and before the date of the invalid agreement, but also for the services after that date. I think the appeal should be allowed, and judgment given for such a sum as shall be found to be due on the basis of a quantum meruit in respect of all services rendered by the plaintiff to the company until he was dismissed. The defendants seem to me to be in a dilemma. If the contract was an effective contract by the company, they would be bound to pay the remuneration provided for in the contract. If, on the other hand, the contract was a nullity and not binding either on the plaintiff or the defendants, there would be nothing to prevent the inference which the law draws from the performance by the plaintiff of services to the company, and the company's acceptance of such services, which, if they had not

- A been performed by the plaintiff, they would have had to get some other agent to carry out."

Then there is the fairly recent decision in *Upton-on-Severn Rural District Council v. Powell* (3) ([1942] 1 All E.R. 220). I need only read the headnote:

- B "The appellant's farm was in the Upton police district, but in the Pershore, and not the Upton, fire district. A fire broke out on the farm, and the appellant telephoned to the police inspector at Upton and asked for the fire brigade to be sent. The Upton fire brigade was informed, and it went to the farm at once. The appellant was entitled to the services of the Pershore fire brigade without charge, but the Upton brigade, if it went to a fire outside its own area, was entitled to contract for payment for its services. At the time when the brigade was summoned, all the parties concerned were under the impression that the farm was in the Upton fire district. For the Upton fire brigade it was contended that a contract had been created by implication, under which it was entitled to be remunerated for its services:—HELD: the appellant must be treated as having asked for the Upton fire brigade to be sent to his farm, and the fact that at the time the parties thought that the fire was in its area did not prevent there being a contractual relationship. The appellant, was, therefore, liable under an implied contract to pay for the brigade's services."
- D

This is a decision of the Court of Appeal. LORD GREENE, M.R., pointed out (*ibid.*):

- E "The sole question here is whether or not any contract was made by which the Upton fire brigade rendered services on an implied promise to pay for them made by or on behalf of the appellant."

LORD GREENE made it perfectly clear that the appellant did not know that he was in fact asking for the services of a fire brigade outside his own area, for which he would have to pay, and at the same time the Upton fire brigade thought that they were performing a gratuitous service within their own area. None the less, when the true facts were known, the law implied a contract to pay regardless of the actual intention of the parties at the time.

- F
- I am unable to see any valid distinction between work done which was to be paid for under the terms of a contract erroneously believed to be in existence, and work done which was to be paid for out of the proceeds of a contract which both parties erroneously believed was about to be made. In neither case was the work to be done gratuitously, and in both cases the party from whom payment was sought requested the work and obtained the benefit of it. In neither case did the parties actually intend to pay for the work otherwise than under the supposed contract, or as part of the total price which would become payable when the expected contract was made. In both cases, when the beliefs of the parties were falsified, the law implied an obligation—and in this case I think the law should imply an obligation—to pay a reasonable price for the services which had been obtained. I am, of course, fully aware that in different circumstances it might be held that work was done gratuitously merely in the hope that the building scheme would be carried out and that the person who did the work would obtain the contract. That, I am satisfied, is not the position here. In my judgment, the proper inference from the facts proved in this case is not that the work was done in the hope that the building might possibly be reconstructed and that the plaintiffs might obtain the contract, but that it was done under a mutual belief and understanding that the building was being reconstructed and that the plaintiffs were obtaining the contract,
- I

I do not derive very much assistance from *Landless v. Wilson* (4) ((1880), 8 R. (Ct. of Sess.) 289), a Scottish decision, and, indeed, I am not really satisfied that all the statements of the law enunciated in that case correctly represent the law of this country as opposed to the law of Scotland. Some assistance, perhaps,

is obtained from a short passage in the judgment of LORD SHAND (*ibid.*, at p. 293), which, I think, lends some support to the view which I have already expressed as to the use of plans, or estimates, for extraneous purposes. A

[On the alternative submission* of counsel for the defendants, HIS LORDSHIP found from the agreed correspondence which was submitted in evidence that Mr. Day, a member of the firm of surveyors employed by Mr. Davis, requested the plaintiffs to do all this work, that Mr. Day never disguised the position from Mr. Davis, and that throughout the whole of his dealings with the plaintiffs, Mr. Day was acting within the scope of his authority.] B

I have, therefore, come to the conclusion that the defence to the alternative claim fails and that the court should imply a condition or imply a promise that the defendants should pay a reasonable sum to the plaintiffs for the whole of these services which were rendered to Mr. Davis. As to amount, I have considered the plaintiffs' charges as set out in the schedule with some care. On the rather scanty information available to me, I have come to the conclusion that, while some of the items may well be undercharged, certain of the larger items—in particular items 4, 10, 14, 24 and 27—cannot be fully justified. The plaintiffs are entitled to a fair remuneration for the work which they have done, but they cannot, in my view, quantify their charges by reference to professional scales. C
Doing the best that I can, I think that the plaintiffs would be fairly recompensed if I deducted £100 from the amount claimed, leaving a balance of £250 13s. 5d. D

I might perhaps add one last word to this judgment. Counsel for the defendants suggested that, if I found for the plaintiffs in the present case, I would be granting a new charter to builders for which no authority can be found in the books. As to the lack of authority, it must be borne in mind that until a comparatively short time ago builders' estimates were useful for one purpose only, namely, to ascertain what a proposed building would cost. When licences are required for a variety of purposes and when war damage claims require to be settled, this is no longer the case. The old-fashioned purpose of an estimate may become an almost subsidiary one, and builders may be called on to perform all kinds of services and to provide all kinds of information quite unconnected with the submission of a tender. I find it difficult to think that any injustice will result if building owners, who obtain the benefit of all these services on the understanding that a contract is to be given, should be required to make some payment for them if they subsequently decide that the contract should be withheld. In the result, there will be judgment for the plaintiffs for the sum of £250 13s. 5d. E F

Judgment for the plaintiffs.

Solicitors: *Owen White & Catlin*, Hounslow (for the plaintiffs); *Oscar Mason & Co.* (for the defendants).

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

* See p. 716, letter E, ante.

A

PAICE v. PAICE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), June 27, 1957.]

B

Legal Aid—Costs—Interlocutory proceedings—Costs of interlocutory application reserved to trial judge—Direction by trial judge for legal aid taxation—No specific order as to costs of interlocutory applications—Costs reserved inter partes—Effect of direction for taxation—Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6 c. 51), Sch. 3, para. 4 (1)—Legal Aid (General) Regulations, 1950 (S.I. 1950 No. 1359), reg. 18 (3) (as amended by S.I. 1954 No. 166).

C

The husband petitioned for divorce and the wife by her answer cross-prayed for a decree of restitution of conjugal rights. The wife obtained a civil aid certificate. Two interlocutory applications were made by the husband to the registrar who in each case reserved the question of costs to the trial judge. At the trial, the husband was granted a decree nisi and the wife's prayer in her answer was rejected. The judge made no order for costs save that the wife should have an order for taxation for the purposes of the Legal Aid and Advice Act, 1949. The wife duly lodged her bill of costs but the taxing officer declined to deal with the bill until the question of the costs of the two applications had been dealt with. The wife now applied to the judge to deal with these costs.

D

Held: where a trial judge directs taxation of costs in accordance with Sch. 3 to the Legal Aid and Advice Act, 1949, the taxation extends to all the costs of the action whether or not they have been reserved inter partes.

E

[As to orders for costs of and incidental to the suit, see 12 HALSBURY'S LAWS (3rd Edn.) 398, para. 884, note (k).]

For the Legal Aid and Advice Act, 1949, Sch. 3, para. 4 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 566.

F

For the Legal Aid (General) Regulations, 1950, reg. 18 (3) as amended, see SUPPLEMENT to 5 HALSBURY'S STATUTORY INSTRUMENTS 218.]

Application.

This was an application by the wife after decree for an order disposing of the costs of interlocutory applications, the costs having been reserved to the trial judge.

G

The husband presented a petition for divorce on the ground of the wife's cruelty and desertion and the wife by her answer cross-prayed for a decree of restitution of conjugal rights. The wife obtained a civil aid certificate. On Oct. 26, 1954, Mr. Registrar RUSSELL made an order on an interlocutory application directing that the wife file a further and better affidavit of documents, and reserved the question of costs. On Nov. 9, 1954, DAVIES, J., allowed the wife's appeal against the registrar's order and ordered "costs in cause" but made no specific order as to the costs of the hearing before the registrar.

H

On Nov. 23, 1954, on the husband's application to strike out the wife's answer, the registrar made no order except that the costs be referred to the trial judge. The suit came before SACHS, J., on May 23, 1955, and on May 25, 1955, his Lordship rejected the wife's prayer of the answer, granted a decree nisi to the husband on his petition and directed under reg. 18 (3) of the Legal Aid (General) Regulations, 1950, as amended, that the wife's costs be taxed in accordance with the provisions of the Legal Aid and Advice Act, 1949, Sch. 3. The wife's bill of costs was duly lodged for taxation but the taxing officer declined to deal with it until the question of costs relating to the two applications before the registrar on Oct. 26 and Nov. 23, 1954, had been dealt with. The wife now applied to SACHS, J., for an order disposing of those costs.

I

D. A. Fairweather for the wife.

SACHS, J.: I am going to rule that where the judge after the end of a trial of a case orders* a taxation in accordance with the Legal Aid and Advice Act, 1949, Sch. 3, that relates to all the costs of the action irrespective of whether or not they have been reserved inter partes to the judge at the trial. Where a judge or a court reserves costs of an application or other proceedings to the judge at trial, prima facie that is a reservation inter partes and is not intended to affect the legal aid taxation. Further, he can be informed, if it is a technical matter, how to adjust the matter. In this particular case, I rule that if my order as to costs does not apply it shall be amended under the slip rule [R.S.C., Ord. 28, r. 11] to make it apply.

Order accordingly.

Solicitors: *John W. W. Sachs & Co.*, Bromley, Kent (for the wife).

[*Reported by A. T. HOOLAHAN, ESQ., Barrister-at-Law.*]

HALL v. MEYRICK.

[COURT OF APPEAL (Hodson, Parker and Ormerod, L.J.J.), June 20, 21, 1957.]

Limitation of Action—Amendment of statement of claim—Statute-barred cause of action introduced by amendment—Alleged negligence of solicitor—Allegation of breach of duty under joint retainer by two clients—Amendment by alleging separate retainers by each client.

On Nov. 29, 1949, a widow, J., and a man, H., who had been living in her house as a boarder for about fifteen years, each instructed a solicitor at an interview at which both of them were present, to prepare a fresh will for her or him, and in each will each conferred benefits on the other. During the interview mention was made by a son of J., about the possibility of J. and H. getting married, but the solicitor, who knew that they had lived in the same house for many years, did not draw their attention to the fact that, if they married, their marriage would revoke their wills. The wills were prepared and executed. J. and H. married subsequently in September, 1950, and in December, 1952, H. died without having executed a new will. H. left considerable property. On Mar. 10, 1954, J. brought an action for damages against the solicitor for negligence in failing to advise her and H. that their subsequent marriage would revoke their wills. By her statement of claim, as amended by consent in October, 1954, she alleged a joint retainer of the solicitor by herself and H. At the hearing on Nov. 28, 1956, the trial judge acceded to J.'s request that the statement of claim should be amended to allege separate retainers by J. and H., but reserved all questions of costs and reserved the defendant's right to make further submissions when the amendment had been formulated. The amendment having been formulated, the defendant on Dec. 18, 1956, objected that the claim put forward by the amendment was statute-barred. To this objection the trial judge did not accede on the ground that it should have been taken, but was not taken, when the question of amendment was first raised. The trial judge found that there were separate retainers by J. and H. in November, 1949, and that the defendant had then been guilty of negligence. On appeal,

Held: the amendment of December, 1956, should not have been allowed as it alleged new contracts of retainer in 1949 and, since the only basis of

* By the Legal Aid (General) Regulations, 1950, reg. 18 (3), as amended by S.I. 1954 No. 166.

A the defendant's alleged negligence lay in contract (*Groom v. Crocker*, [1938] 2 All E.R. 394 applied), the amendment alleged a new cause of action which was statute-barred at the time of the amendment.

Per CURIAM: we would not for a moment suppose that it was the duty of a solicitor in all cases to draw the attention of persons who come into his office to make wills to the effect of marriage on a will; each case depends on its own particular facts (see p. 725, letter G, and p. 730, letters B and C, post).

B Per PARKER, L.J.: on an application for leave to amend pleadings the trial judge may express the view that he will allow or consider an amendment, but unless and until the amendment has been put into writing and submitted to the other side, and the other side have had an opportunity to make submissions on it, anything that the trial judge has said must be in the nature of a provisional view, and not a final ruling (see p. 729, letter E, post; and cf. per HODSON, L.J., at p. 724, letter C, post).

Decision of ASHWORTH, J. ([1957] 1 All E.R. 208) reversed.

[As to amendment of writ and pleadings introducing a new cause of action out of time, see 20 HALSBURY'S LAWS (2nd Edn.) 784, para. 1087; and for cases on the subject, see 32 DIGEST 536, 537, 1891-1897.]

D Cases referred to:

(1) *Groom v. Crocker*, [1938] 2 All E.R. 394; [1939] 1 K.B. 194; 108 L.J.K.B. 296; 158 L.T. 477; Digest Supp.

(2) *Weldon v. Neal*, (1887), 19 Q.B.D. 394; 56 L.J.Q.B. 621; 32 Digest 536, 1892.

E Appeals.

By writ issued on Mar. 10, 1954, the plaintiff claimed damages against the defendant for loss and injury alleged to arise out of the defendant's negligence and failure to use reasonable skill and diligence as the plaintiff's solicitor on a contract between the defendant on the one hand and the plaintiff and a Mr. Hall, whom the plaintiff subsequently married, on the other. The alleged contract

F was one entered into in November, 1949, for the preparation by the defendant of wills by the plaintiff and Mr. Hall in favour of each other and the alleged negligence and failure to use reasonable skill and diligence consisted of a failure to advise the parties that their subsequent marriage would revoke their wills. The statement of claim was delivered on Apr. 9, 1954, and on Oct. 4, 1954, it was amended by consent to allege a joint retainer of the defendant by the

G plaintiff and Mr. Hall in November, 1949. In the course of the trial, on Nov. 28, 1956, ASHWORTH, J., intimated that he could not find a joint retainer of the defendant by the plaintiff and Mr. Hall, but he permitted the plaintiff to amend her statement of claim to allege separate contracts and on Dec. 18, the amendment being then formulated, found separate retainers of the defendant by the plaintiff and Mr. Hall and gave judgment for the plaintiff on the issue of negligence ([1957] 1 All E.R. 208).

H On appeal, the defendant submitted that the amendment of the statement of claim should not have been allowed, since it enabled the plaintiff to raise a fresh cause of action after the time had elapsed for bringing an action under the Limitation Act, 1939.

F. W. Beney, Q.C., and *A. G. Friend* for the defendant.

H. J. Phillimore, Q.C., and *J. W. Borders* for the plaintiff.

I

HODSON, L.J.: This is an appeal from a judgment of ASHWORTH, J., given on Dec. 21, 1956. The action was brought by Mrs. Hall, the widow of a man called Robert Constable Hall, against a solicitor, Mr. Meyrick, for damages for loss incurred through the defendant's negligence in his capacity as solicitor. The learned judge found that the case as advanced by the plaintiff was not established, but, at the conclusion of the addresses of counsel, he stated that the question of amendment might at that late stage be considered. It was considered on Nov. 28, 1956, and he did in general terms give leave to the plaintiff

to amend; but, as his judgment shows, he did not exclude the defendant from raising objections to the amendment when it had been formulated. On Dec. 18, 1956, the amendment had been formulated—I shall have to deal with what it was in a moment. At that stage leading counsel for the defendant took a point which had not been taken before, but which was in the learned judge's mind, as he stated, viz., that, if this amendment were allowed, it would have the effect of taking away from the defendant the benefit of the Limitation Act, 1939. The learned judge felt obliged, as he thought in fairness to the parties, not to resile from the position he had previously taken up, and, therefore, he did not reverse his original decision that there should be, or could be, an amendment.

The first point taken by the defendant in this court is that the learned judge was wrong in allowing the amendment. He was in no sense barred by the fact that, the objection not having been taken at the earliest possible moment, he had come provisionally to the view that the amendment could be allowed; if a judge has expressed himself by word of mouth, then until the order has been perfected he can make a different order, if he is so minded. This court is asked to deal with the case on the basis that, in accordance with well-established authority, it is unjust to the defendant to deprive him of the benefit of the Limitation Act, 1939, by a circuitous route. Secondly, it is said that the learned judge, having decided the case correctly in favour of the defendant on the case as put, was wrong on the amended case, because in the circumstances here there was no duty on the defendant of which he was in breach. Finally, it is said that the damages of £1,200 assessed by the learned judge did not in any event flow from the breach, if any.

Having regard to the decision which I have reached, I do not propose to say anything about the difficult question—and, indeed, from the academic point of view, the interesting question—whether it can be said on the facts of this case, there being a breach, that any damages would flow from that breach, or whether the damages assessed by the learned judge were largely excessive, having regard to the number of contingencies involved before any damage could be suffered by the plaintiff. I propose to rest my decision on the first point, viz., the question whether the amendment ought to be allowed.

The plaintiff is a lady with three grown-up sons and one married daughter. At the time when the events with which we are concerned happened she must have been about fifty years of age (though there is no direct evidence to this effect). She was acquainted with Mr. Hall, who had been divorced by his first wife in 1931. The defendant is a solicitor and a member of the firm of Messrs. Greene & Underhill, and from 1931 until 1954 he was the sole member of the firm, because Mr. Underhill died in 1931.

The plaintiff was a widow and she had employed the defendant as her solicitor in succession to Mr. Underhill. Mr. Hall, whom the plaintiff subsequently married, had been an accountant. In 1933 the plaintiff was keeping a boarding-house and Mr. Hall was living there as a paying guest. They lived together in the house as guest and boarding-house keeper for some years. In 1947 Mr. Hall won £25,000 in the Irish Sweep, and he was introduced by the plaintiff to the defendant, who acted for them both from time to time. Mr. Hall got the defendant to make a will for him in 1947 in which he left everything to the plaintiff. There is some evidence that he was asked to make a will also for the plaintiff at that time. In September, 1949, on the instructions of Mr. Hall, £6,000 worth of securities were settled on the plaintiff for life, with remainder to her children. This work was done by the defendant. An appointment was made on Nov. 24, 1949, with the defendant by Leonard, the plaintiff's son, who stated that he had come from his mother, who wanted a new will made for her. There was some question about the terms of the will. Mr. Hall also desired to make a fresh will. Eventually, on Nov. 29, 1949, an interview took place at the defendant's office at which were present not only the defendant, Mr. Hall, and the plaintiff,

A but also, as the judge finds, Leonard. The defendant made notes of the instructions which he received for the wills which he was to make. These wills were not exactly mutual wills; Mr. Hall left his money to the plaintiff, and provision was made for her children, and the plaintiff left a house and £2,000 (which was more than she possessed) to Mr. Hall; so, in substance, they were making wills in one another's favour, a provision being put in that, if the plaintiff survived
B Mr. Hall for fourteen days, his property was to go to her; otherwise the money was to go to her children.

The defendant's knowledge of the situation at that time was that these people had been living together for fifteen years and were minded to benefit one another in the way I have described. But there was a dispute as to what was said at this interview, the point being that, if these people were going to get married,
C it would be quite idle to make wills for them, because those wills would only take effect until marriage unless expressly made in contemplation of marriage. The defendant said that no question of marriage was mentioned. He had known these relatively elderly people for a considerable time, fifteen years, and he never thought of any question of marriage. He denied firmly that anything was said about marriage. The plaintiff and the son Leonard gave evidence to the contrary, and the evidence of Leonard was accepted. The effect of the evidence was that, in the course of a discussion, sitting round the defendant's table, he said "Why don't you two get married?", to which his mother replied "We will one day. When we move to the country we will have to get married, as everyone knows everyone else's business". The judge found that, although, according to
E the son's evidence, this sally was greeted with some laughter, it was a drawing of the defendant's attention to the question of marriage which put him in a position in which he was under a duty to draw their attention (which he did not do) to the fact that, if they were going to get married, the will would be revoked, unless the will was made in a particular form.

A question of great importance and interest to solicitors is whether the judge
F was right in holding, as he did, that there was any duty at all on a solicitor, in the circumstances, to draw the attention of the client or clients to the provisions of s. 18 of the Wills Act, 1837. I have said that I do not propose to give any concluded finding on this point, but I think it is right to say this. I would not for one moment suppose that it was the duty of a solicitor in all cases to draw the attention of persons who come into his office to make wills to the effect of
G marriage on a will. In such a case I must use the words which are so well known, that "each case depends on its own particular facts". This is a very special and unusual case. The parties came into the defendant's office, a man and a woman each known to the defendant to be single, each desiring to benefit the other substantially to the extent of their whole possessions before death by their
H wills. They were known to have been living together for fifteen years as housekeeper and boarder. Evidence was given that the attention of the defendant was drawn by a member of the family present, the son, who helped the mother to do her business, to the prospect of marriage, and that evidence was accepted; another solicitor, Mr. Daynes, gave evidence, which was also accepted, to the effect that in those circumstances as a matter of good practice it would be right for a solicitor
I to ask questions and to draw the attention of the client to s. 18 of the Wills Act, 1837. The defendant admitted that, if such a state of affairs as I have described existed, he would be under a duty to draw the attention of his client to that possibility in that event, viz., that they were going to enter into matrimony. On those facts the learned judge's decision at any rate is supported by evidence. I leave that matter, having made it clear, I hope, that I am not going to impose an extravagant standard of duty on solicitors who are making wills for their clients.

The point put first in this appeal depends on how the case was pleaded. The writ as indorsed was for damages for negligence A

“and failure to use reasonable skill and diligence as solicitor of the plaintiff”;

but, when the statement of claim was delivered, the form of action was made plain, and in my opinion, under R.S.C., Ord. 20, r. 4, from that moment the statement of claim only is the document to be looked at in order to see what it was that the plaintiff was claiming. In para. 2 of the statement of claim the plaintiff claims that in November, 1949, she and “the deceased” (i.e. Mr. Hall) B

“retained and employed the defendant as their solicitor to advise them in making mutual wills in contemplation of marriage and to prepare drafts of the said wills in such form as would carry out their intentions and instructions to be executed by them.” C

Application was made to strike out the statement of claim, and in those proceedings, to save the expense of amendment, an undertaking was given on Oct. 4, 1954, to the effect that between the word “deceased” and the word “retained” the word “jointly” should be treated as having been inserted; so that the allegation in para. 2 was that the plaintiff and Mr. Hall had “jointly retained” the defendant as solicitor “to advise them” in making their wills. So far as the mutual wills were concerned in contemplation of marriage, their case failed; they did not establish that. The learned judge came to an adverse conclusion, with which I shall have to deal, on the question whether or not there was a joint retainer. D

The statement of claim as it originally stood went on to recite that drafts were prepared and that the wills were executed on Dec. 2, 1949, by each of the persons concerned. Paragraph 6 alleged: E

“The defendant further negligently failed to advise the plaintiff or the deceased, as it was his duty to do, that both the said wills would be revoked by their marriage.” F

Paragraph 8 refers to a fact which I should have stated previously, that on Sept. 23, 1950, the plaintiff and Mr. Hall were married, and their wills were thereby revoked. Mr. Hall died on Dec. 27, 1952, without having made a further will, and it is as a result of that event that the plaintiff claims to have suffered loss.

The amendment subsequently made in the statement of claim, when the judge had rejected the case originally put forward by the plaintiff, was as follows: G

“In or about November, 1949, the plaintiff . . . and the deceased jointly or alternatively separately in the presence of each other retained and employed the defendant as their solicitor to advise them in making and to draft and prepare for execution wills whereby each was to confer benefits upon the other. On or about Nov. 29, 1949, at an interview between the plaintiff, the deceased, and the defendant, at which the son of the plaintiff, one Leonard Martin James, was present, the defendant was informed, as the fact was, that the plaintiff and the deceased were contemplating marriage as and when they moved from London to the country, as they were intending to do.” H

The new para. 5 is: I

“The defendant negligently failed to express in the draft of the said wills that each of the same was made in contemplation of the marriage of the plaintiff and the deceased, and in consequence the said representations [which he had made] were untrue, as the defendant well knew, or ought to have known.”

The effect of that amendment is to substitute the allegation that there was a separate retainer of the solicitor by the plaintiff as an alternative to the joint

A retainer which had originally been alleged. The point at once emerges that, if a separate contract is alleged between the plaintiff and the solicitor, that is an entirely new contract, a different contract from that which was originally pleaded, and, having regard to the lapse of time, on the face of it, the defence of the Limitation Act, 1939, is available to the defendant if he chooses to rely on it.

Counsel for the plaintiff has sought to avoid that difficulty in two ways:

B First of all, on the pleadings as they stand, he has submitted that para. 6 of the statement of claim can stand by itself as an allegation of negligence. I think that this submission fails, because the only basis of an allegation of negligence between the plaintiff and the defendant, her solicitor, is contract. I think that is clear from the authorities, to one of which the learned judge referred, *Groom v. Crocker* (1) ([1938] 2 All E.R. 394). In the statement of claim, which is the

C right document to look at, the only contract pleaded is in para. 2, which sets out a contract between the plaintiff and Mr. Hall jointly with the defendant. Therefore, I think that submission fails.

The second submission is that the plaintiff was entitled to succeed on the case as originally pleaded, because the judge was wrong in finding, as he did, that there was an independent retainer on the part of these two people as opposed to a

D joint retainer. The judge expressed his conclusion in no uncertain terms on this matter, and I have no doubt that he was right. He said ([1957] 1 All E.R. at p. 210):

“ It is not disputed that as a result of the interview two wills were drafted by the defendant, one for Mr. Hall and one for the plaintiff. This result would appear to involve a finding that instructions to draft wills were given

E by Mr. Hall and by the plaintiff, and it was not seriously suggested that only one of them gave instructions. The real problem is whether instructions were given to the defendant jointly or severally. While it is true that Mr. Hall and the plaintiff arrived at the defendant's office together, and were both in his room when the instructions were given, I am satisfied that the instructions were given severally. Each of them, Mr. Hall and the

F plaintiff, wished to make a will, and each wished to confer benefits on the other, but in my view these were separate wishes and involved separate instructions. On this point I accept the defendant's recollection, refreshed by the note [on p. 3] which he made at the time, that he was dealing with Mr. Hall and the plaintiff separately.”

The note on p. 3 of the correspondence is one that I have already referred to

G in passing. It is a document which is of a kind commonly produced by a solicitor when he takes instructions from a client for making a will. It is headed: “ Instruction given by Mr. Hall and Mrs. James on Nov. 29, 1949 ”. It reads:

“ If Sheela Kathleen James shall not survive me for fourteen days then I appoint him [the solicitor] as executor and give all to (1) Sheela Jessie

H Holden [the daughter] and (2) Leonard Morton James [the eldest son], (3) Cyril Nally James, (4) Reginald Lionel James absolutely.”

Then Mrs. James' name appears, followed by the words

“ To Mr. Hall house and £2,000, the same executors, and residue to children.”

I Then there is a note which the solicitor added as to the spelling of the name “ Sheela ”—“ ? Sheila ”—and then a note “ By Friday ”.

Counsel for the plaintiff relies on the fact that features in this matter point towards the retainer being joint, because these people were acting in concert, each seeking to benefit the other. Moreover, only one account was rendered to cover the preparation of the two wills, the wills themselves were sent under one cover to Mr. Hall, the account was sent to the son Leonard, and the bill was paid by the mother, the plaintiff. To my mind, those considerations do not displace the correctness of the learned judge's conclusion that these were

independent instructions given by two independent people. Therefore, the claim as based on the pleading in the statement of claim must fail. A

As regards the amendment, the general rule is clear that the plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have been barred by the Limitation Act, 1939. That principle was declared in no uncertain terms by LORD ESHER, M.R., in *Weldon v. Neal* (2) ((1887), 19 Q.B.D. 394). LORD ESHER said (*ibid.*, at p. 395): B

"We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendment. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so. This case comes within that rule of practice, and there are no peculiar circumstances of any sort to constitute it an exception to such rule." C D

LINDLEY, L.J., was of the same opinion. He said (*ibid.*):

"I do not think it would be just to the defendant to allow these amendments, the effect of which would be to deprive him of his defence under the Statute of Limitations." E

LOPES, L.J., was of the same opinion. He said (*ibid.*, at p. 396):

"The effect of allowing those amendments would be to take away from the defendant the defence under that statute and therefore unjustly to prejudice the defendant." F

Counsel for the plaintiff has not been able to indicate to us any peculiar circumstances which would, in the mind of LORD ESHER, M.R., or this court, be likely to influence it in departing from that general rule of practice. For example, it is not suggested in any way that the plaintiff was tricked by the defendant or lulled into a sense of false security that the statute would not be pleaded against her. No question of that kind arises. Therefore, I see no possible ground on which this court could depart from the ordinary rule. I think that the learned judge was wrong in permitting the amendment as he did when the objection was taken that it would have the effect of depriving the defendant of the benefit of the Limitation Act, 1939. For that reason, I would allow this appeal. G

PARKER, L.J.: I have come to the same conclusion. I think it is clear that, unless amended, the claim as pleaded must fail. The contract alleged was a joint retainer to prepare mutual wills in contemplation of marriage. In so far as the contract alleged was for the making of mutual wills in contemplation of marriage, it clearly was not proved. Indeed, when the particulars under the statement of claim were delivered, it was clear that the plaintiff could not substantiate that claim. Nor do I see any reason to differ from the learned judge in coming to the conclusion that there was no joint retainer but several retainers by the plaintiff and Mr. Hall for the preparation of their wills. Indeed, it seems to me that, once a contract for the preparation of wills in contemplation of marriage is not persisted in, the presumption is that there is no joint retainer. Here the wills were not even mutual wills in the strict sense of the term, and I think it would require very special circumstances from which the court could infer a joint retainer. H I

- A Counsel for the plaintiff stressed, as one of the circumstances to be taken into consideration, the fact that a single bill was rendered. No doubt that is a circumstance to take into consideration, but I cannot treat it as something from which a joint retainer should be inferred. The bill was in fact sent to the plaintiff's son, Mr. Leonard James, who had been acting for both parties, and who in fact had sent the solicitor the wills when completed. The matter seems to me to be concluded by the express finding of the learned judge, who clearly accepted on this point the evidence of the defendant, Mr. Meyrick.

Counsel for the plaintiff also strongly relied on para. 6 of the statement of claim, which is in these terms:

- C "The defendant further negligently failed to advise the plaintiff or the deceased, as it was his duty to do, that both the said wills would be revoked by their marriage."

- D He said that the words in that paragraph were sufficient to cover the claim as now presented. I think it is clear from that that it must be read with para. 2 of the statement of claim. The basis of the claim is contract, and the only contract pleaded of which para. 6 is alleging a breach is the joint retainer in para. 2. If that were not clear of itself, it seems to me that the very wording of para. 6 makes it clear, because the duty which is said to be broken is a duty to advise the plaintiff herself of the fact that *both wills* would be revoked. That duty could only arise under a joint retainer.

- E In regard to the amendment, I will only say this: It often happens in the course of a trial that an application is made by a party for leave to amend, and the trial judge may well then and there express the view that he will allow an amendment or will consider an amendment; but, unless and until the amendment has been put into writing and submitted to the other side, and the other side have had an opportunity of making submissions on it, anything that the trial judge has said must be in the nature of a provisional view, and not a final ruling. Indeed, in this case, as I understand it, that was what the learned judge himself intended, because in reciting the events in his judgment he says ([1957] 1 All E.R. at p. 214):

"... I granted it [leave to amend], reserving all questions of costs and reserving to counsel for the defendant the right to make further submissions when he had seen and considered the amendment."

- G It seems to me that was the proper attitude, the judge treating anything he had previously said as purely provisional. When, therefore, the hearing was resumed on Dec. 18, 1956, and counsel for the defendant drew attention to the fact that the proposed amendment was setting up a statute-barred claim, there could be no question of the judge being bound by any previous ruling. His discretion was completely unfettered by what had gone before. That being so, once it appeared that the new claim was statute-barred, and the defendant objected to the amendment on that ground, I think that the judge was bound to refuse the amendment in the proper exercise of his discretion.

- H Even if the learned judge had intended to give a final ruling, it was always open to him to change his mind until the order was drawn up. Though no doubt a judge would not take that course where the matter had been argued and submissions had been made, yet, in a case where there is an element of surprise and counsel has not had a full opportunity of making his submission, it seems to me that it would be perfectly proper for the judge to take a different view from that which he had already expressed.

I In my judgment, this appeal should be allowed on these grounds, and I find it unnecessary to go into the further question whether the defendant in this case was guilty of any breach of contract or duty and as to any damages which might result. I would expressly say, however, that I entirely associate myself with the general observations that my Lord has made on the duty of a solicitor.

ORMEROD, L.J.: I agree that this appeal should be allowed on the ground A
that, the original instructions having been separate and independent, as the
learned judge, in my view, has properly found, the case as originally pleaded
could not stand. I agree, for the reasons which have already been given by my
Lords, that it was a wrongful exercise of his discretion for the judge to allow the
pleadings to be amended in such a way as to cause to be pleaded a cause of
action which was statute-barred at the time of the amendment. B

I agree with the remarks of HODSON, L.J., on the duty of a solicitor in these
circumstances. I have no doubt that it would be the clear duty of a solicitor,
on being instructed to prepare a will, to advise his client of the effect of subsequent
marriage on the will if in fact the client told him that he was intending to get
married in the near future, or even, perhaps, if his intention came to the know-
ledge of the solicitor in a less direct way. I certainly do not, however, accept C
the view that it is the duty of a solicitor so to advise merely because the question
of marriage has been casually, and perhaps jocularly, mentioned to the solicitor
in an interview either by a third person, as was the case here, or even by the
client himself. In my judgment, whether the duty would arise on such an
occasion would depend on the actual words used at the time and on the whole
of the circumstances in which they were used, including, of course, the previous D
knowledge of the solicitor of the affairs and intentions of his client.

In view of the evidence given on behalf of the plaintiff by the plaintiff herself
and her son, Mr. Leonard James, I would have felt very reluctant to find that
there was a breach of duty on the part of the solicitor, but for the fact, possibly,
that the defendant himself in answer to the learned judge in re-examination did
say that he would have regarded it as his duty to warn the plaintiff about the E
effect of subsequent marriage on the will, if the words were said which the judge
found were said. However, that is not a matter which now falls to be considered.
Certainly it is true in a case of this kind that the judge who has an opportunity
of seeing the witnesses and considering their evidence as it was given is in the best
position to form a clear picture as to what happened, and in those circumstances
it might well be that this court should be reluctant to interfere with the decision F
of the learned judge; but, in view of the fact that this appeal is being allowed
on the ground that the amendment should not have been granted, it is unnecessary
to consider the matter further. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *J. F. Coules & Co.* (for the defendant); *Linsley-Thomas & Co.* (for
the plaintiff).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

A R. v. MINISTER OF FUEL AND POWER AND ANOTHER,
Ex parte WARWICKSHIRE COUNTY COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Devlin, JJ.), June 25, 26, 1957.]

B *Town and Country Planning—Statutory undertakers—“Operational land”—Land vested in statutory undertakers but not yet used by them for the purpose of their undertaking—Land not contiguous to land used for the purpose of a statutory undertaking—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 119 (1).*

C A gas board, who were statutory undertakers* within the meaning of the Town and Country Planning Act, 1947, wished to build a gasification plant on land that was vested in them but which they had not yet used for the purpose of their undertaking. An application for planning permission under the Act was refused by the local planning authority, and the board's appeal from the refusal was referred to the Minister of Fuel and Power†, under s. 119 (2) of the Act, for determination of the question whether the land was operational land as defined in s. 119 (1)‡. The Minister, having caused a local inquiry to be held, determined that the land was operational land and subsequently gave reasons§ for his determination. The local planning authority moved for an order of certiorari to quash the determination.

E **Held:** land in which an interest was held for the purpose of carrying on the undertaking of statutory undertakers could be “operational land” as defined in s. 119 (1) of the Town and Country Planning Act, 1947, (a) although the statutory undertakers had not begun to use it for the purpose of their undertaking nor (per DEVLIN, J.) had obtained power to do so, and (b) (per BYRNE and DEVLIN, JJ.) although the land was not contiguous to other land of statutory undertakers used for the purposes of their undertaking; and, therefore, certiorari to quash the Minister's determination would not be granted.

F Per LORD GODDARD, C.J.: the question whether land is “... comparable rather with land in general than with land which is used ... for the purpose of the carrying on of statutory undertakings” within the definition of “operational land” in s. 119 (1) of the Act of 1947 is a question of fact (see p. 735, letter A, post).

G **[Editorial Note.** The consequence of the decision that the land was operational land would be to bring it within s. 35 (2), (4) of and Sch. 5 to the Town and Country Planning Act, 1947.

H For the Town and Country Planning Act, 1947, s. 35, s. 119 and Sch. 5, see 25 HALSBURY'S STATUTES (2nd Edn.) 542, 635 and 646.]

* The term “statutory undertakers” is defined in s. 119 (1) of the Town and Country Planning Act, 1947, as meaning persons authorised by any enactment to carry on, among other undertakings, any undertaking for the supply of gas.

† The style of the Minister of Fuel and Power was changed to the “Minister of Power” by the Minister of Fuel and Power (Change of Style and Title) Order, 1957 (S.I. 1957 No. 48).

‡ By s. 119 (1) of the Town and Country Planning Act, 1947, the definition of operational land is as follows:

“‘operational land’, in relation to any statutory undertakers, means land which is used for the purpose of carrying on the undertakings of those undertakers and land in which an interest is held for that purpose, not being land which, in respect of its nature and situation, is comparable rather with land in general than with land which is used, or in which interests are held, for the purpose of the carrying on of statutory undertakings.”

§ The reasons are set out at p. 733, letter I, to p. 734, letter D, post.

Motion for Certiorari.

The Warwickshire County Council, who were the local planning authority for the County of Warwick, moved for an order of certiorari to bring up and quash a determination of the Minister of Fuel and Power, issued on Oct. 19, 1956, that certain land in the rural district of Meriden, in Warwickshire, was "operational land", as defined in s. 119 (1) of the Town and Country Planning Act, 1947.

The land in question was acquired by Birmingham Corporation in or about 1938, and an application was then made to the Board of Trade for an order under the Gas Regulation Act, 1920, and the Gas Undertakings Act, 1929, to authorise the corporation to use the land for the manufacture and storage of gas. A local inquiry was held but no decision was ever made. In 1948 the corporation informed the planning authority that the land was surplus to the requirements of their gas committee and that they proposed to appropriate it for the purposes of their education committee. In February, 1952, the corporation informed the county council that the land had become vested in the West Midlands Gas Board. In July, 1952, the gas board informed the corporation that they were prepared to agree to the land being allocated in the county development plan for educational purposes, and to the corporation having a right of pre-emption over the land for a period of ten years from May 1, 1949. By a letter dated Apr. 27, 1955, the corporation informed the gas board that they were prepared to surrender their right of pre-emption.

In November, 1955, the gas board made an application under s. 14 of the Town and Country Planning Act, 1947, to the county council for permission to develop the land by the erection of a gasification plant. Permission was refused on the ground, among other grounds, that the land lay within the green belt area between Birmingham and Coventry. The gas board appealed to the Minister of Housing and Local Government under s. 16 of the Act of 1947, on the ground that the land was "operational land" as defined in s. 119 (1) of the Act, and the matter was referred to the Minister of Fuel and Power under s. 119 (2).

On Oct. 11, 1956, an inquiry was held by a senior legal assistant attached to the Ministry of Fuel and Power who inspected the land. The land was in the vicinity of the Hams Hall Electricity Station which was operated by the Central Electricity Authority as a statutory undertaking. There were also in the vicinity a railway, a sewage works and the River Thane. The land was separated from the electricity station by the railway, the river, and a belt of trees and though, at first sight, it might well be considered as ordinary agricultural land yet, after inspection, the impression obtained was different. The inspector concluded as a fact that the land was not land which, in respect of its nature and situation, was comparable rather with land in general than with land which is used, or in which interests are held, for the purpose of the carrying on of statutory undertakings. On Oct. 19, 1956, the Minister issued his determination, the terms of which are stated at p. 733, letter E, post; subsequently the Minister by letter gave his reasons, which are stated at pp. 733, 734, post. By that letter the Minister found as a fact that the gas board held an interest in the land for the purpose of carrying on their undertaking and had done so since Apr. 27, 1955.

For the purposes of the motion it was not disputed that the gas board had the subjective intention of using the land for the purpose of their undertaking if the board could obtain authority to use it for that purpose. The local planning authority submitted that the Minister was wrong in law for the following reasons, among others: (a) that land was not operational on the mere subjective intention of the undertakers to use the land operationally, and no such intention

- A could be effective unless some authority to institute the use could be shown; and (b) though, in applying the portion of the definition of "operational land" in s. 119 (1) of the Act of 1947 concerning comparable land, there need not be land used for the purpose of the particular statutory undertaker whose land is in question contiguous or adjacent to the land alleged to be operational, yet there must be land of some statutory undertaker, which was contiguous, adjacent
- B or comparable to the land in question, and to be operational the land in question must be physically comparable therewith. The local planning authority alleged that in fact the land in question was agricultural land and comparable with adjoining agricultural land and not with the operational lands of statutory undertakers other than the gas board.

- C *S. Cope Morgan, Q.C.*, and *D. P. Kerrigan* for the applicants, the Warwickshire County Council.

The Solicitor-General (Sir Harry Hyllton-Foster, Q.C.) and *Rodger Winn* for the first respondent, the Minister of Power.

J. R. Willis, Q.C., and *F. A. Stockdale* for the second respondents, the West Midlands Gas Board.

- D **LORD GODDARD, C.J.:** This is a motion on behalf of the Warwickshire County Council for an order of certiorari to bring up and quash a determination of the Minister of Fuel and Power dated Oct. 19, 1956, in which he determined that certain land specified by reference to a plan attached to the determination was operational land. The Minister's determination read:

- E "Whereas a question has arisen between the Warwickshire County Council and the West Midlands Gas Board whether the land specified in the schedule hereto being land in which that gas board as statutory undertakers for the supply of gas have an interest is or is not operational land: Now therefore the Minister of Fuel and Power in pursuance of s. 119 (2) of the Town and Country Planning Act, 1947, hereby determines that the
- F land so specified is operational."

- It seems that this land is on the borders of the city of Birmingham, and there is a large power station on some adjoining land from which it is separated by a belt of trees which was put up as a screen, but apparently was not a wholly effective screen. Behind the belt of trees there is a railway, a waterway and
- G various industrial buildings. The land is, in fact, a field on the very edge of a large industrial area, and there is no doubt that the field is the property of the gas board. The Warwickshire County Council, very naturally, because this is part of what they call their "green belt", do not want the land developed for industrial purposes. The gas board, however, propose to extend their statutory undertaking and the works which they are entitled to operate, and, accordingly, they appealed to the Minister when the county council refused permission. The only question which we have to decide on the motion for certiorari is whether or not the Minister has gone wrong in law in making his determination.
- H To enable that point to be brought before the court the county council pressed the Minister to state the reasons for his decision, and the Minister has done so. The reasons are stated in a letter dated Jan. 1, 1957, in which it is said:

- I "The Minister held, as a matter of law, that the expression 'operational land' as defined in s. 119 (1) of the Town and Country Planning Act, 1947, should not be construed as being restricted to land upon which a statutory undertaker has already obtained power to operate and that this was clear from the provisions of para. 1* of Sch. 5 to the Act.

* Paragraph 1 of Sch. 5 deals with applications for permission to develop operational land; see 25 HALSBURY'S STATUTES (2nd Edn.) 646.

"He further held that the inclusion in the definition of 'operational land' of the words 'not being land which, in respect of its nature and situation, is comparable rather with land in general than with land which is used, or in which interests are held, for the purpose of the carrying on of statutory undertakings' should not be construed so as to imply the necessity of the particular statutory undertaking concerned, in this case the gas board, owning contiguous or adjacent land which is used for the purposes of its undertaking, since such a construction would run counter to the wording of the definition.

"In the light of these conclusions the Minister found as a fact that the West Midlands Gas Board held an interest in the land for the purpose of carrying on their undertaking and had done so from Apr. 27, 1955, when the Birmingham Corporation surrendered all interest it held in the land to the board. Further, as regards the land itself, after considering the report of the officer holding the inquiry, who viewed it, the Minister found that it was not land which, in respect of its nature and situation, was comparable rather with land in general than with land which is used, or in which interests are held, for the purpose of the carrying on of statutory undertakings."

So far as the question of law is concerned, it entirely depends on the construction of the definition of "operational land" which is to be found in s. 119 (1) of the Act:

"'operational land', in relation to any statutory undertakers, means land which is used for the purpose of carrying on the undertakings of those undertakers and land in which an interest is held for that purpose . . ."

I pause there because that raises the first point which the Minister has determined and which counsel for the applicants controverts. The argument submitted on behalf of the county council is that land cannot become operational, although it is held by statutory undertakers, unless the statutory undertakers have begun to use it in some way for the purpose of their undertaking. The words of the definition, however, are not only "land which is used for the purpose of carrying on the undertaking", but "land in which an interest is held for that purpose"; in other words, land in which the statutory undertakers have an interest either as freeholders or leaseholders, as the case may be, and their interest is for the purpose of carrying on their undertaking. A comparison of those words with the words which immediately precede them seems to me to show that the phrase "operational land" includes not only the land which the statutory undertakers have already begun to use for the purpose of the undertaking but also land which they intend to use in the future. They are holding the land and, as statutory undertakers, they are holding it for the purpose of their undertaking. It may often happen that, when statutory undertakers acquire land, they acquire more than they actually require at the time, because they are, perhaps, only starting to develop their undertaking. Thus they may have land which they intend to use in the future for the purpose of their undertaking, and that land seems to me clearly to be operational land. I think that the Minister's interpretation of the section on that point is quite impeccable and we cannot say that there is any ground on which we can quash the determination.

The second point is that the definition of "operational land" in s. 119 (1) provides:

" . . . not being land which, in respect of its nature and situation, is comparable rather with land in general than with land which is used, or

A in which interests are held, for the purpose of the carrying on of statutory undertakings."

Prima facie, that seems to raise a question purely of fact. Whether land is comparable with land in general or land on which other of these undertakings is carried on is obviously a question of fact. In this case we know that the

B inspector who was sent down to hold the inquiry viewed the land. Having seen it, he came to the conclusion that the land was not "comparable . . . with land in general", which, I suppose, means other agricultural land. If the land is agricultural land, there is, of course, no question about it. All the factors having been taken into account and the situation of the land having
C been inspected, it was found that the land was not land which was comparable with land in general, but that it was comparable with land which is used for the purpose of carrying on statutory undertakings. It seems to me that that is essentially a question of fact. Counsel for the applicants submitted that there should not be such a finding unless statutory undertakings were actually being carried on on the land in question. That does not seem to me to be the
D right construction of the definition in s. 119 (1). In my opinion, this second question raises a question of fact, and we cannot reverse the Minister on that. As far as I can see he has adopted, and his inspector has used and applied, the right principles. They have not taken into consideration anything which they ought not to have taken into consideration. They have come to a perfectly right opinion so far as the first point is concerned, and there is no fault to be
E found with the decision on the other point. For these reasons, the motion fails and is dismissed with costs.

BYRNE, J.: I agree. The Minister found in fact that the West Midlands Gas Board held an interest in the land for the purpose of carrying on their undertaking. That being so, the question is whether the land comes within the
F definition of "operational land" in s. 119 (1) of the Town and Country Planning Act, 1947. As I understand the argument on behalf of the applicants, it amounts to this: the land or part of it must have been operated on for it to have become operational land. In my view, that argument is erroneous. The term "operational land" is not restricted to land on which operations have taken place, because that situation is provided for in the first part of the definition. Neither,
G in my opinion, is it necessary that it should be land which is contiguous to other land which is being used for a statutory undertaking. In my opinion, the Minister made no mistake in law.

DEVLIN, J.: I also agree. I think that the point which we are called
H on to decide is extremely narrow. The question is, as my Lords have said, whether the land which was considered at the inquiry comes within the definition of "operational land" in s. 119 (1) of the Town and Country Planning Act, 1947. That definition consists of two categories of land and of an exception which would take the land out of either of those categories—at any rate, out of the second.

I The Minister, having given his determination, was invited to give his reasons for it, so far as they raised questions of law. In a letter dated Jan. 1, 1957, he stated two conclusions of law at which he had arrived, and which were essential to his finding of fact. No complaint was made that the statement was not sufficient; it was not suggested that there must have been other matters of law decided. The argument of counsel for the applicants was very far-reaching and I invited him, in order that I might follow it, to put into writing or formulate any further point of law about which he said that the Minister

must have been in error. He did not accede to that invitation. I, therefore, A
deal with the matter simply by inquiring whether the two propositions of law
laid down in the letter of Jan. 1 are correct or incorrect. In my judgment,
they are manifestly correct. The first of them merely involves this question:
Before it can properly be concluded that land is land in which an interest is
held for a particular purpose, is it necessary that there should be power B
immediately to put that purpose into effect? That is what I understand
the submission of counsel for the applicants to be because he says that
land cannot be held for a purpose unless there has previously been obtained
planning permission to carry the purpose into effect. I can find no justifica- C
tion in the language of the definition, or in any other material to which
counsel for the applicants has directed our attention, for holding that such a
limitation should be read into the words. The words in their natural meaning
are plain enough; one can have a purpose without the power to put it into
immediate execution, although cases may arise where the possibility of the
purpose being put into execution is so remote that it might be held not to be
within the Act, on the point of law on which the Minister was asked to decide
I think that he has arrived at the right conclusion. D

The second point is even simpler. It is whether within the exception in the
definition land can be comparable with other land to which it is not contiguous
or adjacent. I think that it quite plainly can. On that point also, I think that
the Minister's conclusion was right, and I agree, therefore, that the motion fails.

Motion dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. M. Willis*, Warwick (for
the applicants); *Treasury Solicitor* (for the first respondent); *Sherwood & Co.*,
agents for *A. C. Croasdell*, Birmingham (for the second respondents).

[Reported by E. COCKBURN MILLAR, Barrister-at-Law.]

A

R. v. DUNBAR.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Byrne and Devlin, JJ.),
June 24, July 1, 5, 1957.]

B

Criminal Law—Capital murder—Diminished responsibility—Burden of proof of diminished responsibility—Preponderance of probability—Homicide Act, 1957 (5 & 6 Eliz. 2 c. 11), s. 2 (2).

C

D., having killed an old lady after breaking into her house to steal, was convicted of capital murder under s. 5 (1) (a) of the Homicide Act, 1957, viz., of committing murder in the course or furtherance of theft. At his trial he had raised the defence under s. 2 of the Act of 1957, viz., that he was suffering from such abnormality of mind as substantially impaired his mental responsibility for the killing. By s. 2 (2) of the Act of 1957 the defence of diminished responsibility was for the defence to prove. The judge did not point out to the jury the difference between the burden of proof on the prosecution and the burden of proof on the defence.

D

Held: the burden of proof on the accused of the defence of diminished responsibility was not as heavy as the burden of proof on the prosecution and was the burden of showing a preponderance of probability; in summing-up a judge should direct the jury on the difference in the burden of proof and, as that had not been done, a verdict of manslaughter would be entered.

R. v. Carr-Briant ([1943] 2 All E.R. 156) and *H.M. Advocate v. Braithwaite* (1945 S.C. (J.) 55) followed.

E

Appeal allowed.

[As to the standard of proof when the burden of proof rests on the accused, see 10 HALSBURY'S LAWS (3rd Edn.) 437, para. 810.]

Cases referred to:

F

- (1) *H.M. Advocate v. Braithwaite*, 1945 S.C. (J.) 55; 2nd Digest Supp.
- (2) *R. v. Carr-Briant*, [1943] 2 All E.R. 156; [1943] K.B. 607; 112 L.J.K.B. 581; 169 L.T. 175; 107 J.P. 167; 2nd Digest Supp.
- (3) *Cooper v. Slade*, (1858), 6 H.L. Cas. 746; 27 L.J.Q.B. 449; 31 L.T.O.S. 334; 22 J.P. 511; 10 E.R. 1488; 20 Digest 66, 464.

Appeal.

G

This was an appeal by Ronald Patrick Dunbar, the appellant, against his conviction of capital murder under s. 5 (1) (a) of the Homicide Act, 1957, before ASHWORTH, J., and a jury at the assizes at Newcastle-upon-Tyne on May 16, 1957. At the trial the appellant raised the defence of diminished responsibility under s. 2 of the Act of 1957; his grounds of appeal were that the trial judge failed to direct the jury properly or misdirected them as to the burden of proof required of the defence to establish the defence of diminished responsibility, and that he misdirected the jury on the medical issues raised by that defence and the evidence thereon. The appeal proceeded only on the question of the judge's direction as to the burden of proof placed on the defence.

H

The facts of the case and the relevant passages from the summing-up of the trial judge are set out in the judgment.

I

P. Stanley-Price, Q.C., and *J. R. Johnson* for the appellant.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), *G. De P. Veale, Q.C.*, and *J. C. Willis* for the Crown.

Curr. adv. vult.

July 5. LORD GODDARD, C.J., read the following judgment of the court: The appellant was convicted before ASHWORTH, J., at the last assizes for Newcastle-upon-Tyne of capital murder in that on or about Mar. 5, 1957, he

murdered Selina Mewes in the course or furtherance of theft*. There was no dispute that the appellant had killed the woman in question and that he did so after breaking into her house for the purpose of stealing. The only defence raised was under s. 2 (1) of the Homicide Act, 1957, which provides that where a person kills another he shall not be convicted of murder if he was suffering from

“such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing”,

this defence being generally known as one of diminished responsibility. By s. 2 (2) it is provided:

“On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.”

By sub-s. (3) it is provided:

“A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.”

The facts, which were not in dispute, were that the appellant, a young man of twenty-four years of age, on the night in question broke into the house occupied by Mrs. Mewes, an old woman of eighty-two years of age. He did this after discussion with a friend with whom he had been spending the evening but who did not accompany him on his criminal enterprise. From a statement which he made the next day when he gave himself up to the police he admitted that he had got into the house by breaking a window. He then forced the door of the back room which was locked and the door of the front room in which Mrs. Mewes was sleeping. She woke up and thinking that she had recognised him he picked up a lemonade bottle with which he attacked her, and the medical evidence showed that she must have been struck several times on the head with the bottle so that her skull was smashed and her cheek bones broken. The appellant then picked up several 10s. notes and ran out of the house. At the trial a psychiatrist was called for the defence and, although the evidence which he gave was of a somewhat vague description, he did say that the prisoner, in his opinion, was a psychopath and was suffering from an abnormality of mind. The evidence of the prison doctors, while agreeing with some of the evidence that the psychiatrist had given, was that they were firmly of opinion that the prisoner was not a psychopath and this issue was left to the jury by the learned judge. The court desires to say at once that in their opinion no fault could be found with his charge to the jury as to what constituted diminished responsibility. It is a defence which the Act of 1957 has borrowed from the law of Scotland and the learned judge's direction to the jury was quite in accordance with the directions which have been given by the Lords of Justiciary, and in particular we would refer to the charge of the Lord Justice-Clerk, afterwards Lord Justice-General, LORD COOPER, in *H.M. Advocate v. Braithwaite* (1) (1945 S.C. (J.) 55). Nor can any fault be found with the learned judge's statement of the facts. The appeal was solely based on, and the only matter discussed before us was, whether he had given a proper direction to the jury as to the burden which was on the defence when setting up a plea of diminished responsibility. In addressing the jury counsel for the appellant had contended that the jury were only concerned with the balance of probabilities and that it was not for the defence to establish the

* The appellant was convicted under the provisions of s. 5 (1) (a) of the Homicide Act, 1957.

- A defence of diminished responsibility by the same high degree of proof as that which is demanded of the prosecution in proving a criminal offence. Counsel for the prosecution contended that the defence had to prove beyond reasonable doubt that the defendant came within the words of s. 2 (1). He added: "They have to prove beyond any reasonable doubt that [the appellant] is within those words as a reasonable probability". The learned judge dealt with this matter more than once in his summing-up. Early in his summing-up he said:

"Let me tell you what Parliament has said, and, after all, that is what you and I have got to go by. 'On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder'. That is what Parliament has said: fairly and squarely the burden is placed on the defence."

A little later on and shortly before the mid-day adjournment he said:

"Lastly, on this point, if you are not satisfied that he was suffering from such abnormality as I have been dealing with, then, members of the jury, you must take it from me that it is your duty to reject this defence. Something has been said about balance of probabilities and about the burden of proof and about doubt, and so on. I prefer to leave you with the simple words of the Act of Parliament, '... it shall be for the defence to prove'; and if it does not, the defence goes."

The Attorney-General, who intervened in this case on the appeal, conceded that in view of the decision in *R. v. Carr-Briant* (2) ([1943] 2 All E.R. 156) that this was not an adequate direction. That case, which is binding on us, decided that where either by statute or at common law some matter is presumed against an accused person unless the contrary is proved the jury should be directed that it is for them to decide that the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that this burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called on to establish. This case is often cited as showing that where an onus is placed on an accused person it may be discharged by proving what would be enough to support a verdict in a civil action, and that, to use the words of WILLES, J., in *Cooper v. Slade* (3) (1858), 6 H.L. Cas. 746 at p. 772, "in civil cases the preponderance of probability may constitute sufficient ground for a verdict."

The Attorney-General, however, contended that later passages in the learned judge's summing-up corrected any wrong impression the jury might have got from the words which we have already quoted. While dealing with the evidence of Dr. Orton, the psychiatrist, the learned judge said:

"The way to do [justice] is to look at the evidence in the light of the whole of the facts and ask yourselves quietly and soberly: 'Am I satisfied that the defence have proved that he was suffering in the way indicated?'"

His final direction to the jury was this:

"The way I would direct you to consider this issue is to look, first, and form your own view about the history in the sense of what was the proper description of [the appellant's] working record and his after-care, and so on, and then to recall to your minds the doctors' evidence, and then to ask yourselves very carefully: 'Out of all these factors which may help to build up the picture of a psychopath, or may tend against him, where is the balance?' And, members of the jury, unless the balance is brought down in favour of abnormality the defence must fail. That is important."

But the learned judge nowhere, probably because *R. v. Carr-Briant* (2) was not cited to him, pointed out to the jury the difference between the onus which is on

the prosecution and that which is on the defence. The last passage which, had it stood alone, might have supported the verdict was not, we think, sufficient considering the very strong directions which the learned judge had given earlier in his summing-up that the burden must rest fairly and squarely on the defence and that he would leave the question of probabilities or doubts simply in the words of s. 2 (2) of the Act of 1957. We think it must be pointed out to a jury in these cases that the burden on the defence is not as heavy as the burden on the prosecution. That this is the law of Scotland as well as the law of England is clear from *H.M. Advocate v. Braithwaite* (1), which we have already cited, where the Lord Justice-Clerk in concluding his charge to the jury said (1945 S.C. (J.) at p. 58):

“ If you think the balance of probability to be in favour of that defence, you must sustain it, and your verdict will be culpable homicide. If, on the other hand, doing your duty fearlessly and honestly to the best of your ability, you cannot find in the evidence laid before you material to justify the conclusion that the balance of probability is in favour of this defence, then I have to tell you that it is your duty to return a verdict of murder.”

If that direction had been given it is indeed highly likely considering the somewhat vague nature of the psychiatrist's evidence and the positive evidence of the doctors called for the prosecution that the jury would have returned the verdict which they did, but in a matter which makes a difference between a capital sentence and a sentence only of imprisonment we feel it would be undesirable for the court to consider applying the proviso* and accordingly we have already directed that a verdict of manslaughter should be entered instead of one of capital murder and the prisoner sentenced to imprisonment for life. Accordingly the appeal is allowed to that extent.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions.*

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

* Viz., the proviso to s. 4 (1) of the Criminal Appeal Act, 1907 (5 HALSBURY'S STATUTES (2nd Edn.) 929).

A

R. v. VICKERS.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery, Byrne, Slade and Devlin, JJ.), July 1, 5, 1957.]

Criminal Law—Capital murder—Implied malice—Killing done in furtherance of theft—Woman killed from blows inflicted by burglar—Direction to jury that malice implied from voluntary act causing grievous bodily harm—Implied malice still sufficient to constitute murder—Causing grievous bodily harm not “another offence” within Homicide Act, 1957 (5 & 6 Eliz. 2 c. 11), s. 1 (1).

B

C

D

In the course of committing a theft the accused, who had broken into a house occupied by a woman of seventy-three years of age, attacked her with his fists. He struck her, and he kicked her in the face. From those injuries, although they could have been inflicted with a moderate degree of violence, she died. He was convicted of capital murder. The trial judge directed the jury that malice aforethought would be implied if the victim were killed by the voluntary act of the accused done with intent to cause her grievous bodily harm. On appeal against conviction on the ground that the direction was wrong in law in view of s. 1 (1)* of the Homicide Act, 1957,

E

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Held: the conviction should stand because s. 1 (1) did not abolish the doctrine of implied malice, viz., that malice aforethought may be implied from the voluntary act of an accused inflicting grievous bodily harm on the deceased causing her death; but s. 1 (1) did abolish the doctrine of constructive malice, viz., that the causing of death in the course of committing some felony of violence (e.g., rape) other than that which resulted in the killing amounted to murder, and, although in the present case the deceased's death had been caused in the furtherance of the crime of theft, yet there had been also the inflicting of grievous bodily harm from which malice aforethought, essential to the crime of murder, might rightly be implied.

Appeal dismissed.

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[**Editorial Note.** A former anomaly in relation to the crime of murder was illustrated by the cases where death resulted from causing an abortion. If death could not reasonably be expected to result in such a case from the act done, but did in fact result, the crime was manslaughter (see the cases cited in 10 HALSBURY'S LAWS (3rd Edn.) 714, para. 1368, note (h)). This anomaly, which rested, perhaps, on the fact that in those cases there was no intention to do harm or anything against the wish of the person injured (see per SWIFT, J., in *R. v. Stone*, [1937] 3 All E.R. at p. 921, letter H), will no longer exist in view of s. 1 (1) of the Homicide Act, 1957, since by virtue of that enactment the causing of death in such circumstances will be manslaughter.]

As to the definition of murder and as to the meaning and implication of malice aforethought, see 10 HALSBURY'S LAWS (3rd Edn.) 704, para. 1349, 707, paras. 1354, 1357, and as to constructive malice, see *ibid.*, p. 714, para. 1368, text and note (f); for cases on the subject, see 15 DIGEST (Repl.) 930, 931, 8904-8925.]

I

Appeal.

This was an appeal by John Willson Vickers, the appellant, against his conviction of capital murder under s. 5 (1) (a) of the Homicide Act, 1957, viz., of murder done in the course or furtherance of theft, before HINCHCLIFFE, J., and a jury at Carlisle Assizes on May 23, 1957. The appellant was sentenced to death. In the early hours of Sunday morning, Apr. 14, 1957, the appellant, who was a labourer aged twenty-two, broke into the cellar of a shop which was

* See p. 742, letter G, post.

occupied by an old woman of seventy-three, a Miss Duckett, intending to steal money. At the shop Miss Duckett carried on a prosperous business of grocer and tobacconist, and she lived alone on the same premises in two rooms above the shop; she was a small woman and the appellant, who lived in lodgings a short distance away, knew that she was deaf. While the appellant was in the cellar Miss Duckett came down the stairs leading to it and saw the appellant. She asked him what he was doing and came towards him, whereupon the appellant attacked her with his fists and struck her several blows; she fell down. The medical evidence was that Miss Duckett was struck by ten to fifteen blows and was kicked in the face by the appellant, and that death was caused by shock due to general injuries; the medical evidence was also that the degree of force necessary to inflict the injuries sustained by Miss Duckett would be moderately severe to quite slight force.

The appellant now appealed against his conviction inter alia on the ground that the judge misdirected the jury when he told them that malice aforethought could be implied if the victim was killed by a voluntary act done with the intention of causing grievous bodily harm.

D. J. Brabin, Q.C., and I. H. M. Jones for the appellant.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), J. M. E. Di V. Nahum, Q.C., and D. P. Bailey for the Crown.

LORD GODDARD, C.J., delivering the judgment of the court, stated the facts and continued: The point that has been raised on the appellant's behalf turns entirely on s. 1 (1) of the Homicide Act, 1957, which came into force this year*. At the first hearing of the case on July 1, 1957, there not being complete unanimity among the members of the court who heard the case, I assembled a full court of five members and I am happy to say that there is now complete unanimity in the court and the judgment which I am now about to deliver is the judgment of the court and is agreed by all the members of it. I should like also to say that the court has been much indebted to Mr. Brabin, leading counsel for the appellant, for the learned and careful argument which he has put forward on behalf of the appellant. There can be no doubt, therefore, that the matter has been thoroughly explored and that the court is enabled to give a decision which will be a guidance to courts in the future. I should also like to say that in the opinion of the court the summing-up of HINCHCLIFFE, J., was quite impeccable in this case.

The point that is raised is this: s. 1 (1) of the Act of 1957 says:

"Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

The marginal note of s. 1, which of course is not part of the section, but may be looked at as some indication of the purpose, is: "Abolition of 'constructive malice'."

"Constructive malice" is an expression that has crept into the law—I do not think that it will be found in any particular decision but it is to be found in the text-books—and is something different from implied malice. The expression "constructive malice" is generally used and the best illustration of constructive malice which is generally given is that if a person caused death during the course of his carrying out a felony which involved violence, that always amounted to murder. There were cases in which a man was not intending to cause death, as for instance where a mere push was given which would never have been considered in the ordinary way as one which would cause death, but

* The Homicide Act, 1957, came into force on Mar. 21, 1957, the date on which it received the royal assent.

- A the person pushed fell down and most unfortunately struck his head or fell down the stairs and broke his neck, yet if the act were done, for example, in the course of burglary, it amounted to murder. Take the case of rape. If a man raped a woman and in order to overcome her resistance proceeded to strangle her, the fact that he might only have used a moderate degree of violence in the strangling, in holding her throat, would have been no defence. If he did cause death it would have been murder because he caused death during the commission of the offence of rape. Another instance of constructive malice which was always held sufficient to amount to murder was the killing of a police officer in the execution of his duty. If a prisoner was resisting arrest, although he might use only a moderate degree of violence on a police officer, yet if he caused the death of the officer from some unusual or perhaps extraordinary reason, he was, before the Act of 1957, guilty of murder. Murder is, of course, killing with malice aforethought and "malice aforethought" is a term of art. Malice aforethought has always been defined in English law as either an express intention to kill such as could be inferred when a person, having uttered threats against another, produced a lethal weapon and used it on him, or an implied intention to kill, as where the prisoner inflicted grievous bodily harm, that is to say, harmed the victim by a voluntary act intended to harm him and the victim died as the result of that grievous bodily harm. If a person does an act on another which amounts to the infliction of grievous bodily harm he cannot say that he did not intend to go so far. It is put as *malum in se* in the old cases and he must take the consequences. If he intends to inflict grievous bodily harm and that person dies, that has always been held in English law, and was at the time when the Act of 1957 was passed, sufficient to imply the malice aforethought which is a necessary constituent of murder.
- E It will be observed that s. 1 preserves the implied malice as well as express malice and the words "where a person kills another in the course or furtherance of some other offence" cannot in our opinion refer to the infliction of the grievous bodily harm, if the case which is made against the prisoner is that he killed a person by having assaulted the person with intent to do grievous bodily harm and from the bodily harm which he inflicted that person dies. The furtherance of some other offence must refer to the offence that he was committing or endeavouring to commit other than the killing, otherwise there would be no sense in it. It was always the English law that if death were caused by a person in the course of committing a felony involving violence, that was murder. Therefore, in this particular case it is perfectly clear that the words "where a person kills another in the course or furtherance of some other offence" must be attributed to the burglary which the appellant was committing. The killing was in the course or furtherance of that burglary. He killed that person in the course of the burglary because he realised that the victim recognised him and he therefore inflicted grievous bodily harm on her, perhaps only intending to render her unconscious, but he did intend to inflict grievous bodily harm by the blows he inflicted on her and by kicking her in the face, of which there was evidence.
- H Section 1 (1) of the Act of 1957 then goes on:

"the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

- I It would seem clear, therefore, that what the legislature is providing is that where there is a killing, though it may be done in the course or furtherance of another offence, that other offence must be ignored. The other offence is not taken into consideration. What has to be considered are the circumstances of the killing; and if the killing would amount to murder by reason of the express or implied malice then that person is guilty of capital murder. It is not enough that he killed in the course of the felony unless the killing is done in a manner which would amount to murder ignoring the felony which is committed.

It seems to the court, therefore, that here you have a case of a burglar attacking a householder to prevent recognition. The householder died as the result of blows inflicted on her—blows or kicks or both—and if s. 1 of the Act of 1957 had not been passed there could be no doubt that the man would have been guilty of murder. He is guilty of murder because he has killed a person with the necessary malice aforethought being implied from the fact that he intended to do grievous bodily harm. A

I will now briefly refer to the summing-up of HINCHCLIFFE, J., which the court thinks is quite impeccable. He put it, I think, exceedingly well. He said to the jury: B

“If you are not satisfied that the charge of capital murder has been proved, that is to say, if you are in doubt whether the accused man had the intention to inflict grievous bodily harm on Miss Duckett, it is right that, in those circumstances the accused would be guilty of manslaughter, if you were satisfied that the accused had brought about the old lady’s death without any malice, without any intention to do her grievous bodily harm.” C

Again, he said:

“If capital murder is not so proved and you come to the conclusion that the accused killed Miss Duckett without any malice, that is, without intending her any harm, or only trifling harm, then your verdict will be one of guilty of manslaughter” D

for instance, a push to get her out of the way. Further, he said:

“Murder is with the intention to kill or to do grievous bodily harm; manslaughter is an unlawful killing, but without any intention.” E

Finally he gave this direction to the Jury:

“Malice will be implied, if the victim was killed by a voluntary act of the accused—and here is the importance of what I am going to say—done with the intention either to kill or to do some grievous bodily harm. The grievous bodily harm need not be permanent, but it must be serious, and it is serious or grievous if it is such as seriously and grievously to interfere with the health or comfort of the victim . . . Ask yourselves: Is it proved that the accused man killed Miss Duckett with malice, that is, when he struck the blows he intended to do her serious bodily harm?” F

The court desires to say quite firmly that in considering the construction of s. 1 (1), it is impossible to say that the doing of grievous bodily harm is the other offence which is referred to in the first line and a half of the sub-section. It must be shown that independently of the fact that the accused is committing another offence, that the act which caused the death was done with malice aforethought as implied by law. The existence of express or implied malice is expressly preserved by the Act of 1957 and, in our opinion, a perfectly proper direction was given by HINCHCLIFFE, J., to the jury, and accordingly this appeal fails and is dismissed. G H

Appeal dismissed.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Director of Public Prosecutions.

[Reported by WENDY SHOCKETT, Barrister-at-Law.]

A WESTMINSTER BANK, LTD. v. INLAND REVENUE COMMISSIONERS.
 WRIGHTSON AND ANOTHER v. INLAND REVENUE COMMISSIONERS.

B [HOUSE OF LORDS (Earl Jowitt, Lord Morton of Henryton, Lord Reid, Lord Radcliffe and Lord Keith of Avonholm), March 25, 26, 27, 28, July 4, 1957.]

Estate Duty—Passing—Property deemed to pass—Money received under policy of assurance—Settlement inter vivos of policies on life of settlor—Income to be accumulated for specified period—Life interest in trust fund—Proceeds of policies falling in on settlor's death—Whether life interest in possession if no income during life of settlor—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (1) (d).

C By a settlement dated Mar. 5, 1929, a settlor, who at all times was domiciled in Northern Ireland, assigned to a bank as trustees two fully paid policies of assurance on his life, which were locally situate in England, and "all moneys to become payable thereunder and the full benefit thereof" to the trustees "to hold the same on the trusts" therein declared. He also gave the sum of £12,000 to the trustees on the same trusts. The sums assured by the first policy were two four per cent. Victory Bonds and the policy provided that if either of the bonds was drawn during the currency of the policy a certain sum in cash should be paid to the assured or his assigns forthwith. The second policy was a single premium policy assuring payment of a sum of money on the death of the settlor. Clause 2 of the settlement provided that the trustees should "out of the proceeds of the said policies" pay all duties leviable on the death of the settlor and should invest the residue of these moneys and should forthwith invest the £12,000 "which moneys and the property for the time being representing the same and the accumulations of the income thereof hereinafter directed to be made are hereinafter called 'the trust fund'". In the events which happened the trustees were directed to pay the income of the trust fund (after a period of accumulation which ended in 1942) to J.B. for life, and the income was then paid to him. The settlement contained no power to surrender the policies. During the life of the settlor one of the Victory Bonds was drawn, and £750 was paid in respect of it to the trustees in accordance with the policy and was invested and the income was paid to J.B. The settlor died in 1951, J.B. surviving him. On a summons to determine whether, on the settlor's death, estate duty became payable under s. 2 (1) (d) of the Finance Act, 1894, in respect of the proceeds of the policies (excluding the £750) to the extent of the then value of J.B.'s life interest therein,

H **Held** (LORD RADCLIFFE dissenting): no estate duty was payable in respect of the proceeds of the policies because, although the settlor had, by providing the policies in 1929, provided an "annuity or other interest" within the meaning of para. (d) of s. 2 (1) of the Act of 1894 (and had provided not only the policies but also the policy moneys), yet no beneficial interest in the policies (or the proceeds thereof) accrued or arose on the death of the settlor within the meaning of that paragraph.

I *Lord Advocate v. Hamilton's Trustees* (1942 S.C. 426) approved.

D'Avigdor-Goldsmid v. Inland Revenue Comrs. ([1953] 1 All E.R. 403) applied.

Decision of the COURT OF APPEAL (sub nom. *Re Barbour's Life Assurance Policies*, [1956] 1 All E.R. 627) reversed.

By a settlement dated June 21, 1932, a settlor assigned to trustees four fully paid policies of assurance on his own life and "all bonuses and additions assured by or to become payable under the said policies", and directed that the trustees should "receive all moneys assured by or to become payable under the said policies on maturity (hereinafter called 'the trust fund') " and should divide the same into six parts. The trustees were further directed to pay three equal sixth parts of the trust fund to the trustees of the N.H. Settlement to be held by them on trusts corresponding to those affecting the N.H. estate. As regards the remaining three equal sixth parts of the trust fund, the trustees were directed to invest one such part for each of three of the settlor's four sons (i.e., excluding the eldest) and to apply the income for the maintenance, education and benefit of the son until he should attain the age of twenty-one years and thereafter to pay the income thereof to the son during his life or until he should become tenant for life of the N.H. estate. The settlement further provided that if any of the said sons should become tenant for life of the N.H. estate or should die the trustees should pay or transfer his share of the trust fund to the trustees of the N.H. Settlement to be held on the trusts affecting the N.H. estate. The settlement of 1932 contained no power for the trustees to sell or surrender any of the policies. The settlor's eldest son became tenant for life of the N.H. estate during the settlor's lifetime. The settlor died on Jan. 7, 1950, and at that date his four sons were all living and over the age of twenty-one years. Estate duty was claimed on the death of the settlor under the Finance Act, 1894, s. 2 (1) (d), in respect of the interest for life of each of the settlor's four sons in the said policies or in the property or moneys thereby secured.

Held (LORD REID and LORD RADCLIFFE dissenting): estate duty was not payable, the case being indistinguishable from *Westminster Bank, Ltd. v. Inland Revenue Comrs.* (p. 745 ante).

Appeal allowed.

[As to estate duty on policy moneys and interests arising on death, see 15 HALSBURY'S LAWS (3rd Edn.) 25, para. 47; and for cases on the subject, see 21 DIGEST 15, 16, 73-80.]

For the Finance Act, 1894, s. 2 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 350.]

Cases referred to:

- (1) *D'Avigdor-Goldsmid v. Inland Revenue Comrs.*, [1953] 1 All E.R. 403; [1953] A.C. 347; 3rd Digest Supp.
- (2) *A.-G. v. Murray*, [1904] 1 K.B. 165; 73 L.J.K.B. 66; 89 L.T. 710; 68 J.P. 89; 21 Digest 16, 79.
- (3) *Adamson v. A.-G.*, [1933] A.C. 257; 102 L.J.K.B. 129; sub nom. *A.-G. v. Adamson*, 148 L.T. 365; Digest Supp.
- (4) *Sneddon v. Lord Advocate*, [1954] 1 All E.R. 255; [1954] A.C. 257; 3rd Digest Supp.
- (5) *Lord Advocate v. Hamilton's Trustees*, 1942 S.C. 426; 2nd Digest Supp.
- (6) *Lethbridge v. A.-G.*, [1907] A.C. 19; 76 L.J.K.B. 84; 95 L.T. 842; 21 Digest 18, 99.
- (7) *A.-G. v. Dobree*, [1900] 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 64 J.P. 24; 21 Digest 17, 97.
- (8) *Tennant's Trustees v. Lord Advocate*, 1938 S.C. 224; *affd.* H.L. 1939 S.C. (H.L.) 1; sub nom. *Tennant v. Lord Advocate*, [1939] 1 All E.R. 672; [1939] A.C. 207; 108 L.J.P.C. 65; 160 L.T. 441; Digest Supp.
- (9) *Westminster Bank, Ltd. v. A.-G.*, [1939] 2 All E.R. 72; [1939] Ch. 610; 108 L.J.Ch. 294; 160 L.T. 432; Digest Supp.

A Appeals.

The first of these appeals was by Westminster Bank, Ltd. (as trustees of a settlement dated Mar. 5, 1929, made by Sir John Milne Barbour) from an order of the Court of Appeal (LORD EVERSHERD, M.R., BIRKETT and ROMER, L.J.J.) dated Feb. 21, 1956, and reported sub nom. *Re Barbour's Life Assurance Policies*, [1956] 1 All E.R. 627, reversing an order of HARMAN, J., dated July 14, 1955, and reported [1955] 3 All E.R. 41, on an adjourned summons. HARMAN, J., held that estate duty did not become payable in connexion with the death of the settlor in respect of policies of assurance settled by the said settlement, or the proceeds thereof.

The second appeal was by Sir John Garmondsway Wrightson and Oliver Wrightson, the present trustees of a settlement dated June 21, 1932, made by Sir Thomas Garmondsway Wrightson, Baronet, against an order of the Court of Appeal (LORD EVERSHERD, M.R., BIRKETT and ROMER, L.J.J.) dated Feb. 21, 1956, discharging an order dated July 22, 1955, of HARMAN, J., who had found the case indistinguishable from *Westminster Bank, Ltd. v. Inland Revenue Comrs.*

The facts of the *Westminster Bank, Ltd.* case are set out in the opinion of LORD MORTON OF HENRYTON, p. 748, letter B, post. The facts of *Wrightson's* case are also set out in the opinion of LORD MORTON OF HENRYTON, p. 752, letter F, post.

Geoffrey Cross, Q.C., and *J. A. Wolfe* for the appellants in both appeals.

J. Pennyquick, Q.C., and *E. Blanshard Stamp* for the Crown.

The House took time for consideration.

E July 4. The following opinions were read.

EARL JOWITT: My Lords, I have had the advantage of reading in print the speech about to be delivered by my noble and learned friend, LORD MORTON OF HENRYTON, with which I agree.

F LORD MORTON OF HENRYTON: My Lords, I turn first to *Westminster Bank, Ltd. v. Inland Revenue Comrs.* The originating summons in this case raised the question whether, having regard to the provisions of a settlement of Mar. 5, 1929, and in the events that have happened, estate duty became payable, under s. 2 (1) (d) of the Finance Act, 1894 or otherwise, on the death of Sir John Milne Barbour (hereafter called "the settlor") in respect of the life interest of James Barbour in the money or property assured by two several policies of assurance on the life of the settlor effected with the Scottish Amicable Life Assurance Society and comprised in the said settlement. HARMAN, J., held that estate duty did not become payable, but his decision was reversed by the Court of Appeal (LORD EVERSHERD, M.R., and BIRKETT, L.J.—ROMER, L.J., dissenting).

H It was not contended that duty could be payable otherwise than under s. 2 (1) (d) of the Finance Act, 1894. I shall at once set out the relevant portions of s. 1 and s. 2 of that Act:

I "1. In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty', at the graduated rates hereinafter mentioned . . .

"2. (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (d) Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

It is apparent that, in order to answer the question raised by the originating summons, your Lordships have to determine—(i) whether by the settlement of Mar. 5, 1929, the settlor provided “any annuity or other interest” within the meaning of s. 2 (1) (d); and (ii) if so, whether, on the death of the settlor, a beneficial interest in the property so provided accrued or arose to James Barbour, within the meaning of the same section. A

The settlement of Mar. 5, 1929, was made between the settlor of the one part and the appellants, Westminster Bank, Ltd. of the other part, and contained recitals stating (*inter alia*) that the settlor was absolutely entitled to the four policies of assurance specified in the schedule thereto and that the settlor had paid to the bank the sum of £12,000 to be held by the bank on the trusts therein-after declared. The settlor was at all material times domiciled in Northern Ireland, and your Lordships are concerned only with two of the policies, which were, at the settlor’s death in October, 1951, locally situate in England. These two policies were made with the Scottish Amicable Life Assurance Society. In one case the insurers promised, in consideration for a single premium already paid at the date of the settlement, to pay to the executors, administrators and assignees of the settlor the sum of £7,000, with profits, on the settlor’s death. In the other case, in consideration of annual premiums payable during a period which had expired at the date of the settlement, the insurers covenanted on the settlor’s death to pay or transfer to his executors, administrators and assignees two specified four per cent. Victory Bonds of £5,000 each; and the policy further provided that, in the event of either of the bonds being drawn for redemption during the currency of the policy, the settlor or his assigns should (in effect) be paid fifteen per cent. of the amount of the bond and that the balance of eighty-five per cent. thereof should be paid on the settlor’s death to his executors, administrators and assigns. B C D E

By cl. (1) of the settlement the settlor assigned to the bank the four policies

“and all moneys to become payable thereunder and the full benefit thereof To hold the same unto the bank upon the trusts and subject to the powers and provisions hereinafter declared and contained concerning the same.” F

Clause (2) was as follows:

“The bank shall out of the proceeds of the said respective policies pay all death duties if any leviable at the death of the settlor in respect thereof and all costs and expenses incurred by the bank in connexion with the collection and receipt of the proceeds of the said policies and shall invest the residue of the said moneys and shall forthwith invest the said sum of £12,000 (which moneys and the property for the time being representing the same and the accumulations of the income thereof hereinafter directed to be made are hereinafter called ‘the trust fund’) in the name of the bank in or upon . . .” G

Then follows a list of investments which I need not set out. Clause (3) and cl. (4) are as follows: H

“(3) The bank shall until June 30, 1942, accumulate the entire of the income of the trust fund by investing the same and the resulting income thereof at compound interest in any of the investments hereby authorised and shall hold and apply the accumulated fund as part of the capital of the trust fund. I

“(4) From and after the said June 30, 1942, the bank shall pay the income of the trust fund and of the accumulations thereof and of the investments for the time being representing the same (the said policies and the proceeds thereof however not to be treated as income bearing until the amounts payable in respect thereof shall have been received and invested) to the settlor’s son John Milne Barbour during his life and if necessary the

- A said income shall be apportioned as between capital and income as of the said respective dates."

Clause (5) contained trusts to take effect after the death of John Milne Barbour in favour of his sons and grandsons. In fact, John Milne Barbour predeceased the settlor. He died without issue in 1937, i.e., during the period of accumulation.

- B Accordingly, by the effect of certain subsequent clauses of the settlement, the name of the settlor's nephew James Barbour is to be substituted for that of his son for all the purposes of the beneficial interests conferred by the settlement; in other words, the settlor's nephew James became the first tenant for life under the settlement, and he was entitled by virtue of its terms to the income of "the trust fund" as defined in cl. (2).

- C Two further facts should be mentioned. First, that the settlement contained no power for the bank to sell or surrender any of the policies. Secondly, in 1937 one of the Victory Bonds was drawn for redemption, so that the bank then received in respect of it the sum of £750. The bank then became bound to invest that sum, and, after the expiry of the period of accumulation in 1942, the bank became bound to pay the income of that sum and all its accumulations immediately to James Barbour.

- D I now turn to the first of the two questions stated above. My Lords, in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) ([1953] 1 All E.R. 403 at p. 411) I expressed a doubt whether a policy of assurance was an "annuity or other interest" within the meaning of s. 2 (1) (d) of the Act of 1894, and if I had to decide that question in the absence of authority, I should feel the same doubt today. The argument presented by counsel for the appellants has considerable attractions. However, in *A.-G. v. Murray* (2) ([1904] 1 K.B. 165), the Court of Appeal answered that question briefly in the affirmative. That decision has stood unquestioned for over fifty years and very many policies must have been dealt with on the footing that it was correct. Moreover, this House in *Adamson v. A.-G.* (3) ([1933] A.C. 257) gave a wide meaning to the words just quoted, though it does not appear that the trust funds included any policy of assurance.
- F Finally, if the decision in *Murray's* case (2) had not been in accordance with the intentions of the legislature, it is reasonable to suppose that the necessary amendment would have been made in some subsequent Finance Act. In these circumstances, I think that this is plainly a case in which the principle *stare decisis* should be applied, and I would, therefore, hold that, when the settlor provided the four policies, as he undoubtedly did, he provided an "annuity or other interest" within the meaning of s. 2 (1) (d). I would add that, in my opinion, the settlor also "provided" the moneys which became payable to the trustees on his death and the investments representing these moneys from time to time during the continuance of the trusts declared by the settlement. All these items of property were the direct result of his bounty. In the course of the argument the very pertinent question was asked: "If the settlor did not provide these moneys and investments, who did provide them?", and I can see no satisfactory answer to that question. Reference was made to *Sneddon v. Lord Advocate* (4) ([1954] 1 All E.R. 255), but I can find nothing in that case which conflicts with the opinion which I have just expressed. In *Sneddon's* case (4), the House had to consider the provisions of s. 2 (1) (c) of the Finance Act, 1894, incorporating the provisions of s. 38 (2) (a) of the Customs and Inland Revenue Act, 1881, and the decision turned on the words

"property . . . taken under a disposition made by the deceased purporting to operate as an immediate gift inter vivos . . . by way of declaration of trust."

It was held that the "property taken" within the meaning of that section was a sum of £5,000 given to trustees by a truster and not the investments in which the trustees decided to invest that sum. In the present case, the wording of the

section is, in my opinion, vitally different. I need not elaborate this matter further, as I understand that your Lordships are all agreed that *Sneddon's* case (4) is distinguishable from the present case. A

I realise, however, that, in the course of stating my opinion in the *D'Avigdor-Goldsmid* case (1), I made certain observations which may not accord with my present view that the settlor provided the policy moneys as well as the policies. For instance, I said ([1953] 1 All E.R. at p. 411): "The only 'other interest' purchased or provided by the deceased (Sir Osmond) was the policy". That observation was not necessary for the decision of the case. The point which all the members of the House, including myself, were concerned to establish was that it was not *only* the policy moneys which were provided by the deceased, for he also provided the policies the source from which these moneys came. No other member of the House associated himself with the particular observations to which I now refer, although LORD PORTER (*ibid.*, at p. 407) approved of my analysis of certain authorities and LORD ASQUITH OF BISHOPSTONE (*ibid.*, at p. 417) expressed his concurrence with my opinion. In these circumstances, I feel free to say that, in my opinion, any observations of mine which stated or implied that the deceased, Sir Osmond, did not "provide" the policy moneys were to that extent incorrect. B C D

I would answer the first question, already stated, in the affirmative.

I now turn to the second question whether, on the death of the settlor, a beneficial interest in the property provided by the settlor accrued or arose to James Barbour. My Lords, in my view, this question should be answered in the negative, having regard to the *D'Avigdor-Goldsmid* case (1). The facts of that case were as follows:—By a marriage settlement made in 1907 a settlor settled a policy on his life effected in 1904 for £30,000 with profits. Subsequently a resettlement of the policy was made, and on Nov. 10, 1934, the settlor and his eldest son, under a joint power of appointment conferred by the resettlement, appointed the policy and other settled property to the son absolutely. The settlor died in 1940 and his son received under the policy £48,765. Estate duty was claimed on this sum under s. 2 (1) (d) of the Act of 1894. It was held by your Lordships' House that duty was not payable, since, from 1934, the policy belonged to the son and no beneficial interest in it accrued or arose on the death of the deceased within the meaning of the section. VISCOUNT SIMON expressed his views as follows ([1953] 1 All E.R. at p. 406): E F

"A life policy is a piece of property which confers on the owner of it the right, if certain conditions continue to be satisfied, to claim and be paid the policy moneys on the death of the person whose life is assured. These rights, therefore, belonged to the appellant from 1934 and were the beneficial interest in the policy which belonged to him from that moment. When the death occurred, he held these rights, and the quality of these rights was not changed by the death, which was merely the occasion when the rights were realized. There was, therefore, no new or additional beneficial interest in the policy which arose on the death of the appellant's father." G H

LORD PORTER said (*ibid.*, at p. 407):

"... I cannot accept the view that some fresh interest accrues or arises in the beneficial holder of a policy on the death of the deceased life. From the date of the assignment to him in 1934, the appellant was the absolute owner of the policy and, subject to payment of the premium, entitled to receive the sum insured, with any bonus, when the stipulated time of payment, viz., the death, had been reached. He did not get a new interest; he obtained the fruition of the interest which he already held. As one of your Lordships expressed it in the course of argument, the value of the chose in action is increased, the interest of the beneficiary is not altered." I

The *D'Avigdor-Goldsmid* case (1) differs from the present case to this extent, that, in the former case, the appellant had the entire beneficial interest in the

A policy both before and after the death of his father; but, in my opinion, the principles there stated go far to decide the present case in favour of the appellants. Nor does the matter end there. In the speeches delivered in the *D'Avigdor-Goldsmid* case (1), reference was made to *Lord Advocate v. Hamilton's Trustees* (5) (1942 S.C. 426) and the facts of that case were summarised by me as follows ([1953] 1 All E.R. at p. 414):

B "In that case the deceased, who died in 1936, had in 1912 settled certain policies on his life on trusts for the benefit of his sons and daughter. The sons were to become absolutely entitled on attaining the age of twenty-five and the daughter's share was settled on her for life with remainders over. The trust deed stated that these provisions in favour of the children 'shall vest in them respectively at the date hereof'. The policies became fully
C paid in 1914 and 1915, and the premiums payable in the meantime were borrowed by the trustees from the deceased. On the deceased's death, duty was claimed under s. 2 (1) (d) on the amount of the policy moneys less the amount borrowed from the deceased by the trustees in order to pay the premiums, and the claim was rejected by the Inner House, affirming the Lord Ordinary (LORD KEITH) on the grounds that (i) 'in the circumstances
D the property sought to be charged had not been provided by the deceased,' and that '(ii) there was no beneficial interest accruing or arising on the death of the deceased, in respect that the whole interest in the policies had passed to the beneficiaries twenty-four years before the truster's death, their interest having fully vested.'"

E I went on to say (*ibid.*, at p. 415):

"It is unnecessary for the present purpose to consider the first of these two grounds, but, in my view, the second ground was correct."

I venture to quote these observations because they were approved by LORD PORTER and were, I think, accepted by the other noble and learned Lords.

My Lords, it is to be observed that in *Hamilton's Trustees'* case (5) the daughter
F took a life interest in her share. I do not think that it would be right to say that the decision of the Inner House in favour of the daughter was expressly approved by this House in *D'Avigdor-Goldsmid's* case (1), for it was never suggested in the arguments in this House that her case might have been decided differently from the case of the sons; but, in my view, the decision in *Hamilton's Trustees'* case (5) was right in every respect, and I can see no real distinction
G between the position of the daughter in that case and the position of James Barbour in the present case. In order to ascertain what were the beneficial interests in the property provided, one can only look at the settlement of Mar. 5, 1929. The succession of beneficial interests there set out do not include any one which comes into being on the death of the settlor. Under the trusts therein declared, James Barbour was tenant for life in possession both immediately
H before and immediately after the death of the settlor. To quote again one sentence from the speech of LORD PORTER in *D'Avigdor-Goldsmid's* case (1) ([1953] 1 All E.R. at p. 407) "He did not get a new interest: he obtained the fruition of the interest which he already held."

Finally, my Lords, I would adopt with gratitude a passage from the judgment of ROMER, L.J., in the present case. After pointing out that James Barbour
I had received the income of the investments representing the £750 during the settlor's lifetime and that nobody had suggested that the income was wrongfully so paid, the learned lord justice continued ([1956] 1 All E.R. at p. 638):

"The question arises then: By virtue of what beneficial interest did Mr. James Barbour become entitled to receive this income? The answer to this must surely be, by virtue of the beneficial interest in the policy to which he was entitled under the settlement. The next question is: By virtue of what beneficial interest did Mr. James Barbour become entitled to receive the

income of the moneys which were paid to the trustees under the policies on the death of the settlor? The answer would again appear to be, by virtue of the beneficial interest in the policies to which he was entitled under the settlement. Does then the beneficial interest which entitled him to receive the income of the last-mentioned moneys differ in quality from the interest which entitled him to receive the income of the £750 and would have entitled him to receive the income of any other 'proceeds' of the policies that might have been paid to the trustees during the settlor's lifetime? I confess that I cannot see in what respect it does differ. The £750 and the moneys received on the settlor's death were equally moneys which became payable under the policies (or 'proceeds' of the said policies) and Mr. James Barbour's right to receive the income of both funds derived under precisely the same title, namely, the life interest which he took under the settlement. In these circumstances I do not for myself see how, in the words of LORD REID in *D'Avigdor-Goldsmid's case* (1) ([1953] 1 All E.R. at p. 415), it can truly be said that '... some right or property of a different kind from that previously enjoyed by' Mr. James Barbour accrued or arose on the death of the settlor."

I would allow the appeal, and answer in the negative the question asked by the originating summons.

I now turn to the second case before the House, *Wrightson v. Inland Revenue Comrs.* The originating summons issued in this case raised the question whether, having regard to the provisions of a settlement of June 21, 1932, and in the events that happened, estate duty became payable under s. 2 (1) (d) of the Finance Act, 1894, or otherwise on the death of Sir Thomas Garmondsway Wrightson, Bt. (hereafter called "the settlor") in respect of the life interests of his four sons in the proceeds of four several policies of assurance on the life of the settlor comprised in the said settlement. HARMAN, J., held that estate duty did not become payable, but his decision was reversed by the Court of Appeal (the Master of the Rolls and BIRKETT, L.J.—ROMER, L.J., dissenting). In this case, as in the *Westminster Bank* case, it was not contended that duty could be payable otherwise than under s. 2 (1) (d) of the Finance Act, 1894.

The settlement of June 21, 1932, was made between the settlor of the one part and two trustees of the other part. By cl. 1 the settlor assigned to the trustees four fully paid policies of assurance on his own life

"and all bonuses and additions assured by or to become payable under the said policies or any of them and the full benefit thereof"

on the trusts and with and subject to the powers and provisions thereafter declared of and concerning the same. Clause 2, cl. 3 and cl. 4 were as follows:

"2. The trustees shall receive all moneys assured by or to become payable under the said policies on maturity (hereinafter called 'the trust fund') and shall divide the same into six equal parts.

"3. The trustees shall pay three equal sixth parts of the trust fund to the persons who shall then be the trustees for the purpose of the Settled Land Act, 1925, of a settlement (hereinafter called 'the Neasham Hall Settlement') created by the will dated Nov. 21, 1899, and two codicils thereto dated respectively Jan. 11, 1911, and Mar. 15, 1920, of Sir Thomas Wrightson, Baronet, who died on June 18, 1921, to be held by them upon trusts and limitations and with powers corresponding to the trusts limitations and powers affecting the Neasham Hall Estate thereby settled in strict settlement or such of the same trusts limitations and powers as shall then be subsisting and capable of taking effect.

"4. The trustees shall invest one equal sixth part of the trust fund (hereinafter called 'Peter's Share') in any manner hereby authorised and shall apply the income thereof for the maintenance education and

A benefit of the said Peter Wrightson until he shall attain the age of twenty-one years and shall thereafter pay the income thereof to the said Peter Wrightson during his life or until he shall become tenant for life of the said Neasham Hall Estate."

B Clause 5 and cl. 6 contained trusts in favour of the settlor's sons Rodney and Oliver respectively in the same terms as cl. 4, save for the alteration in the name of the beneficiary. Clause 7 was as follows:

C "If and when any of them the said Peter Wrightson Rodney Wrightson and Oliver Wrightson shall become tenant for life of the said Neasham Hall Estate or shall die then the trustees shall pay or transfer his share of the trust fund and the investments for the time being representing such share to the then trustees of the Neasham Hall Settlement to be held by them upon trusts and limitations and with powers corresponding to the trusts limitations and powers affecting the said Neasham Hall Estate so settled as aforesaid or such of the same trusts limitations and powers as shall then be subsisting and capable of taking effect And if there shall be no such trustees the trustees shall hold such share and the income thereof upon the like trusts as if the same had been or represented capital moneys arising under the Settled Land Act, 1925, from the Neasham Hall Estate so settled as aforesaid."

E The settlement of 1932 contained no power for the trustees thereof to sell or surrender any of the policies. The settlor died on Jan. 7, 1950. At that date his four sons were all alive and over the age of twenty-one. The eldest son became tenant for life of the Neasham Hall Estate during his father's lifetime.

My Lords, in my opinion, there is no good ground for distinguishing this case from the *Westminster Bank* case. I would allow the appeal in this case also, and answer in the negative the question asked by the originating summons.

F LORD REID: My Lords, I agree that policies of assurance come within the scope of s. 2 (1) (d) of the Finance Act, 1894, and I also agree that, when a settlor settles a policy, or for that matter any other "interest", he must be held to "provide" not only the policy but also the proceeds of the policy which have to be dealt with under the provisions of the settlement. The question here appears to me to be quite different from that in *Sneddon v. Lord Advocate* (4) ([1954] 1 All E.R. 255) where this House had to determine what was the "property taken" by the trustees. There the property taken was determined at the time when it was taken, but it appears to me that a settlor who makes provisions for the future in a settlement must be held to provide throughout its duration the property with regard to which he gives directions. A policy is a right to claim money from an insurance company in a certain event and, if a new beneficial interest under the settlement arises after the policy money has become payable or has been paid, it appears to me that such a beneficial interest is an interest in what was provided by the settlor.

I Accordingly, the question in each of the present cases is whether, on the death of the settlor, any beneficiary acquired a beneficial interest which he did not previously have. As was explained in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) ([1953] 1 All E.R. 403) it is not enough that a beneficiary should be benefited by the death. No doubt there were reasons why that was not made the ground for liability for duty. Duty is only payable if, after the death, the beneficiary has some right different from any rights which he had before. When the settlors died, no new rights against the insurance companies arose or accrued to the trustees of these settlements. Using the language of LORD PORTER in *D'Avigdor-Goldsmid's* case (1) the trustees did not then get new interests; they obtained the fruition of the interests which they already held. But it does not necessarily follow that no new beneficial interest then accrued or arose to any beneficiary under the settlements. The provisions made by a settlor may be in

such a form that a new beneficial interest does accrue or arise to a particular beneficiary at the time of the settlor's death, and the question in each of these cases appears to me to be whether, on a proper construction of each settlement, a beneficial interest did accrue or arise to the life tenants on the settlor's death. In my opinion, *Lord Advocate v. Hamilton's Trustees* (5) (1942 S.C. 426) was rightly decided in all respects. In that case, policies on the life of the truster were held by trustees for his four children equally. The three sons had vested rights to the capital of their shares and it follows from the decision of this House in *D'Avigdor-Goldsmid's* case (1) that no beneficial interest accrued or arose as regards their shares on the truster's death. The trustees were directed to hold the daughter's share for her life-rent alimentary use alienably and on her decease to divide the amount of her share among her children equally with further provision for the event of her dying without issue. She had no right in any event to the capital but she had a vested right of life-rent before the truster's death.

I see nothing to prevent a person having a vested right of life-rent in a subject which is not for the time being productive or capable of producing income, and, if the truster has conferred such a right, then it appears to me to follow from *D'Avigdor-Goldsmid's* case (1) that no new right emerges on the trust fund becoming productive of income, and s. 2 (1) (d) has no application.

It may seem unduly technical that liability for estate duty should depend on the form of the settlement and not on the fact that a financial benefit emerges on the death, but that seems to me to be inevitable once it is found, as it was in *D'Avigdor-Goldsmid's* case (1), that "beneficial interest" in s. 2 (1) (d) means a legal right and not a financial benefit. It must, I think, follow from the decision in that case that, if a person has an immediate right both before and after the settlor's death to any income there may be from a trust fund, he acquires no new right merely because, on the settlor's death, the trust fund is for the first time in a position to produce income.

The provisions of the settlements now under consideration are not the same. Although I find some difficulty in construing the settlement in the *Westminster Bank* case I think that, as in *Hamilton's Trustees' case* (5), no new beneficial rights arose or accrued on the settlor's death, and I therefore agree that the appeal in this case should be allowed. But I have much more difficulty in *Wrightson's* case. There the trustees are directed to hold the policies, to receive all moneys payable under them on maturity and then to divide these moneys into six equal parts. The only express gifts to the sons take the form of directions to the trustees to pay the income from these six equal parts of the policy moneys, and I find it difficult to infer from the terms of the settlement that, before the death of the settlor, the sons had any right with regard to the policies other than the right common to all beneficiaries, however remote the contingency in which they might take beneficial interests—the right to prevent the trustees from acting improperly and to ensure the preservation of the trust fund. It seems to me that the only beneficial interests declared by the settlement were beneficial interests in the policy moneys received by the trustees on maturity of the policies. If that be so, then beneficial interests did accrue or arise to the sons on the settlor's death, and with some hesitation I have come to the conclusion that the appeal in this case ought to be dismissed.

LORD RADCLIFFE: My Lords, I am afraid that I do not find it possible to arrive at the conclusion which, as I understand, commends itself to the majority of your Lordships. I entertain the clear opinion that the orders made by the Court of Appeal in these cases were correct. I will try to be as short as is, I think, the point itself.

In considering whether and, if so, to what extent a beneficial interest accrued or arose on the death of Sir Thomas Wrightson, Bt. (to take the *Wrightson* case) in the interest which he had purchased or provided, it seems to me that the important thing to do is to compare the beneficial interests of the sons as from the date of

- A his death with their beneficial interests prior and up to the same date. We are, after all, considering equitable interests under a trust of personalty. Such interests consist either of the equitable ownership of property itself, such as, for instance, a life tenant's equitable ownership of the interest and dividends received by his trustees on the trust investments, or of rights to require the trustees to carry out the obligations which the trust instrument has imposed on them with regard to managing, dealing with, or, more generally, receiving and disposing of the trust investments or the income which they produce.

- In this case then, so long as the settlor was alive, no son could require anything of the trustees except that they should keep the policy documents in safe custody and do nothing else about them. None of the sons could require them to surrender or realise the value of the policies and to turn the proceeds into income producing investments. None of them could even demand the "enjoyment" of the trust property in the sense that a tenant for life of settled chattels can, on terms, obtain the advantages of possession. In effect, a son could do nothing except wait and watch the premiums which his father had paid to the insurance company accumulated by that company until his father died. To ask whether, in that set of circumstances, a son ought to be described as having a vested life interest in the trust property prior to his father's death seems to me to ask a question which, though it may conceivably be of some significance for other purposes, is without any material bearing on the question under the Finance Act, 1894, s. 2 (1) (d), which is now before us.

- On the father's death a complete change took place in the son's beneficial rights. How else is one to describe what happened? That change did not consist merely in the fact that the policy had matured. It consisted in the fact that now, for the first time, he would have the right to require the trustees to collect the moneys secured by the policy, to invest them as authorised by the instrument of trust and to pay over to him during his life the interest or dividends as they arose on the investments so made. Again, it seems to me an explanation that does not explain to say that all this change was merely the expression of the fact that the son had had from the first a vested life interest in the trust fund "whatever it might be" for the time being. It was the whole scheme of the settlement in question that there should not be a trust fund at all for anyone to be tenant for life of until the settlor died and the moneys fell in. Trust funds do not exist as ideal conceptions without material substance; nor, I would suppose, does the form of a settlement take shape without reference to the nature and incidents of the property that is to be the subject of settlement. When a man takes out a policy on his life and ties it up in this way it is of the essence of the arrangement that he makes, and the benefits that he provides, that those benefits arise on and by virtue of his death and not before.

- I am sorry that an approach to the subject as simple as this does not commend itself to your Lordships. What divides us, as I understand it, is not any difference as to the legal effect of the settlement made—it is indisputable that there was to be no trust fund for a son to enjoy income out of until the settlor died and the policy moneys were got in—but a difference as to the meaning of s. 2 (1) (d) when applied to the circumstances of this case. I cannot avoid the opinion that the application favoured by the majority of the Court of Appeal is fairly in line with the main purport of this sub-section. Its general purpose, said LORD LOREBURN, L.C., in *Lethbridge v. A.-G.* (6) ([1907] A.C. 19 at p. 23), is

"... to prevent a man escaping estate duty by subtracting from his means, during life, moneys or money's worth, which, when he dies, are to reappear in the form of a beneficial interest accruing or arising on his death."

Estate duty is charged when property changes hands on death. That is the basic idea. It is also chargeable in respect of certain arrangements which produce results analogous to a change of hands on death, though not strictly amounting to such a change. I should, myself, have thought that the settlement

of a policy of this kind in this way was a typical instance of such an arrangement. A

Such a conclusion carries no inconsistency with the decision of this House in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) ([1953] 1 All E.R. 403). The point of that case was that the provider of the policies had made a donee the sole owner of them more than five years before the date of his death. That was equivalent to an outright gift and as such was exempt from duty. No beneficial interest arose or accrued on the death. B

I must add three points so as to make my position clear. The first is that I see no distinction between the policies in the *Wrightson* case and the policies in the *Barbour* case. It is irrelevant that, in the second case, the settlor had arranged that certain sums should be withdrawn from the policy moneys during his life and invested as part of the existing trust fund. No interest in those investments accrued or arose on his death; but an interest in the policy moneys did so arise and accrue. Why should the situation of the one determine the situation of the other? Secondly, I am of opinion that *Lord Advocate v. Hamilton's Trustees* (5) (1942 S.C. 426) was wrongly decided, in so far as it related to duty on the daughter's settled share. It seems plain that the case was argued throughout without any exploration of the question whether the considerations that bore on the liability to duty of the sons' shares were equally applicable to the liability of the daughter's share. Lastly, I cannot understand how the words "by survivorship" in s. 2 (1) (d) can be thought to have any connexion with the Crown's claim to duty in this case. There is no joint tenancy here. The words "by survivorship" in this sub-section are, in my view, the usual words of art to denote the interest which one joint tenant takes on the death of another. So used, they have the same import as the words "by survivorship" in s. 38 (2) (b) of the Customs and Inland Revenue Act, 1881, which is incorporated by s. 2 (1) (c) of the Finance Act, 1894. I have never known a suggestion that they have any other meaning and, so far as I know, all the established text-books on estate duty treat them as relating to joint tenancies. I do not think, therefore, that this case can be solved by any refining on the significance of the words "by survivorship". C D E

I would dismiss the appeals. F

LORD KEITH OF AVONHOLM: My Lords, this is my opinion in the *Westminster Bank* case. The facts in this case have already been sufficiently stated. I only note (i) that the four several policies of assurance were assigned by the settlor to the bank, as trustee of the settlement, at the same time that there was paid to the bank as trustee the sum of £12,000; (ii) that the policies were at the date of the settlement fully paid; (iii) that the settlor retained no interest in the policies and that they were assigned more than five years before his death; (iv) that the policies were payable on the death of the settlor; and (v) that, apart from a direction in cl. (2) of the settlement that death duties "if any" in respect of the policies and the expenses of ingathering the proceeds of the policies should be paid out of these proceeds, and a direction in cl. (4) that the policies and their proceeds were not to be treated as income bearing until the amounts payable in respect thereof shall have been received and invested, no distinction was made as to the purposes to which the policies, the sum of £12,000, and their fruits should be applied. G H

A question was raised whether a policy of assurance could be an interest provided by a settlor within the meaning of s. 2 (1) (d) of the Finance Act, 1894. I agree with the opinions already expressed that an interest provided can take the form of a policy of assurance and I do not have anything to add on this point. I

The other question for determination is whether, under the terms of the settlement, a beneficial interest has accrued or arisen by survivorship, or otherwise, on the death of the settlor, in the policies (an interest provided by the settlor), within the meaning of s. 2 (1) (d) of the Finance Act, 1894. I draw no distinction between the policies and their proceeds. If a beneficial interest arose in the

- A proceeds at the death, it arose, I think, in the policies at the death, and, if it did not arise in the policies at the death, it could not, as I see it, arise in the proceeds at the death. This, I should have thought, was clear, because the first thing to look for is the interest provided by the settlor. The settlor cannot, as I see it, provide two things which have to be separately considered —(i) the policies, and (ii) the proceeds. Whatever he provided he provided at the date of the settlement, and that was undoubtedly the policies, but inherent in the policies was the right to obtain the sums covered by the policies at the due date. So when it is said he provided the policies it can also be said he provided the proceeds produced by the policies. These are two ways of saying the same thing. What did the settlor put in trust? Surely the policies. If not, how could the trustees realise the policies? When the settlor died there were no proceeds in existence, but there were policies in existence by virtue of which the trustees were enabled to obtain the proceeds. If the policies are to be distinguished from the proceeds, I have difficulty in seeing how a beneficial interest can ever accrue or arise by survivorship, on the death, in the proceeds, because the proceeds are not there at the death. I would observe also that it is the interest provided that is to be deemed to pass at the death, but the value of this interest is quantified, for the purposes of duty, by the extent of the beneficial interest accruing or arising by survivorship at the death. This is noted, for example, by my noble and learned friend, LORD MORTON OF HENRYTON, in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) ([1953] 1 All E.R. 403 at p. 411) in commenting on *A.-G. v. Dobree* (7) ([1900] 1 Q.B. 442), by Lord President NORMAND and LORD FLEMING in *Tenant's Trustees v. Lord Advocate* (8) (1938 S.C. 224), and by the Court of Appeal in *Westminster Bank, Ltd. v. A.-G.* (9) ([1939] 2 All E.R. 72 at p. 75). If no beneficial interest accrues or arises by survivorship on the death, then the interest provided, even if it is assumed to pass at the death, attracts no liability to duty. In short, the beneficial interest must be in the interest provided, which, in this case, in my opinion, is the policies with all the rights inherent in the holding of that particular type of asset. If there is no beneficial interest in the policies arising by survivorship on the death, there is no liability to duty. No point was taken on the words "or otherwise" in the statute, so attention may be confined to the words "by survivorship".

My Lords, I can see no reason for thinking that a beneficial interest accrued or arose in the insurance policies or their proceeds at a different time from the beneficial interest that accrued or arose in the sum of £12,000, or its accumulations. There is, accordingly, no room, in my opinion, for holding that a beneficial interest accrued or arose in the policies by survivorship of the settlor. £750 of the sums assured was paid during the lifetime of the settlor. But I attach no significance to that specialty. That was the result of the contract between the settlor and the insurance company. The balance of the sums assured became payable on the death of the settlor.

As I understood the argument for the Crown it was that, where an insurance policy on a settlor's life had to be held by trustees until the death of the settlor, so that a life tenant could not enter into enjoyment of the life interest of the proceeds of the policy until the settlor's death, a beneficial interest arose or accrued in the life policy to the life tenant on the death of the settlor. As it was put, if the life tenant could not demand of the trustees that the policy should be converted into an interest-bearing asset during the lifetime of the settlor, there was in the life tenant only an interest in expectancy, which became an interest in possession of the life tenant on surviving the settlor. This, it was said, was a beneficial interest in the policy provided, accruing or arising by survivorship on the death of the settlor.

My Lords, this seems to me to make the question turn not on the terms of the settlement but on the nature of the asset put into the settlement. I am

unable to accede to this argument. It was recognised, I think, that the argument could hold only where the interest provided in the policy was a life interest. Where the interest provided is an absolute indefeasible interest in the proceeds of the life policy to be paid over by trustees to the person absolutely entitled on the death of the settlor, it has been decided by this House in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) that no beneficial interest arises on the death of the settlor. It would be a remarkable thing, in my opinion, that, where the right at the death is cut down to a life interest, a different result should follow. In *Lord Advocate v. Hamilton's Trustees* (5) (1942 S.C. 426), a father had placed in trust during his lifetime certain policies of insurance on his life and whole sums of money to be derived therefrom to be held for behoof of three sons and a daughter. The sons were to take each a quarter of the proceeds of the policies at his death, but the daughter was restricted to a life rent of a quarter of the proceeds with fee to her issue. It was held that no estate duty was exigible on the death of the truster on the proceeds of the policies. In that case no argument was directed to showing that there was a difference in respect of the sons' shares and in respect of the daughter's share. It is not, I think, correct to say, as suggested by HARMAN, J., and the Master of the Rolls in the present case, that the position of the daughter may have been overlooked. As no point was specifically made of a possible distinction between sons' shares and daughter's share, the court had not the benefit of any argument similar to that addressed to your Lordships, but the position of the daughter was quite clearly taken notice of by the court and it is, I think, plain that it did not occur to the judges who took part in that decision that any distinction fell to be made between sons and daughter. In light of the argument for the Crown in this appeal I have carefully reconsidered that case and I think the decision was right.

I would examine the argument, however, more fully. It is obvious, in the circumstances postulated, that, if the life tenant fails to survive the settlor, he will get no enjoyment of what has been provided for him. That, of itself, seems to me to be a circumstance of little importance. It might be said to be merely a matter of degree. If he survives the settlor he may live to enjoy his life interest only for a day, or a week, or a month. A person absolutely entitled may also not survive to enjoy the benefit provided. The benefit, it is true, in the fullness of time will fall into his estate, or he may sell it during his life and before the settlor's death, suitably discounted. But these are differences due to the nature of the interest provided. The one must bear full fruit; the other may wither in the bud. If the life tenant survives to enjoy what has been provided, he takes not by virtue of a beneficial interest accruing or arising by survivorship, but because the interest provided has begun to bear fruit.

Various situations may be conceived which seem to me to disclose the essential unsoundness of the Crown's contention. For example, if a father purchased a life annuity in favour of his son, payment commencing on the son attaining the age of fifty, and delivered the policy to the son, it is clear that the father has provided an interest, or benefit, for his son. On the son attaining the age of fifty, some twenty or thirty years later it may be, it would not seem possible to say that the nature of the benefit conferred had changed its character, or that the son has acquired a new benefit. Yet this might be said to be an interest in expectancy which has become an interest in possession. But that is merely to describe the nature of the interest given. The nature of the interest provided was fixed once and for all when it was originally conferred. The same would hold good, in my opinion, where the annuity was to commence on the death of the father. That event merely fixes the date of the maturity of the policy. It will be observed that this illustration would fall exactly under the opening words of s. 2 (1) (d)—an annuity purchased or provided by the deceased. But it is not caught, in my opinion, by the concluding words of the sub-section,

A "to the extent of the beneficial interest accruing or arising by survivorship . . . on the death of the deceased."

The beneficial interest would arise, in my opinion, not by survivorship, but by virtue of the contract made with the insurance company when the policy was taken out, fixing the commencement date of the annuity as the date of the deceased's death. It is not, in my opinion, possible to distinguish this case from

B a case where any other date for commencement of the annuity is stipulated for in the policy. My noble and learned friend, LORD REID, I think recognised this in *D'Avigdor-Goldsmid v. Inland Revenue Comrs.* (1) ([1953] 1 All E.R. at p. 417).

So far I have taken the illustration of an annuity policy taken out by the deceased without the interposition of a trust. But it does not appear to me to make any difference that a settlor, wishing to secure that the life interest in a

C policy maturing at his death shall go to A and the capital to B, assigns the policy to trustees of the settlement. If the life tenant is given an immediate indefeasible interest in the income of the trust fund whenever it may arise, the fact that part of that income will not arise until the death of the settlor does not, in my opinion, mean that, in respect of that part, he has acquired a beneficial interest by survivorship if he survives the settlor. In my opinion, this case is

D entirely within the ratio of the decision in *D'Avigdor-Goldsmid's* case (1). All the rights which the life tenant had under the settlement were created at and from the date of the settlement and were indefeasible. At the death nothing happened to change the nature of these rights. To quote the words of VISCOUNT SIMON in the case cited (*ibid.*, at p. 406):

E "When the death occurred, he held these rights, and the quality of these rights was not changed by the death, which was merely the occasion when the rights were realized. There was, therefore, no new or additional beneficial interest in the policy which arose on the death of the appellant's father."

Similar language was used by my noble and learned friend, LORD MORTON OF HENRYTON, and others of their Lordships who took part in the *D'Avigdor-Goldsmid* case (1). The passage I have quoted from the speech of LORD SIMON,

F in my opinion, exactly covers this case. The rights given in the insurance policies were the same in character as those given in the sum of £12,000, and both were given at the same time. The only difference is that the times of realisation were different. What was provided by the settlor was the right under the policy to go against the insurance company, through the trustees, at

G the due date, in order to realise the sum out of which the life tenant would secure his life interest and this right existed without change from the beginning of the settlement. The enforcement of a right cannot create a beneficial interest arising by survivorship.

For the reasons given I would allow the appeal.

My Lords, in the *Wrightson* case, I reach the same result. I had at first some

H doubt whether this case could not be distinguished from the case of the *Westminster Bank*, on the view that no beneficial interest accrued or arose in the policies to anyone until the death of the settlor. I am now satisfied, however, that from the time the policies were assigned to the trustees there was a beneficial interest in the policies in the group of persons who were ultimately to take as life tenants on the death of the settlor and that this beneficial interest remained unchanged in character from the date of the settlement. The case is accordingly,

I in my opinion, indistinguishable from the case of the *Westminster Bank*.

I would allow the appeal.

Appeals allowed.

Solicitors: *Parker, Garrett & Co.* (for the appellants *Westminster Bank, Ltd.*); *Herbert Smith & Co.* (for the appellants *Wrightson*); *Solicitor of Inland Revenue* (for the Crown).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

SUN LIFE ASSURANCE SOCIETY *v.* DAVIDSON
(INSPECTOR OF TAXES).

PHOENIX ASSURANCE CO., LTD. *v.* LOGAN (INSPECTOR
OF TAXES).

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Keith of Avonholm and Lord Somervell of Harrow), May 6, 7, 8, July 4, 1957.]

Income Tax—Repayment—Management expenses—Life assurance companies—Expenses of changing investments—Brokerage and stamp duties—Income Tax Act, 1918 (8 & 9 Geo. 5 c. 40), s. 33 (1).

The two appellant life assurance companies, of whose day-to-day business an essential part was investing their premium income and changing the investments of their life funds as occasion demanded, were charged to income tax on their investment income and not on their profits. They claimed relief under the Income Tax Act, 1918, s. 33 (1)*, in respect of sums expended for brokerage and stamp duty in buying and selling investments, contending that these sums were expenses of management within the phrase "sums disbursed as expenses of management (including commissions)" in s. 33 (1).

Held (LORD REID dissenting as to the sums disbursed as brokerage): the appellant companies were not entitled to the relief claimed since the sums paid in brokerage and stamp duty in the buying and selling of investments in the ordinary course of their business were not "sums disbursed as expenses of management (including commissions)" within s. 33 (1) of the Act of 1918.

Capital & National Trust, Ltd. v. Golder ([1949] 2 All E.R. 956) approved. Decision of the COURT OF APPEAL ([1956] 2 All E.R. 642) affirmed.

[As to the Crown's right of election to assess an assurance company on its investment income, see 20 HALSBURY'S LAWS (3rd Edn.) 206, para. 362; as to relief for expenses of management of a life assurance company, see 20 HALSBURY'S LAWS (3rd Edn.) 475, para. 903; and for a case on the subject, see 28 DIGEST 55, 283.

For the Income Tax Act, 1918, s. 33 (1), see 12 HALSBURY'S STATUTES (2nd Edn.) 27; and for the replacing provision in s. 425 (1) of the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.) 406, 407.

For Sch. 1 to the Assurance Companies Act, 1909, see 3 HALSBURY'S STATUTES (2nd Edn.) 395.]

Cases referred to:

- (1) *Capital & National Trust, Ltd. v. Golder*, [1949] 2 All E.R. 132; *affd.* C.A., [1949] 2 All E.R. 956; 31 Tax Cas. 265; 2nd Digest Supp.
- (2) *Bennet v. Underground Electric Rys. Co.*, [1923] 2 K.B. 535; 92 L.J.K.B. 909; 129 L.T. 701; 8 Tax Cas. 475; 28 Digest 55, 283.
- (3) *Simpson v. Grange Trust, Ltd.*, [1935] A.C. 422; 104 L.J.K.B. 276; 152 L.T. 517; 19 Tax Cas. 231; Digest Supp.
- (4) *Revell v. Edinburgh Life Insurance Co.*, (1906), 5 Tax Cas. 221; 28 Digest 60 h.
- (5) *Gresham Life Assurance Society v. Styles*, [1892] A.C. 309; 62 L.J.Q.B. 41; 67 L.T. 479; 56 J.P. 709; 3 Tax Cas. 185; 28 Digest 59, 302.
- (6) *Scottish Investment Trust Co. v. Forbes*, (1893), 3 Tax Cas. 231; 28 Digest 18 p.

Appeals.

Appeals by the Sun Life Assurance Society and the Phoenix Assurance Co., Ltd. from an order of the Court of Appeal (SINGLETON, MORRIS and ROMER, L.JJ.), dated May 17, 1956, and reported [1956] 2 All E.R. 642, affirming orders

* The terms of the sub-section are printed at p. 762, letter C, post.

- A of HARMAN, J., dated Nov. 2, 1955, and reported [1955] 3 All E.R. 552, on appeals by the appellant assurance companies by way of Cases Stated by the Special Commissioners of Income Tax. The appellant assurance companies claimed, under the Income Tax Act, 1918, s. 33 (1), repayment of so much of the income tax paid by them for the year of assessment 1949-50 as was equal to the amount of tax on sums disbursed as expenses of management for the year ended Dec. 31,
- B 1949. The Crown objected to the claims to the extent and on the ground that included in the expenses of management claimed there were sums disbursed by the companies by way of brokerage and stamp duties. It therefore fell to the Special Commissioners to determine whether such sums were expenses of management reclaimable under s. 33 (1). In the case of the Sun Life Assurance Society the sum was £40,773 and in the case of the Phoenix Assurance Co., Ltd.
- C it was £62,806, less consequential reduction of foreign life fund restriction £3,623, leaving £59,183 net. Both companies were assurance companies carrying on life assurance business within the meaning of s. 33. In common with all assurance companies, the companies were governed by the Assurance Companies Acts, 1909 and 1946, and, in accordance with the provisions of s. 3 of the Act of 1909, they kept a separate account of all receipts of their life assurance business, and such receipts had been carried to and formed separate funds. It was
- D necessary in the ordinary course of carrying out their business for the companies to invest their premium income and from time to time to sell or change such investments. The investments made by the companies were part of their circulating capital. It was contended by the Sun Life Assurance Society that the purchases and sales of the stocks and shares giving rise to the payment of
- E brokerage commissions and stamp duties were part of the ordinary day-to-day trading activities of the society, that the stocks and shares so purchased and sold were part of the ordinary trading assets of the society, and that, in those circumstances, it sought to distinguish *Capital & National Trust, Ltd. v. Golder* (1) ([1949] 2 All E.R. 956) where the stocks and shares purchased and sold were part of the capital assets of the company. It was contended by the Phoenix
- F Assurance Co., Ltd. that *Capital & National Trust, Ltd. v. Golder* (1) was distinguishable on the ground that the investments representing the life funds constituted circulating capital of its trade, or, alternatively, that *Capital & National Trust, Ltd. v. Golder* (1) was wrongly decided. Both companies contended that the expenses were "sums disbursed as expenses of management (including commissions)" within the meaning of s. 33 (1) of the Act of 1918.
- G It was contended by the Crown that the sums in question were not expenses of management within the meaning of s. 33 (1) on the authority of *Capital & National Trust, Ltd. v. Golder* (1), and in the case of the Phoenix Assurance Co., Ltd., that such sums were directly referable to each several purchase and sale of a holding of investments and were to be treated as part of the cost, or as a reduction from the receipts of sale of each such purchase and sale. The commissioners
- H found, in the case of each company, that it was necessary for the company in carrying on its business to purchase investments out of its premium income and from time to time to sell or change investments as part of its ordinary day-to-day business activities. They held, however, that the expenses were so specifically referable to the transactions involved that they constituted part of the expenses of purchase or sale and were not expenses of management, and they therefore
- I disallowed the claims. HARMAN, J., and the Court of Appeal dismissed the companies' appeals against that decision, holding themselves bound by *Capital & National Trust, Ltd. v. Golder* (1).

Charles Russell, Q.C., F. N. Bucher, Q.C., and J. L. Creese for the Sun Life Assurance Society.

F. Heyworth Talbot, Q.C., and S. M. Young for the Phoenix Assurance Co., Ltd.

The Attorney-General (Sir Reginald Manningham-Buller, Q.C.), Roy Borne-man, Q.C., and Sir Reginald Hills for the Crown.

The House took time for consideration.

July 4. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this and the succeeding case, *Phoenix Assurance Co., Ltd. v. Logan (Inspector of Taxes)*, raise a question of general importance to life assurance and some other companies. It is whether sums disbursed by them by way of brokerage and stamp duties in connexion with the purchase and sale of investments in the ordinary course of carrying on their business are expenses of management in respect of which they are entitled to relief under s. 33 (1) of the Income Tax Act, 1918. That sub-section runs as follows:

“Where an assurance company carrying on life assurance business, or any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, or any savings bank or other bank for savings, claims and proves to the satisfaction of the Special Commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the Rules applicable to Case I of Sch. D, the company or bank shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year: Provided that— (a) relief shall not be given under this section so as to make the tax paid by the company or bank less than the tax which would have been paid if the profits had been charged in accordance with the said rules . . .”

The claim immediately under consideration is made by the appellant society in respect of the year of assessment 1949-50 and is for repayment of tax equal to the amount of tax paid on £40,773 being sums disbursed by it for brokerage and stamp duties on the sale and purchase of investments. The claim has been rejected by the Commissioners for the Special Purposes of the Income Tax Acts and by HARMAN, J., and the Court of Appeal.

The relevant facts are fully set out in a Case Stated by the Special Commissioners for the opinion of the court. I can refer to them shortly. The appellant society carries on the business of life assurance, which is a trade for the purpose of the Income Tax Acts. Its profits are, therefore, assessable under Case I of Sch. D to the Income Tax Act, 1918, but no such assessments have been made because the Crown has elected to charge it not on its trading profits but on its income from investments. It is bound by s. 3 of the Assurance Companies Act, 1909, to keep, and has always kept, a separate account of all receipts from its life assurance business and those receipts have been carried to and form a separate fund known as the Life Assurance Fund. The maintenance of this fund is clearly of great importance to the society. I quote from the Case:

“The business of life assurance is highly competitive. It is therefore essential that, in order to keep its premiums as low as possible, the society should invest its premiums to the best advantage and, as necessary, change the investments from time to time. Moreover it is necessary that the premiums should be invested to earn a rate of interest sufficient to meet the society's obligations under its policies as well as to provide profits for the benefit of participating policyholders and of shareholders . . . Thus in the ordinary course of carrying on its business it is necessary for the society to purchase investments and from time to time to sell or change such investments. The investments made by the society are part of its circulating capital and do not constitute part of its fixed capital assets. In order to carry out the day-to-day work in respect of the investment and reinvestment of its moneys in the Life Assurance Fund the society has a special staff of employees in the investment department. This department is concerned with

A buying investments quoted on the Stock Exchange and also with investing the society's money privately, that is, not through the agency of members of the Stock Exchange. In addition the society makes investments by advancing moneys at interest to policyholders on the security of their policies."

B It would seem, therefore, that the society did not in the case of every investment have to pay brokerage nor, presumably, did it in the case of an original subscription for stock or shares have to pay transfer stamp duty, but I do not think that this throws any light on the question whether when such charges were payable they were "expenses of management".

C The society's right to relief cannot depend on the way in which it chooses to treat these payments in its books but it is a matter to which reference has been made and I, therefore, quote again from the Case:

D "In the books of the society the sums paid or suffered as brokerage and stamp duties on the purchase or sale of investments in the year ended Dec. 31, 1949, were charged to a General Expenses Account. In the Revenue Account of the life assurance business of the society for that year drawn up in the form prescribed by s. 4 (a) and Sch. 1 to the Assurance Companies Act, 1909, the said sums are included in the amount debited for expenses of management. Any profits arising on the realisation of investments are passed to inner reserves and by virtue of a directors' resolution are reserved for policyholders . . . The accounts of fifty-six assurance companies had been examined by Mr. Wardrop [one of H.M. Senior Principal Inspectors of Taxes] who ascertained that in the case of forty-eight of them the amounts expended on brokerage and stamp duties in connexion with purchases and sales of investments were in the case of purchases, treated as part of the costs of acquiring the investments in question and, in the case of sales, were treated as deductions from the proceeds of sales. Nevertheless, when computing their claim under s. 33 all such forty-eight companies included such brokerage and duties as part of their expenses of management. In the case of the remaining eight companies the amounts so expended were from the beginning charged as expenses in the revenue accounts of the respective life assurance businesses."

G I have thought it right to mention this matter but, as I have said, it is plainly irrelevant to the issue. Nor, in my opinion, can greater importance be attached to the fact that it was only in 1949 that the claim of the society to relief in respect of these charges was first refused. It is a fact which should deter me from saying what I otherwise might, that the matter is very clear; but it would be contrary to all experience to say that the Inland Revenue authorities cannot grow inveterate in error in granting as in refusing relief. I do not allow my judgment to be influenced by their previous willingness to grant this relief.

H Nor, again, can I get much help from an argument forcefully pressed by learned counsel for the society that the Inland Revenue authorities have allowed other claims for disbursement in respect of a large number of items amounting to about £750,000, but have challenged these claims which, as they alleged, were indistinguishable in quality; thus, they say the way would be paved to a disallowance of other claims formerly admitted. Counsel for the Crown was in effect, therefore, invited to say where he proposed to draw the line and which, I if any, of the items previously allowed he intended in the future to challenge. But he was, I think, well entitled to answer that he was concerned only with the items that had, in fact, been challenged, and that future action might well depend on the decision given in this House in regard to them. It is, in fact, very clear that an expression like "expenses of management" is insusceptible of precise definition, and that there must be a border-line or twilight area in which a conclusion one way or the other could easily be reached. That does not mean that there is not on either side of it an area of sunshine and of darkness.

The question is, then, whether these particular charges are expenses of management. I have so far ignored the fact that these words have in the section an appendage “(including commissions)”. It has been assumed on both sides that “commissions” here refers to the payment made to the agent who obtains business for his society and does not include the brokerage payable to a stockbroker, which is often called commission. I am content, without deciding it, to make the same assumption. In these circumstances, I do not get any help from these words. “Commissions” may be expressly included either because it would otherwise not be included or in order to make clear what might otherwise be in doubt. No light is thrown on what else is comprised in expenses of management.

Counsel for the society further supported their submission by reference to the origin of the expression “expenses of management”. It is to be found in the statutory form prescribed in Sch. 1 to the Assurance Companies Act, 1909, and had, in fact, been incorporated in that Act from earlier Acts. The form, which is that of a revenue account, contains (inter alia) two headings of deduction, viz. (i) commission (ii) expenses of management. But I cannot infer from this that all disbursements made by the society must fall under one or other of these headings. That would be to ignore both the fact that there is a third heading “Other payments (accounts to be specified)” and the fact that, as a matter of accounting, such disbursements need not be and generally are not included in the item “Expenses of management”.

The Special Commissioners, in disallowing the claim, expressed their opinion in a way that I find helpful. They said:

“We have come to the conclusion and we so hold that the brokerage, and stamp duties payable on the purchase of an investment, being not general expenses of conducting the society’s business but expenses specifically referable to and only incurred by reason of the purchase, are expenses of the purchase and not expenses of management. If we draw a line between the moneys admittedly laid out by the society for expenses of management and the moneys laid out for the price of an investment, we hold that the brokerage and stamp duties fall on the same side of the line as the latter. The fact that the purchase is necessarily made in the ordinary course of carrying on the society’s business does not of itself determine whether the sums in question are expenses of management of that business. In our view the disputed items are so closely linked with the transaction of purchase (being necessarily incurred in the course thereof) as to be considered part of the expenses of the purchase and not expenses of management of the society’s business. We also hold that the brokerage and stamp duties paid by the society on the sale of an investment are not expenses of management.”

The Special Commissioners have recognised what I think is of first importance in interpreting the words in question, namely, that they are words of qualification or limitation. It is not all the expenses incurred by the society; it is not its trading or general expenses which are deductible. The society is not being assessed on its trading profits under Case I of Sch. D; on the contrary, a special method of assessment is prescribed and language is used, which makes it clear that some only of the expenses which would be deductible under Case I and the relevant rules are deductible under this special method. Counsel for the society, though they contended that the expenses of management were the same as the expenses of conducting, carrying on or running its business, yet conceded that some qualification must be introduced and, quite illogically as it appeared to me, admitted that there could not be included in such expenses the cost of purchase of the investments themselves. I do not know why not, for the acquisition of the necessary stock in trade would appear to be a first expense of carrying on a business. A further refinement was, indeed, introduced, and it was said that such an expense could only be excluded if, and to the extent to which, it was

A represented by an asset of the business. I do not follow, and cannot give effect to, this argument. The concession is, nevertheless, of value, for, if the expense of purchasing an investment is not an expense of management, I can see no valid ground of distinction between the price of the stock which is purchased and the stamp duty paid on contract or transfer and the brokerage paid to the broker. Each item is an integral part of the cost of acquisition or, as the commissioners put it, a part of the expenses of the particular purchase not of the expenses of management. This is, perhaps, even more clearly seen on a sale than on a purchase of an investment, for in that case there is no disbursement at all but only a diminution of the sum received by the society.

B HARMAN, J., who would, but for the authority of *Capital & National Trust, Ltd. v. Golder* (1) ([1949] 2 All E.R. 956) to which I will again refer, have been disposed to allow the appeal from the Special Commissioners so far as it related to brokerage, distinguished between that expense and the expense of stamp duties. C But it appears to me that the same reasoning applies with equal force to each expense. I agree with him that the payment of stamp duty is ([1955] 3 All E.R. at p. 555)

D “ . . . imposed by the state by way of taxation and may truly be said to be part of the cost of each transaction to the company and be treated as such.”

But, if the machinery of the Stock Exchange is used for the purchase or sale of investments, the payment of brokerage is imposed by its rules and is equally part of the cost of each transaction. The same doubts were expressed in the Court of Appeal, but in that court too, *Golder's* case (1) was regarded as an authority which was decisive in favour of the Crown. And so I think it was. E For in *Golder's* case (1) the Court of Appeal, affirming the judgment of CROOM-JOHNSON, J., had held that charges for brokerage and stamp duties incurred by an investment company were not expenses of management within the section and had so held on grounds which were no less applicable to a life assurance company than to an investment company. It was suggested that the decision F could be justified on a ground not present in the instant case, viz.: that the payments there made had the quality of capital expenditure. It may be so, but that was not the ground of decision. The judgment of CROOM-JOHNSON, J., has been closely criticised and, verbally, at least, it is open to some criticism, but I think that the broad ground of his decision is precisely that of the Special Commissioners, that the price of the shares, the brokerage and the stamp duties G are several parts of the cost of acquiring or disposing of an investment and cannot, the one more than the other, be regarded as expenses of management. I would here interpolate that, though in the Case Stated reference is made to a fundamental difference between the nature of the businesses carried on by a life assurance company and an investment company respectively, I agree with ROMER, L.J., in thinking that there is no relevant distinction between the disbursement in the one case and the other.

H There is little other authority on the meaning of the relevant words, but I get some assistance from a decision of ROWLATT, J., in *Bennet v. Underground Electric Rys. Co.* (2) ([1923], 8 Tax Cas. 475). The company having to raise capital abroad issued bonds which were payable in sterling in London or in foreign currency at a certain rate of exchange. In the event, in order to comply I with its obligations, the company had to buy foreign currency and, suffering a loss in doing so, claimed that the loss was an expense of management. In language, of which I seemed to hear an echo in this case, counsel urged that the company, in order to manage its business properly, had to offer to pay its foreign creditors in their own country and currency, therefore the cost of exchange was an expense of management. ROWLATT, J., rejected the claim; he pointed out that the reason why the company had suffered a loss was because, in order to carry on its business, it had to provide itself with money in New York and Amsterdam and, as it did not have money lying there, it had to buy it at a high rate of

exchange; that, if the company had been able to obtain the needed currency on favourable terms, its management would not have cost less, and, if, as it happened, it could only obtain the necessary money on unfavourable terms, its management could not be said to have cost more. In either case the cost of management was the same. A

It could be said of this decision that, though the learned judge very incisively said that the loss incurred in the purchase of foreign currency was not an expense of management, his reason for saying so, viz., that the cost of management remained the same, really involved a *petitio principii*. For the cost of management could only remain the same, if the loss was not an expense of management. B
But the value of the case lies in the reaction of a very learned judge to the argument that an expense necessarily incurred in order to carry on a business properly is, therefore, an expense of management. And if on an analysis it would seem that, in effect, the learned judge said "This is not an expense of C
management because it is not an expense of management", I should not give any less weight to his authority. He did not attempt to define management in this context; to him the plain English word could not properly extend to cover such a payment, and at the end of the day I doubt whether any more cogent reason can be given. In the present case, I differ with reluctance from the opinion of the late SINGLETON, L.J. He took the view that (I quote his words D
[1956] 2 All E.R. at p. 647):

"If the purchase is part of the ordinary day-to-day business of the society it is difficult at first sight to see why something which the society has to pay in order to carry out the purchase is not an expense of the ordinary running of the society's business. It is argued that the expenses of management end when a decision is made to buy, and thus that the cost of stamp or brokerage which takes place later is not an expense of management. That cannot be right, for someone on behalf of the society has to receive and to check the securities and the broker is under the duty of seeing to the transfers and forwarding the securities. That is a part of his work in return for the remuneration he receives by way of brokerage or commission. It seems to me to be impossible to split up the transaction in this way: to do so is to depart from common sense." E
F

The case is thus put by the learned lord justice as cogently as it can be put. But it is, I think, vitiated by the initial mistake that he regards "management" as equivalent to running the company's business in a wide and almost colloquial sense. If it had this meaning, it would cover the price of the investment equally with the brokerage and stamp duties. But, *ex concessis*, it does not, and I would say with the greatest respect that it would be to depart from common sense to treat the three constituents of the cost of purchase differently. G

I am of opinion that the appeal should be dismissed with costs.

In *Phoenix Assurance Co., Ltd. v. Logan (Inspector of Taxes)*, the appeal H
raises the same question as the preceding case, and the relevant facts are not distinguishable.

In my opinion, the appeal should be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, the sole question in dispute on this appeal is whether certain sums disbursed by the appellants by way of brokerage and stamp duty in connexion with purchases and sales of investments, in the ordinary course of carrying on its business of life assurance, are "sums disbursed as expenses of management (including commissions)" within the meaning of s. 33 (1) of the Income Tax Act, 1918. That section has already been read. I

Counsel for the society contended that the sums in question were "expenses of management". They did not contend that the sums paid by way of brokerage were "commissions" within the meaning of the section. For my part, I am

- A not satisfied that the sum paid to a stockbroker on the purchase or sale of an investment is not a commission within the meaning of the section, but I express no opinion on the point, as it has not been argued. The result is that I have to form an opinion whether brokerage and stamp duty, which are obviously expenses of the society, fall into the category of "expenses of management" or into the category of other expenses of the society.
- B It has been common ground between the parties throughout all courts that "expenses of management" do not include the price of investments bought by the society in the course of its business. Now it is clear that the sums now in question are not part of the *price*, for the price of an investment, purchased or sold, is the sum which is paid by the purchaser to the seller. These expenses are, however, so closely linked with the transaction of purchase that they may
- C naturally be considered as items in the total *cost* of a purchase which has already been resolved on by the management of the company, and not as expenses of management. This is the short and simple ground on which the Special Commissioners decided the case in favour of the Crown, and I have arrived at the conclusion, though with considerable doubt, that it is a sound ground. Until the year 1949-50, with which this appeal is concerned, the Crown had always
- D admitted the claim to deduct these sums as expenses of management in the case of life assurance societies. The Crown had followed a similar line in the case of investment companies until the previous year, when the Court of Appeal decided in *Capital & National Trust, Ltd. v. Golder* (1) ([1949] 2 All E.R. 956) that in the case of those companies these sums could not be deducted as expenses of management. In the present case, HARMAN, J., and the Court of Appeal
- E thought that *Golder's* case (1), was indistinguishable from the present case and they, therefore, followed it; but HARMAN, J., and two members of the Court of Appeal indicated that they would have decided otherwise had they been free to do so.

- My Lords, I agree with both courts that *Golder's* case (1) cannot be distinguished from the present case. It seems to me that the transaction carried out on the
- F sale or purchase of an investment is exactly the same, whether the company carrying it out is an investment company or a company such as the society. It is true that, in *Golder's* case (1), the investments formed part of the fixed capital of the Capital & National Trust, Ltd., whereas in the case of the society, to quote the Case Stated,

- G "the investments are part of its circulating capital and the purchases and sales of investments are made in the ordinary course of carrying on its day-to-day business activities."

- This difference, however, does not seem to me to affect in any way the nature of the transactions carried out in buying and selling investments or the nature of the payments made to stockbrokers or to the Revenue on the occasion of such
- H sales or purchases.

- In my opinion, *Golder's* case (1) was rightly decided, but I cannot accept all the reasons given by CROOM-JOHNSON, J. ([1949] 2 All E.R. 132), and the Court of Appeal for their decision. The reason why I am of opinion that *Golder's* case (1) was rightly decided is the short and simple reason given by the commissioners, which I have already quoted.

- I My Lords, having formed the view which I have already expressed, I am fortified by the fact, which appears in the Stated Case, that, out of fifty-six assurance companies whose accounts had been examined by Mr. Wardrop (one of Her Majesty's Senior Principal Inspectors of Taxes) forty-eight companies treated the amounts expended on brokerage and stamp duties in connexion with purchases and sales of investments, in the case of purchases, as part of the costs of acquiring the investments in question and, in the case of sales, as deductions from the proceeds of sales. I could not, however, regard this fact as of any weight in arriving at a decision, especially as in the case of the remaining eight

companies the amounts so expended were from the beginning charged as expenses in the Revenue accounts of their respective life assurance businesses. A

I would add two comments. First, that if I had been persuaded that brokerage was covered by the expression "expenses of management" I should still have inclined to the view that stamp duties were not so included. Secondly, although I would decide this appeal in favour of the Crown, I do not accept the very narrow view of the words "expenses of management" which was put forward by B
counsel for the Crown.

I think that these words should be given a wide construction, for the reasons about to be given by my noble and learned friend, LORD SOMERVELL OF HARROW.

In the *Phoenix Assurance Co.* case, counsel were agreed that the case could not be distinguished from the *Sun Life Assurance Society's* case.

I would dismiss the appeals for the reasons which I have given. C

LORD REID: My Lords, we have to construe the phrase "sums disbursed as expenses of management (including commissions)" in s. 33 (1) of the Income Tax Act, 1918. The relief afforded by this section was first given in 1915 and I think that one can properly assume that the draftsman had regard to the fact that "expenses of management" and "commission" were items in the statutory form of accounts of life assurance companies provided by the Assurance Companies Act, 1909, and the Life Assurance Companies Act, 1870. But the relief given in 1915 was not limited to assurance companies; it was also given to investment companies and savings banks to which the Acts of 1909 and 1870 did not apply. And the combined phrase "expenses of management (including commissions)" is not the same as the separate items "expenses of management" and "commission" in the earlier Acts. So I do not think that one can solve the present question simply by considering whether the two items now in dispute—brokerage or commission paid to stockbrokers and stamp duty on transfers—ought to be included in one or other of the items "expenses of management" and "commission" in the appellant societies' statutory accounts. One must take the words in s. 33 and read them in their context in the light of the apparent D
general object of the section. E

A trading company such as the appellant societies may receive a large part of its income in the form of dividends out of which tax is payable by deduction or otherwise. Tax payable in this way may exceed the amount of tax which the company would have had to pay if the Crown had chosen to assess it under Case I of Sch. D. In calculating taxable profit under Case I, the taxpayer can deduct a wide variety of expenses, but, before 1915, if the Crown did not choose to proceed under Case I, the trader had no right to deduct any expenses but must, like any other taxpayer, pay the whole tax deductible from dividends received. Apparently this was thought to be unjust and the relief was given which is enacted in s. 33. Section 33 does not apply to all traders, perhaps because the problem only arose acutely in the case of the three classes mentioned in the section. But it is less easy to understand why the relief under s. 33 is extended to certain companies which do not engage in trade and to which the above-mentioned reason does not apply. They are given a preference over individuals who derive their income from investments, and, indeed, the relief to them is not even subject to the limitation which applies to trading companies (*Simpson v. Grange Trust, Ltd.* (3) (1934), 19 Tax Cas. 231). F

I do not get much assistance from these general considerations and I turn to consider the words used in s. 33 (1). In the first place, not all expenses are included but only expenses of management. And, secondly, it appears to me that the words in brackets "(including commissions)" are of considerable importance in determining what is meant by "expenses of management". I cannot believe that this form of drafting "expenses of management (including commissions)" could have been adopted unless it had been thought that commissions were at least so closely analogous to expenses of management that, I

A without the words in brackets, it would have been doubtful whether commissions were, or were not, within the ambit of the leading words. That appears to me to be sufficient to negative one argument for the Crown—that expenses of management only include expenses involved in taking managerial decisions and exclude expenses involved in carrying them out in individual cases. Commissions arise from individual cases and, if expenses of management had this narrow meaning, they would differ so radically in their nature from commissions that I cannot see any reasonable person merely bringing them in in a parenthesis. Moreover, even without this consideration I should find it very difficult to accept the view that no part of the administrative expenses involved in dealing with individual policies, from receipt of a proposal to final payment of policy moneys, was to be regarded as expenses of management.

C It is convenient at this point to note that it has not been argued for the societies at any stage of this case that the payments of brokerage to stockbrokers are commissions within the meaning of that word as used in this section. I, therefore, express no opinion on that matter, and I must deal with the case on the footing that, if the societies are to succeed, they must bring these payments within the scope of the words “expenses of management”.

D I do not think that it is possible to define precisely what is meant by “expenses of management”. It has not been argued that these words have any technical or special meaning in this context. They are ordinary words of the English language, and, like most such words, their application in a particular case can only be determined on a broad view of all relevant matters. I cannot accept the argument for the societies that every sum spent by the company is an expense of management unless it can be brought within certain limited classes of expenditure which are, admittedly, not expenses of management such as payments to policyholders and the purchase price of investments acquired by the company. It is not enough to show negatively that a particular sum does not fall into any other class; it must be shown positively that it ought to be regarded as an expense of management. But, looking to the purpose and content of the section, it appears to me that the phrase has a fairly wide meaning so that, for example, expenses of investigation and consideration whether to pay out money either in settlement of a claim or in acquisition of an investment must be held to be expenses of management. And the collocation of the words “(including commissions)” shows that a sum can be an expense of management whether the work in question is done by the company’s staff or done by someone else on a commission basis, and it must follow that if work of an appropriate kind is done for a fixed fee that fee may also be an expense of management.

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G Admittedly, the price paid for an investment is not an expense of management, and counsel for the societies did not, and could not, reasonably withhold the admission that a sum spent on enhancing the value of a trading asset is not an expense of management. I do not think that it is practicable or reasonable to draw a rigid line between payments which enhance the value of an asset and payments which do not. For example, if a call is made in respect of shares not fully paid, paying the sum necessary would not be an expense of management, although there have been cases where shares remained of no value after becoming fully paid. It seems to me more reasonable to ask, with regard to a payment, whether it should be regarded as part of the cost of acquisition on the one hand or, on the other hand, something severable from the cost of acquisition which can properly be regarded as an expense of management. If that be the true test, then I have no doubt that the sums paid for stamp duty were not expenses of management. The companies could not acquire and hold shares without making these payments and no matter of management was involved any more than it was in paying the price due to the seller. Buying the shares and paying the duty were inseparable. I do not say that no payment of duty can be an expense of management; for example, cheques are required for management and it seems

to me that the cost of acquisition of cheque books must be an expense of management whether it arises from stamp duty or not. But, where payment of duty is a necessary consequence of something which is not itself an expense of management, I do not see how the payment of duty becomes an expense of management. A

The question as to payments of brokerage or commission to stockbrokers seems to me much more difficult. If it were possible for members of the companies' staffs to arrange purchases or sales direct with other sellers or buyers I cannot see how expenses involved in arranging sales or purchases could be other than expenses of management. And, equally, if the companies agreed to pay commission to persons who introduced sellers or buyers I think that commission earned in this way would also be expenses of management. But, under modern conditions, it may generally be impracticable to proceed in this way, and buying and selling through stockbrokers subject to the rules of a stock exchange may be the only course to take. Nowadays an investor might well regard all payments to his stockbroker as simply parts of the cost of acquiring his shares and also regard the net sum received as the whole of what he has realised on a sale. But I do not think that these practical differences are sufficient to warrant payments to a commission agent and payments to a stockbroker being put in different categories and on this matter I think the societies are right. B C D

I would allow the appeals, but only to the extent of allowing relief in respect of sums disbursed as brokerage.

LORD KEITH OF AVONHOLM: My Lords, I agree with the opinion delivered by my noble and learned friend on the Woolsack, and have nothing to add. E

LORD SOMERVELL OF HARROW: My Lords, the option of the Crown to tax the profits of a trade under Case I or to tax the income from investments under Case III, Case IV or Case V has long been recognised. In respect of income which has suffered tax by deduction the exercise of the option leaves things as they are. Notwithstanding the explanation that has been given (see *Revell v. Edinburgh Life Insurance Co.* (4) (1906), 5 Tax Cas. 221 at p. 226) it has always seemed to me anomalous to assess traders on a sum arrived at irrespective of all expenses of earning the profits, if any. It might be said to be in conflict with the "one point" which LORD WATSON said was free from obscurity, namely, that the legislature intended all traders whether in groceries, annuities or other articles of commerce to be assessed on the same footing (*Gresham Life Assurance Society v. Styles* (5), [1892] A.C. 309 at p. 318). F G

Parliament decided to deal with this anomaly in 1915. Assurance companies carrying on life assurance business, companies whose business consists mainly in the purchase of investments and savings banks, became entitled, on proof that they had been charged to tax by deduction or otherwise and not charged on their profits under Case I, to repayment of so much of the tax paid as equalled any sums disbursed as expenses of management (including commissions). Proviso (a) to s. 33 (1) reads as follows: H

"relief shall not be given under this section so as to make the tax paid by the company . . . less than the tax which would have been paid if the profits had been charged in accordance with the said rules . . ."

The Life Assurance Companies Act, 1870, provided by s. 4, that a company carrying on life assurance and other business must keep a separate account in respect of its life assurance fund and prepare a revenue account in the form set out in Sch. 1. On the right-hand side of the form appeared the items "commission", "expenses of management", "other payments (accounts to be specified)". This Act was repealed and the above provisions re-enacted in the Assurance Companies Act, 1909. I

- A Parliament having decided to deal with the anomaly, one would expect it to be removed wholly or substantially. There would seem to be no sense in leaving life assurance companies still liable to suffer tax on some sum over and above their profits. The formula "expenses of management (including commissions)" is clearly taken from the form of revenue account in Sch. I to the Life Assurance Companies Act, 1820. I would regard the words themselves as apt to cover the
- B expenses which would normally be deductible in respect of its life assurance business if an assurance company carrying on life assurance business was assessed as a trade. There may be, as the Assurance Acts recognise, "other payments" which might, or might not, be deductible under Case I. The fact that these words are qualified by the words "accounts to be specified" is, I think, some indication that the words "expenses of management" and "commission" were regarded as
- C covering all ordinary expenses. Proviso (a) contemplates that expenses of management (including commissions) may exceed in amount the expenses which would be deductible under Case I. This weighs heavily against the very restricted sense of management for which the Crown contended. The section has to operate by providing for a repayment of tax already suffered. The purchase price of the investment cannot enter into the computation as an expense. It would only
- D come in if one was in search of the "profit" made subsequently by its realisation. Having regard to the intention of the section to be gathered from its terms and to the statutory background, the words should be given, in my opinion, a wide construction. I wholly reject the distinction sought to be drawn between the management and the carrying on of the business, restricting the former to the head management.
- E The section also refers to companies whose business consists mainly in making investments, and some reference was made to this in argument. Investment companies are, I think, commoner today than they were in 1915. In *Scottish Investment Trust Co. v. Forbes* (6) ((1893), 3 Tax Cas. 231), an investment company was held liable to pay tax on the net gains realised by selling investments at a profit. It was stated, and I accept, that there are today investment com-
- F panies whose purchases and sales of securities do not constitute a "trade". In *Simpson v. Grange Trust, Ltd.* (3) ((1934), 19 Tax Cas. 231 at p. 232), it was admitted by the inspector of taxes that the company—an investment trust company—was not carrying on a trade. The memorandum and articles were exhibited but do not appear in the report. The question would turn, as it did in the *Scottish Investment Trust* case (6), on the wording of the articles and perhaps
- G on the policy of the company. Life assurance companies were, in any case, the main subject-matter of s. 14 of the Finance Act, 1915, and I doubt whether Parliament had in mind that certain companies whose business consisted in the "making"—not, be it marked, the "holding"—of investments might be held to be outside Case I in respect of the profits of their dealings. I do not, myself, think that the possibility of such cases throws any light on the construction of
- H the clause.

Unaided, I would, I think, have come to the conclusion that the items in issue here were expenses of management. The buying and selling of securities is clearly part of the business of the company, and a function of management. No one would dispute that it was proper to buy and sell on the Stock Exchange. Might not the expenses of doing so be said to be expenses of management?

I This is plainly a possible view as it was that taken by the Inland Revenue from 1915 to about 1940. It was also, I think, the view taken by some of the learned judges below, although they held themselves bound by *Capital & National Trust, Ltd. v. Golder* (1) ([1949] 2 All E.R. 956). I am, however, impressed by the arguments on the other side as restricted to these two particular items. The brokerage and stamp duty, though not, as the commissioners held in *Golder's* case (1), an integral part of the purchase price, are a direct and necessary part of the cost of a normal method of purchase. I therefore, with some hesitation,

agree that they should not be treated as expenses of management, and that the appeals should be dismissed. A

Appeals dismissed.

Solicitors: *Hair & Co.* (for the Sun Life Assurance Society); *Slaughter & May* (for the Phoenix Assurance Co., Ltd.); *Solicitor of Inland Revenue* (for the Crown). B

[Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

R. v. CRASKE, *Ex parte* COMMISSIONER OF POLICE OF THE METROPOLIS. C

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Devlin, JJ.), July 2, 1957.]

Justices—Procedure—Summary trial for indictable offence—Consent of accused to summary trial—Withdrawal of consent after plea but before evidence given—Whether summary trial begun—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 19 (3), (5), s. 24. D

An accused, who was over seventeen years of age, was charged on information before a metropolitan magistrate with an indictable offence triable summarily by virtue of s. 19 of the Magistrates' Courts Act, 1952. He consented to be tried summarily and pleaded not guilty. The hearing was adjourned. On its resumption the accused, being then legally represented, was allowed, before any evidence had been called, to withdraw his consent and to elect to be tried by jury. On an application for mandamus to the magistrate to try the accused summarily, E

Held: it was right to allow the accused, before any evidence was led, to withdraw his consent to be tried summarily, since— F

(i) (per LORD GODDARD, C.J., and BYRNE, J.) the magistrates' court had not begun to try the information within the meaning of s. 24 of the Magistrates' Courts Act, 1952, and

(ii) (per DEVLIN, J.) s. 19 (5) of the Magistrates' Courts Act, 1952, does not deprive a magistrates' court of power to allow an accused, who has given his consent to being tried summarily, to reconsider the matter before the court proceeds with the trial. G

[For the Magistrates' Courts Act, 1952, s. 18 (5), s. 19 (3), (5) and s. 24, see 32 HALSBURY'S STATUTES (2nd Edn.) 437, 439 and 443.]

Motions for mandamus and prohibition.

The prosecutor, the Commissioner of Police of the Metropolis, moved the court for an order of prohibition and an order of mandamus directed to the metropolitan magistrate, A. H. GLENN CRASKE, Esq. H

On May 6, 1957, the accused, George Hayden Rees, appeared before the magistrate sitting at South Western Magistrates' Court to answer the following charges: (i) receiving a certain motor car knowing the same to have been stolen thereby contravening the Larceny Act, 1916, s. 33 (1)*; (ii) taking and driving away the motor car without the consent of the owner thereby contravening the Road Traffic Act, 1930, s. 28 (1)†; (iii) driving the motor car whilst he was disqualified; and (iv) driving the motor car without insurance. The accused, who had attained the age of seventeen, consented under the Magistrates' Courts Act, 1952, s. 19 (5), to a summary trial of the charge of receiving, and the magistrate determined under s. 18 of the Act, on the application of the prosecutor, I

* 5 HALSBURY'S STATUTES (2nd Edn.) 1032.

† 24 HALSBURY'S STATUTES (2nd Edn.) 598.

- A to deal summarily with the second charge. The third and fourth charges were triable only summarily. The accused pleaded not guilty to all four charges, and then applied for and was granted an adjournment to enable him to be legally represented. At the adjourned hearing on May 28, 1957, the accused through his counsel asked permission to withdraw his consent to the summary trial of the receiving charge and asked the magistrate to inquire into that and the
- B second charge as an examining justice. The magistrate consented to this course and proceeded to try summarily the third and fourth charges, in respect of which the accused was found guilty. The hearing of the inquiry as to the first two charges was adjourned until June 18, 1957, evidence in deposition form of the arrest and charging of the accused having been taken. It was contended by the prosecutor that, although the magistrate was entitled under s. 18 (5) of the Act
- C of 1952 to discontinue the summary trial of the second charge, he had no jurisdiction to proceed with the receiving charge as an examining justice for two reasons: (i) that having begun to try that charge summarily he was precluded by s. 24 of the Act of 1952 from proceeding thereafter to inquire into it as an examining justice; and (ii) that s. 19 (5) of the Act of 1952 was mandatory and he was bound in law to proceed with the summary trial of the receiving charge. On
- D June 12, 1957, the prosecutor was granted leave to move the Divisional Court for an order of prohibition against the magistrate to prohibit him inquiring as an examining justice into the receiving charge and for an order of mandamus requiring him to proceed with the summary trial of that charge. It appears from the judgment of DEVLIN, J., p. 775, letter G, post, that the magistrate did not propose to proceed himself as examining justice.

- E *J. H. Buzzard* for the prosecutor.
Rodger Winn for the magistrate.
D. H. W. Vowden for the accused.

LORD GODDARD, C.J., stated the facts and continued: The matter depends entirely on the Magistrates' Courts Act, 1952, under which persons accused of certain statutory offences can be tried summarily and do not have to be sent for trial. Section 19 has altered considerably the procedure that used to obtain under the Summary Jurisdiction Act, 1879, s. 27*, which was the first Act under which prisoners, except juveniles, could be tried on indictable offences before justices. Section 19 of the Magistrates' Courts Act, 1952, provides:

- G “(2) If at any time during the inquiry into the offence it appears to the court, having regard to [various matters which are set out] that the circumstances do not make the offence one of serious character and do not for other reasons require trial on indictment, the court may proceed with a view to summary trial.

- H “(3) For the purpose of proceeding as aforesaid, the court shall cause the charge to be written down, if this has not already been done, and read to the accused and shall tell him that he may, if he consents, be tried summarily instead of being tried by a jury and, if the court thinks it desirable for his information, shall tell him before what court he would be tried if tried by a jury and explain what is meant by being tried summarily.”

- I In other words something almost equivalent to an indictment, that is to say a written charge, is to be preferred and is to be read to the prisoner just as at the assizes the indictment is read to the prisoner. Section 19 (5) reads:

“After informing the accused as provided by the last two preceding subsections† the court shall ask him whether he wishes to be tried by a jury or

* 14 HALSBURY'S STATUTES (2nd Edn.) 866; see also the Criminal Justice Act, 1925, s. 24; *ibid.*, 948.

† Section 19 (4) requires the court to explain to the accused that if he consents to be tried summarily and is convicted he may be committed to quarter sessions for sentence in certain circumstances.

consents to be tried summarily, and, if he consents, shall proceed to the summary trial of the information." A

No person who is charged with an indictable offence can, except with his own consent, be deprived of the right to be tried by jury. The words of s. 19 (5) are that the court shall ask the accused whether he wishes to be tried by jury or consents to be tried summarily and, if he consents, *shall* proceed to the summary trial of the information. So, after the consent has been given the court is to proceed to trial. Then s. 24 provides: B

"Except as provided in s. 18 (5) of this Act, a magistrates' court, having begun to try an information for any indictable offence summarily, shall not thereafter proceed to inquire into the information as examining justices." C

In my opinion the magistrate, having got no further than hearing that the accused elects to be tried summarily and pleads not guilty, can allow him to withdraw his consent and to elect instead to go for trial by jury. The words of s. 24 are: D

"... a magistrates' court, having begun to try an information for any indictable offence summarily, shall not thereafter proceed to inquire into the information as examining justices." E

Once the court has begun to try the case, the magistrate must go on to try the case; he cannot then sit as examining justice and commit the accused for trial. Counsel for the prosecutor has contended that when the prisoner has elected and pleaded, the trial has started and the magistrate has begun to try the case. If one looks at the whole scope of this section, however, the magistrate has not begun to try the case until at any rate he begins to hear the evidence. I cannot think that Parliament, by these sections, meant to create a wholly different state of affairs in magistrates' courts with regard to indictable offences than prevails at an assize or quarter session with regard to indictable offences. A prisoner who is brought up for trial and has had the indictment read to him and who has pleaded is constantly allowed to withdraw his plea, and he can do it before the jury is empanelled. The trial at assizes does not, so it seems to me, begin until the jury is empanelled to try the case and the prisoner is put in charge of the jury. I think that if it had been intended that in a magistrates' court an election, once given, could never be withdrawn, s. 24 would have been worded very differently. F

It is the inevitable consequence of counsel for the prosecutor's argument that, if an accused were to elect to be tried summarily in the absence of his solicitor and if his solicitor were to arrive before the magistrate had begun to try the case and were to advise the accused to go for trial, the accused could not withdraw his consent and elect to go for trial, although the magistrate had not yet heard a word of the evidence. One should not lightly deprive persons of their right to be tried by a jury. I agree with counsel for the prosecutor that the whole matter is statutory, but I do not find anything in the present case which obliges me to hold that the magistrate had begun to try the case, when in fact all that had happened was that he had taken the plea. The plea joined issue, and once issue is joined the court has to start to try the case; but the magistrate had not started to try the case. He could only have proceeded to try the case, it seems to me, as a summary offence so long as the election stood, but it would not be a correct reading of these sections to say that once the election has been given, it has been given for all time, so that although his consent might have been given by a mistake or although the prisoner would have been advised (if his advocate had been present) to refuse summary trial, and although the magistrate had not embarked on it, he would not be allowed when his advocate did arrive, to elect to go for trial before a jury. For my part I am content to rely on s. 24, to which I have already referred. In my view it does not apply except where the court G H I

A has begun to hear the evidence, and the mere taking of the plea is not enough. For these reasons I think these motions should be discharged.

BYRNE, J.: I agree with the judgment of LORD GODDARD, C.J. The question is when has a magistrates' court begun to try an information for an indictable offence summarily. Two things must take place before the magistrates' court begins to try the information. One is that there must be an election by the defendant, and the other is that there must be a plea entered by him; after that evidence will be heard which, in my view, is the beginning of the trial.

As my Lord has pointed out, the analogy is plain. At courts where cases are tried by jury the defendant enters a plea, but he may not be tried for some time after that. His trial does not take place until he has been given in charge of the jury and until evidence is led. To say that in a magistrates' court the trial begins when an election has been made and a plea entered is straining in my view the language of the statute against the liberty of the subject, because it is to my mind of great importance that a right that any person may have to be tried by jury should be preserved, and for those reasons I agree that these motions should be dismissed.

DEVLIN, J.: I agree with the conclusion which has been proposed by my Lords, and I am very far from dissenting from the reasons which they have given, but I find rather more difficulty than they have found on the point whether or not the trial begins with the plea, having regard to the sections in the Magistrates' Courts Act, 1952, to which counsel for the prosecutor referred us. If the case had to be decided on that ground alone, I might have felt it desirable for my own part to give further consideration to that point; but the substance of the matter can be dealt with on another ground as well as that which my Lords have mentioned, and I should like therefore to support my conclusion by some reference to it.

Suppose that the trial of the action has begun, because the plea has been taken. Is there any reason why a magistrate in those circumstances, if he ascertains that the accused wants to change his election, should not allow him to do so? If he decides that the accused ought to be allowed to do so, there is a reason, viz., the terms of s. 24, why he should not proceed with the committal proceedings himself. Whether the magistrate should proceed with the committal proceedings is, however, a mere matter of procedure; it is not the substance of this matter, for the magistrate in the present case does not propose to proceed with them. He thinks that it is desirable that another magistrate should deal with the committal proceedings. The real substance of the matter is whether the accused can be allowed at this stage to change his election. Counsel for the prosecutor submits that he cannot, and he bases that submission on the words of s. 19 (5) which LORD GODDARD, C.J., has read. Counsel puts his case as high as this: that once the accused has consented to be tried summarily the magistrate is bound to proceed to the summary trial of the information, and no magistrate can give the accused an opportunity of reconsidering his consent, unless, as counsel for the prosecutor is disposed to concede, the consent were given by mistake.

It would be a very cumbersome procedure if, when the accused wanted to change his mind half a minute after he had given his consent, there had to be an investigation whether he was acting under a mistake or not. I do not think that the words of s. 19 require so harsh and unreasonable a construction as that. I think that when Parliament used in sub-s. (5) the word "shall", it used it in relation to the object of this part of the section, which is, as is shown by sub-s. (3), to lay down the things that must be done before the trial is proceeded with, and the order in which they have to be done. Sub-section (3) begins:

"For the purpose of proceeding as aforesaid, the court shall cause the charge to be written down . . ."

That is the first step. Then sub-s. (3) lays down a number of other steps, and having taken all the steps and got the consent of the accused, then the next step is that the court shall proceed to the summary trial of the accused. That does not mean that once the procedure is set in motion, the court has reluctantly to allow the wheels to revolve without any power to stop them if the accused wants to change his mind for some other reason. It means no more than this, that if the summary trial is to be proceeded with in the way provided by s. 19, then these are the steps that must be taken. I can find nothing in the words which would deprive a magistrates' court of the ordinary right, which the court must have in the interests of justice, that if on a full consideration of the matter, it thinks that a man has given his consent ill-advisedly to abandoning his right to a trial by jury, he should be given the opportunity of reconsidering the matter. I think, therefore, that the magistrate was right in the conclusion which he reached on those grounds, and I agree, therefore, that the motions must be dismissed.

Motions dismissed.

Solicitors: *Solicitor, Metropolitan Police* (for the prosecutor); *Treasury Solicitor* (for the magistrate); *R. W. Platt* (for the accused).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

R. v. INDUSTRIAL DISPUTES TRIBUNAL AND ANOTHER, *Ex parte* QUEEN MARY COLLEGE, UNIVERSITY OF LONDON.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Devlin, JJ.), June 26, 27, 1957.]

Master and Servant—Trade dispute—"Dispute"—Dispute as to promotion of one workman—Dispute taken up by group in trade union consisting of workmen employed on similar work by same employer—Application of statutory rule of interpretation that plural includes singular—Industrial Disputes Order, 1951 (S.I. 1951 No. 1376), art. 10, art. 12 (1)—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 1 (1) (b).

The scientific workers employed by the Q.M. college were members of the Association of Scientific Workers, a trade union which had a special group for persons employed by the college. In 1953 the college agreed to grade their scientific workers in four grades (chief technician, senior technician, technician and junior technician), in accordance with an agreement made between the Universities' Committee of Vice-Chancellors and Principals and the union. In September, 1954, C., who had been employed by the college as a laboratory assistant since 1947, applied to be up-graded from a technician to a senior technician. His application having been refused, he reported the matter to the union in December, 1955. At that time several members of the college group of the union had a similar complaint and, at their request, P., the regional organiser of the group, asked for an interview with the registrar of the college to discuss the grading of these members. An interview was refused on the ground that the college was not prepared to discuss with the union the terms and conditions of employment of individual workers, as that was a matter to be dealt with by the individual worker directly with the college. By September, 1956, a number of claims for up-grading had been granted by the college and only two claims had not been granted, among the latter being C.'s claim. In November, 1956, C. applied again directly to the college, and was told by the registrar that he might be up-graded in September, 1957, and that the matter would have to be put before the college governors. Being dissatisfied, C. reported the matter again

- A to his union, asking the union to take action in the matter with the object of his immediate up-grading. At the request of the members of the college group of the union P. reported the matter to the Ministry of Labour and National Service, and the Minister referred the dispute to the Industrial Disputes Tribunal for settlement, under art. 8 of the Industrial Disputes Order, 1951. The college moved for an order of prohibition against the tribunal on the ground that there was no "dispute", as defined in art. 12 (1)* of the order, because the matter concerned only one person, namely C.
- B

Held: there was a dispute between "workmen" and their employer within the definition of "dispute" in art. 12 (1) of the Order of 1951, because the body of workmen, members of the union, had taken up the dispute and, although the dispute referred to the tribunal related to the up-grading of only one workman, yet it was a dispute "connected with . . . the conditions of labour of any of those workmen" within art. 12 (1).

C

R. v. National Arbitration Tribunal, Ex p. South Shields Corpn. ([1951] 2 All E.R. 828) distinguished, and dicta of LORD GODDARD, C.J. (*ibid.*, at p. 833) applied.

- Semble:** workers may be parties to a dispute although they are not workers to whom the award will apply . . . The word "workers" in art. 10† of the Order of 1951 includes the singular "worker", by virtue of s. 1 (1) (b) of the Interpretation Act, 1889, although that enactment does not make the word "workmen" in the definition of "dispute" in art. 12 (1) of the Order of 1951 include the singular, "workman" (see p. 782, letters B and C, post):
- D

- E [For the Industrial Disputes Order, 1951, art. 10 and art. 12 (1), see 7 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 166, 167.]

Cases referred to:

- (1) *R. v. National Arbitration Tribunal, Ex p. South Shields Corpn.*, [1951] 2 All E.R. 828; [1952] 1 K.B. 46; 115 J.P. 594; 3rd Digest Supp.
- F (2) *R. v. Industrial Disputes Tribunal, Ex p. Banstead U.D.C.*, (Jan. 29, 1952), unreported.

Motion for Prohibition.

The applicants, Queen Mary College, University of London, moved for an order of prohibition prohibiting the Industrial Disputes Tribunal and the Association of Scientific Workers from further proceeding with a reference of a dispute alleged to exist between the applicants and members of the association in the employment of the applicants.

G

The reference was in respect of a claim for up-grading by Mr. John Norman Carreck, who was employed by the applicants and was a member of the association. The applicants contended that, as the matter concerned only one workman employed by them, there was not a "dispute" as defined in the Industrial Disputes Order, 1951, art. 12 (1). The facts are stated in the judgment of the court delivered by DEVLIN, J.

H

J. F. Donaldson for the applicants.

W. Gumbel for the Minister of Labour and National Service.

P. R. Pain for the Association of Scientific Workers (a trade union) and John Norman Carreck.

- I **LORD GODDARD, C.J.:** DEVLIN, J., will deliver the judgment of the court.

DEVLIN, J.: Counsel for the applicants, Queen Mary College, University of London, moves for an order of prohibition preventing the Industrial Disputes

* The definition of "dispute" in art. 12 (1) is printed at p. 781, letters D and E, post.

† The relevant terms of art. 10 are printed at p. 781, letter H, post.

Tribunal and a body called the Association of Scientific Workers from further proceeding in the arbitration or settlement of a dispute concerning the up-grading of one John Norman Carreck which has been referred to the tribunal by the Minister of Labour and National Service by a reference in writing dated Jan. 31, 1957. The question to which the application gives rise is the meaning of "dispute" within the terms of the Industrial Disputes Order, 1951. Counsel submits that the dispute described in the notice of reference is not a "dispute" within the meaning of that order. A B

The dispute arises in this way. Mr. Carreck, who is the individual whose claim has given rise to the dispute, is a laboratory assistant in the Department of Geology at Queen Mary College, and has been so employed from July 7, 1947. There are other scientific workers who are employed by the college (referred to hereinafter as "the applicants"), and these workers are members of the Association of Scientific Workers, which is a trade union. On Feb. 1, 1953, the applicants agreed to grade their scientific workers in accordance with an agreement made between the Universities' Committee of Vice-Chancellors and Principals, the Association of Scientific Workers and two other trade unions, and it was arranged that there should be four grades, namely, chief technician, senior technician, technician and junior technician. Mr. Carreck was and is still employed as a technician. In September, 1954, Mr. Carreck applied to the governing body of the applicants through the registrar for up-grading to the grade of senior technician, and his application was refused. He was apparently sufficiently aggrieved about it to report the matter to his union, which he did in December, 1955. The union has a group within itself, consisting of those scientific workers who are members of the union and who are in the employment of the applicants. A Mr. Paynter is the regional organiser of the group and the person who is responsible. C D E

It appears that there were some other members of the group, at that time, who had complaints similar to that of Mr. Carreck, that is to say, who thought that they ought to be up-graded and who were not up-graded, and on Jan. 7, 1956, as a result of a meeting of the group, they gave instructions to Mr. Paynter. He wrote to the registrar, Colonel Tong, asking for an opportunity of meeting him so that he could discuss the grading of these members. A long correspondence took place with which I need not deal. The upshot of it was that at the end the applicants made their position perfectly clear, which is, indeed, the position which they stand on today, namely, that they are not prepared to discuss with the union the terms and conditions of employment of individual workers. They considered, rightly or wrongly, that that was a matter which must be dealt with by the individual member himself direct with the applicants and that no external body such as the union ought to be allowed to take part in those discussions. The correspondence covered a good deal of time, but by March, 1956, the attitude of the applicants' governing body had been made quite clear, and Mr. Paynter was then taking the line (which he set out in a letter written to the registrar on Mar. 21, 1956) that, if that was their attitude, he would be obliged to call on the services of the Ministry of Labour and National Service to deal with the situation. On Apr. 18 he wrote again to the registrar saying that he would be reporting the matter to the Ministry. Some correspondence took place between the Ministry and the applicants and the applicants were asked by the Ministry to consider the matter again. The applicants' governing body did consider it and re-affirmed the principle which they had previously laid down. As the result of that a meeting of the group of the trade union was called on Sept. 11, 1956, and the dispute was reported in detail. F G H I

By that time a number of the cases of up-grading which had been in dispute had been considered by the governing body and the applications had been granted, so that there was no longer any claim in relation to them. At the date of the meeting there were two cases outstanding, one of which was Mr. Carreck's, and

A a resolution was carried at the meeting that the matter should be referred to the Industrial Disputes Tribunal. It was agreed, on Mr. Paynter's recommendation, that Mr. Carreck's case should be selected for reporting to the tribunal. Accordingly, on Nov. 6 Mr. Paynter formally reported the dispute* in a letter of that date to the Ministry of Labour and National Service. He said:

B "The dispute arises from the grading of the technician in charge of the geology department, Mr. J. N. Carreck, who, we believe, should be graded as a senior technician and not as a technician. Our member has himself made approaches to the [applicants] for immediate up-grading to senior technician but, as he met with no success, referred the matter to us."

C Mr. Paynter then recounts at length his efforts to get the applicants to discuss the matter with him and their refusal to do so, and he ends by saying:

D "It is, of course, most unfortunate that the [applicants'] authorities should have refused to meet us when we have not experienced this difficulty with any other college since we have been engaged in national negotiations with the Committee of Vice-Chancellors and Principals. Therefore, we have no alternative but to ask for this individual case of up-grading to be referred to the Industrial Disputes Tribunal."

E Meanwhile, Mr. Carreck decided to make another effort on his own, putting forward his claim individually to the applicants' registrar. He wrote to the registrar on Nov. 7, referring to a conversation which they had had, and at which, apparently, they came near to agreement; but that did not content Mr. Carreck. After saying that Dr. Kirkaldy "has confirmed that it would be the position of curator in that grade, but subject to the [applicants'] possession of sufficient funds in 1957", Mr. Carreck asked for a statement in writing that, subject to the necessary funds being available and "provided that war has not been declared, I shall be appointed as curator and librarian in the senior technician grade, as from Sept. 1, 1957 . . .". Whether that was a reasonable request or not is not a matter with which we are concerned, nor are we concerned with whether it was reasonably dealt with by the applicants. All that, no doubt, would have to be decided, if there is a dispute, by the Industrial Disputes Tribunal. The registrar answered that he could not formally commit himself in terms of that sort and that the matter must be put before the governors. That, evidently, did not content Mr. Carreck, because it appears from Mr. Paynter's affidavit that Mr. Carreck reported the matter to Mr. Paynter and asked him, in effect, to go ahead, saying that he, Mr. Carreck, wanted an immediate up-grading and was not prepared to wait until September, 1957. Mr. Paynter, when he heard of Mr. Carreck's individual efforts, had asked that his letter to the Ministry should be held in abeyance, as it were, and then asked for it to be treated as having been written on Nov. 6, 1956, and as received on Dec. 5, 1956. The Minister decided on the basis of it to refer this dispute to the tribunal†.

H The main submission made by counsel for the applicants is that, in the present case, there is no "dispute", within the meaning of the Industrial Disputes Order, 1951, because this is a dispute which concerns only the case of Mr. Carreck. The order was interpreted in *R. v. National Arbitration Tribunal, Ex p. South Shields Corpn.* (1) ([1951] 2 All E.R. 828), known as "the town clerk's case", where it was decided that there could not be a "dispute" within the terms of an order phrased as this one is if there was merely a dispute between a single workman and his employers. That is what counsel for the applicants' submits this dispute is: that it is merely a dispute on the issue whether Mr. Carreck should be up-graded or not, and that is not within the order. There can be no doubt that, if that is the right view of it, if the only parties to the

* Article 1 of the Industrial Disputes Order, 1951, provides for the reporting of disputes to the Minister of Labour and National Service.

† Article 8 of the order provides for the reference of disputes to the tribunal.

dispute are the employer, on the one hand, and Mr. Carreck, on the other, then it comes within *R. v. National Arbitration Tribunal, Ex p. South Shields Corpn.* (1). Is that, however, the true position on the facts which I have recounted? The mere fact that a person is not materially affected by decisions on the subject-matter of the dispute does not appear to us automatically to prevent him from being a party to the dispute. There are all sorts of industrial disputes which arise out of a difference between the employer and the employees in a factory in relation to a claim made merely by one man, cases, for example, where one man is unfairly victimised, or is unfairly victimised in the estimation of his fellow employees, and his fellow employees may make themselves parties to the dispute because they may say: "Unless this man is treated in the way in which we think that he ought to be treated, there is going to be trouble". Or there may be other reasons which cause men to be interested and to wish to make themselves parties to a dispute which concerns only the claim of one man. Without being materially affected, other people may feel that their prospects of promotion are injured generally. They may be interested in the principle of the thing. They may say: "If a person of the length of service of Mr. Carreck is not promoted, what is going to happen to us when we get to that stage?". Or there may be, on the facts which I have recounted, some general principle involved in the dispute on which this particular claim happens to be founded which is selected as a test action, the general principle here being whether it is right or wrong for the applicants to adopt the attitude that they will not discuss individual claims with the trade union but will discuss them only with the individuals concerned.

These are plainly the sort of grounds which have caused the trade union in this case to take the matter up because Mr. Paynter says at the end of his affidavit:

"It is a dispute of general interest to such members [members of the association in the employment of the applicants] because the reference derives from the unwillingness of the applicants to discuss any individual case of promotion with the association and also because such members are concerned to secure the up-grading of a post and to assist a fellow member."

In short, the proposition for which counsel for the Minister contends really comes down to this: If the union chooses to make the matter a union issue, if it chooses to take up the cudgels on behalf of its member and thereby to become belligerent in the matter, it is a dispute to which more than one workman is a party. No doubt, the union will not do it unless there is a matter of some general principle involved; but if the union chooses to make it a general issue, it becomes a dispute to which the whole body of workmen or group are made parties. We think that that is the right view of the matter, and, indeed—although I shall have to consider the terms of the order and the submissions of counsel for the applicants—we think that it is implicit so far as the authorities go, particularly *R. v. National Arbitration Tribunal, Ex p. South Shields Corpn.* (1), on which counsel for the applicants relied for his general proposition. At the end of the judgment of the Divisional Court in that case, LORD GODDARD, C.J., having announced the general principle and that there was only a single workman involved in the dispute, said ([1951] 2 All E.R. at p. 833):

"It may well be that this definition is contemplating all along a class of workmen. Industrial disputes do arise because a large number or class of workmen support a particular workman who may be dismissed or downgraded by the employer, or sometimes because some particular workman is promoted and in the opinion of the body of workmen someone ought to have been preferred in his place. It may be that it is such matters as that that the order is contemplating in its definition of 'dispute.' That point we need not decide. What we do decide is that there must be a dispute between an employer and more than one workman in his employ though it may be

- A that the dispute originates with a single workman, and that the others only become parties to the dispute in support of one member of their body."

That last sentence seems to us exactly to cover the facts of this case.

In *R. v. Industrial Disputes Tribunal, Ex p. Banstead U.D.C.* (2) ((Jan. 29, 1952), unreported), a decision of this court, the point is underlined where LORD GODDARD, C.J., said again:

- B "We pointed out that the object of the order must be to include the case where there is a dispute which has been taken up, to use a convenient expression, by a trade union or trade representatives of the workmen and they have made themselves a party to it, although the dispute may only be with regard to one workman because of the words 'with the conditions of labour of any of those workmen'."

C That is how the matter stands on the authorities.

As the matter stands on the construction of the order, counsel for the applicants has raised a point which has not hitherto been considered, and that is the bearing on this issue of art. 10 of the order. Before I deal with that, however, I ought to deal with the definition of "dispute" in art. 12 (1), on which the matter must ultimately turn. The definition in art. 12 (1) reads:

- D " 'dispute' does not include a dispute as to the employment or non-employment of any person or as to whether any person should or should not be a member of any trade union but, save as aforesaid, means any dispute between an employer and workmen in the employment of that employer . . . "

- E Pausing there, it was decided in *R. v. National Arbitration Tribunal, Ex p. South Shields Corpn.* (1) that "workmen" is to be interpreted literally in the plural and that the Interpretation Act, 1889, s. 1 (1) (b), does not apply*, because it is not the intention of the order, looked at as a whole, that a dispute between a single workman and his employer should be within it. The definition of "dispute", in art. 12 (1) of the order, goes on: "... connected with the terms of the employment or with the conditions of labour of any of those workmen".

- F If those words are interpreted literally, it is enough that the dispute should be connected with the conditions of labour of any one of those workmen. It is quite plain from the passage which I have read from the judgment of the Divisional Court in *R. v. National Arbitration Tribunal, Ex p. South Shields Corpn.* (1) that the decision of the court did not intend to negative a reading of that sort. We see no reason why the words should not be given that meaning. If the dispute is connected with the conditions of labour of "any workmen", then, providing that one man makes himself a party to the dispute, it appears to us to fall within the definition.

- G Counsel for the applicants submitted that that could not be so because of the terms of art. 10, which is headed: "Award to be implied term of contract". Article 10 provides that, where an award has been made by the tribunal,

- H "... it shall be an implied term of the contract between the employer and workers to whom the award applies that the terms and conditions of employment to be observed under the contract shall be in accordance with the award . . . "

- I Counsel submitted that that meant that the workmen who were parties to the dispute must also have, so to speak, a grievance which was to be remedied by the award, because the terms of the award were to be read into their contract; that the only award which could be made in this particular case, for example, was

* By the Interpretation Act, 1889, s. 1 (1): "... unless the contrary intention appears . . . (b) . . . words in the plural shall include the singular". The Interpretation Act, 1889, applies to the interpretation of the Industrial Disputes Order, 1951, as a whole, by virtue of reg. 99B of the Defence (General) Regulations, 1939; but the application of s. 1 (1) (b) of the Act of 1889 to any particular word in the order can be excluded by an intention appearing that the enactment should not apply.

that Mr. Carreck should be immediately up-graded; and that that was not a term which could properly be read into the contract of employment of any other worker. We think that the answer to counsel's submission is that it does not follow in a matter of this sort, which is arbitration of a general character and not a strict legal proceeding, that the workers who are parties to the dispute must necessarily be workers to whom the award applies. We think that there is no reason why persons should not make themselves parties to a dispute although they are not workers to whom the award applies. For the reasons which we have given, questions of general principle, matters of supporting or assisting a fellow worker, make them parties to the dispute although they are not people to whom the award is going to apply. I suppose that somewhat similar considerations apply to the ordinary case where a guarantor is interested in the construction of a contract although he need not be strictly a party to whom the contract applies. Counsel for the applicants relies on the fact that the word "workers", in art. 10, is also in the plural, but we see no reason why, in relation to this article, s. 1 (1) (b) of the Interpretation Act, 1889, should not have its usual effect, so that the word "workers" should be interpreted as including the singular. Having regard to the passage which I have read from the judgment of LORD GODDARD, C.J., in *R. v. National Arbitration Tribunal, Ex p. South Shields Corpn.* (1), there is nothing in the judgment in that case which could interfere with such an interpretation. The fact that s. 1 (1) (b) of the Interpretation Act, 1889, was held not to apply to art. 12 (1) does not necessarily mean that it does not apply to any other article of the order, and we think that that is plain from the judgment in *R. v. National Arbitration Tribunal, Ex p. South Shields Corpn.* (1).

That concludes the substantial point that was argued by counsel for the applicants, but he also raised a subsidiary point on which we should give our decision. He submitted that there was not any dispute at all in the present case, as the matter had not really reached the stage of a dispute between Mr. Carreck and the applicants. It is significant, as was pointed out by counsel for the Minister, that that is not one of the grounds set forward in the statement. It is also significant that, when the notice of reference was sent to the applicants, they did not reply on the basis that there was no dispute: they replied on the footing that they maintained their attitude that the matter should be dealt with as between them and the individual worker. We think that in this case there is a dispute, although it is of a somewhat narrow character. The dispute is merely whether Mr. Carreck should be up-graded immediately or whether his claim to be up-graded should, if one may so put it, await favourable consideration in, or sometime before, September next. One can hardly suppose that the union would have taken such a matter up and referred it to the tribunal unless there had been some general principle, as they think, lying behind it; and, narrow though the matter is, it is a dispute. Mr. Carreck has made a claim to be up-graded immediately; his claim has not been granted by the applicants; and plainly the applicants and the union are in dispute about that. For these reasons, we think that the matter was properly referred to the tribunal, and therefore the order of prohibition must be refused.

Motion dismissed.

Solicitors: *Stanley & Co.* (for the applicants); *Solicitor, Ministry of Labour and National Service; O. H. Parsons* (for the union and John Norman Carreck).

[Reported by B. L. CHARLES, Esq., Barrister-at-Law.]

A R. v. MARLOW (BUCKS) JUSTICES, *Ex parte* SCHILLER.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Byrne and Devlin, J.J.), July 2, 3, 10, 1957.]

B *National Insurance—Contributions—Recovery—Arrears of contributions—Order for payment of arrears—Fine imposed—Whether sum enforceable as a civil debt for purpose of fixing maximum period of committal in default of payment—National Insurance Act, 1946 (9 & 10 Geo. 6 c. 67), s. 54 (1)—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 64 (3), Sch. 3, para. 4—National Insurance (Contributions) Regulations, 1948 (S.I. 1948 No. 1417), reg. 19 (5).*

C *Justices—Enforcement of orders—National insurance contributions and fine—Whether sum enforceable as a civil debt for the purpose of fixing the maximum period of committal in default of payment—Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 55), s. 64 (3), Sch. 3, para. 4.*

D The applicant was convicted under s. 2 (6) of the National Insurance Act, 1946, of failing to pay contributions due from him as a self-employed person under that Act. He was fined £4 and was ordered, under reg. 19 of the National Insurance (Contributions) Regulations, 1948, to pay arrears of contributions amounting to £38 8s. 3d. He did not comply with this order and the justices made an order committing him to prison for three months. By virtue of para. 4 of Sch. 3 to and s. 64 (3) of the Magistrates' Courts Act, 1952, the maximum period of imprisonment for a sum "enforceable as a civil debt" was six weeks. By reg. 19 (5) of the Regulations of 1948 a sum ordered to be paid for arrears of contributions was "recoverable as a penalty". On motion for an order of certiorari to quash the committal order on the ground that the £38 8s. 3d. was a sum enforceable as a civil debt and that the maximum period of committal was six weeks,

F **Held:** when once the sum had been ordered to be paid under reg. 19 (5) it was recoverable as a penalty, and was not any longer a sum "enforceable as a civil debt" within the meaning of para. 4 of Sch. 3 to the Magistrates' Courts Act, 1952; therefore the applicant could be committed to prison under Sch. 3 for three months and certiorari would not be granted.

G [For the National Insurance Act, 1946, s. 54, see 16 HALSBURY'S STATUTES (2nd Edn.) 735; for the Magistrates' Courts Act, 1952, s. 64 and Sch. 3, see 32 HALSBURY'S STATUTES (2nd Edn.) 470, 526.]

Motion.

H The applicant, Paul William Charles de Zille Schiller, applied for an order of certiorari to bring up and quash an order, dated Mar. 28, 1957, made by the justices in petty sessions at Marlow, whereby the applicant was committed to prison for three months for the non-payment of, so far as is relevant to the present proceedings, national insurance contributions arrears amounting to £38 8s. 3d. due from the applicant. The committal order was suspended for fourteen days. The facts appear in the judgment of the court.

D. A. M. Kemp for the applicant.

Rodger Winn for the Minister of Pensions and National Insurance.

I J. M. Milne for the justices.

Cur. adv. vult.

July 10. LORD GODDARD, C.J.: DEVLIN, J., will deliver the judgment of the court.

DEVLIN, J., read the following judgment: On July 27, 1956, an information was laid against the applicant under the National Insurance Act, 1946, alleging that in January, 1956, he failed to pay contributions due from him under the Act as a self-employed person. The penalty for that offence is prescribed

by s. 2 (6) of the Act as a fine not exceeding £10. The imposition of a fine does not, of course, relieve the offender of his obligation to pay the contributions and s. 54 (1) of the Act provides that they

“ . . . shall be recoverable as debts due to the Crown, and without prejudice to any other remedy may be recovered by the Minister summarily as a civil debt.”

Furthermore, reg. 19 of the National Insurance (Contributions) Regulations, 1948, provides that, on conviction, the offender shall be liable to pay not only the sum covered by the conviction but also (subject to certain conditions) a sum equal to the total of other similar contributions which he has failed to pay; and further provides, by para. (5), that any sum ordered to be paid under the regulation “ shall be recoverable as a penalty ”.

On Aug. 30, 1956, the applicant appeared before the Marlow justices and was convicted, fined £4 and costs and further ordered, under reg. 19, to pay a total of £38 8s. 3d. He has not complied with any part of this order. By the Magistrates' Courts Act, 1952, s. 64, where default is made in paying a sum adjudged to be paid by a conviction or order, the court may issue a warrant of commitment to prison for a period not exceeding that which is made applicable by Sch. 3. Paragraph 1 of that Schedule sets out a table which shows that “ Subject to the following provisions of this Schedule ” the maximum period applicable for a sum exceeding £20 is three months. One of the following provisions is para. 4, which says: “ The maximum period applicable to a sum of any amount enforceable as a civil debt shall be six weeks.”

On Mar. 28, 1957, the justices made a committal order for three months. Counsel for the applicant moves for an order of certiorari to quash this order. The point is whether the £38 8s. 3d. payable under reg. 19 is a sum “ enforceable as a civil debt ” within the meaning of para. 4 of Sch. 3. If it is, it is conceded that the committal order is bad. The Minister of Pensions and National Insurance relies on reg. 19 (5) which, as I have said, provides that the sum is to be “ recoverable as a penalty ”. Counsel for the applicant submits that this provision is ineffective to alter the true character of the £38 8s. 3d., which is that of a civil debt; and, further, that the provision is ultra vires s. 8 of the Act under which it purports to be made.

We have been referred to several decisions on other Acts, but, in my opinion, the question turns entirely on the true construction of para. 4. We are not here concerned with the essential character of the sum, but with the mode of its enforcement or recovery. The combined effect of s. 54 (1) and reg. 19 (5) is that the sum can be recovered either as a civil debt or as a penalty. But, once its recovery as a penalty has been ordered, I do not think that the sum can any longer be described as “ enforceable as a civil debt ” within the meaning of para. 4.

It is understandable that counsel should take the further point of ultra vires. It is at first sight surprising that the Minister should be given an option to turn what is essentially a civil obligation into a criminal debt, which means, among other things, that the defaulter will be deprived of the treatment in prison appropriate to a civil debtor. Counsel for the Minister points out that recovery as a penalty can be ordered only in relation to an offence for which the defaulter has been, or could be, prosecuted; and that, under the Magistrates' Courts Act, 1952, s. 126, “ fine ” includes pecuniary compensation payable under a conviction. But these are general considerations. The validity of the regulation must be decided by reference to s. 8 of the National Insurance Act, 1946, which confers the power to make it, and which says, in sub-s. (1) (e), that regulations may provide for the recovery, on prosecution brought under the Act, of contributions. Is this wide enough to authorise recovery as a penalty? This form of recovery of contributions is not new. The substance of reg. 19 has been enacted in all Insurance Acts since 1925. Since the Act itself provides in s. 54 (1) for recovery as a civil debt, it is difficult to see what can be meant by recovery on

- A prosecution except as a penalty, and difficult to suppose that it was intended to abandon this well-established remedy. Furthermore, s. 8 (1) (a) shows that the collection of national insurance contributions is intended to be co-ordinated with the collection of contributions under the National Insurance (Industrial Injuries) Act, 1946; and s. 69 of the latter Act (on which, of course, no point on vires can be taken) is in the same terms as reg. 19.
- B On these grounds I think that the motion fails. [Application having been made for costs on behalf of the justices, one set of costs only was ordered to be paid by the applicant. The LORD CHIEF JUSTICE added: Unless some attack is made on the justices, as that they had acted improperly by showing bias or have misconducted themselves, the justices should not appear by counsel on these applications for prerogative orders. They should take advantage of the provisions of the Review of Justices Decisions Act, 1972, and, if they do more than that, they will not get costs*.]
- C

Motion dismissed.

- Solicitors: *Giffen, Couch & Gilmore* (for the applicant); *Solicitor, Ministry of Pensions and National Insurance* (for the Minister of Pensions and National Insurance); *Preston, Lane-Claydon & O'Kelly*, agents for *Reynolds, Parry-Jones & Crawford*, High Wycombe (for the justices).
- D

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

E

OYEKAN AND OTHERS v. ADELE. (R. 1. 2.)

[PRIVY COUNCIL (Earl Jowitt, Lord Cohen and Lord Denning), May 6, 7, 8, June 26, 1957.]

- F *Constitutional Law—Act of State—Treaty of Cession—Rights passing to the Crown or remaining with inhabitants will be ascertained from the conduct of the Crown.*
- Privy Council—Nigeria—Title to property—Royal palace at Lagos—Rights of previous ruler—Crown grant of palace to previous ruler—Right of successor of occupying palace—Treaty of Cession, 1861—Crown Grants (Township of Lagos) Ordinance (Laws of Nigeria, 1948, c. 44), s. 3.*
- G In 1861 D., the Oba of Lagos, made a Treaty of Cession with Great Britain whereby the territory of Lagos passed to the British Crown, and until 1949 every Oba (save one for three years) was a member of D.'s family. The official residence of the Oba was known as the Iga Idunganran and, before the Treaty of Cession, the Oba, by native custom, had the right to live in the Iga. In 1870 a British Crown grant of the Iga was made to D., granting it to "King Docemo, His heirs, executors, administrators and assigns for ever". In 1870, however, no man in Lagos was entitled to own a piece of land absolutely; it belonged to the family for their use. The Crown Grant (Township of Lagos) Ordinance of 1947 recited that the effect of the treaty was that there passed to the Crown whatever rights the Oba possessed, and enacted (by s. 3 so far as relevant) that a Crown grant of land should be deemed to have vested in the grantee an estate free from competing interests and restrictions "save only such interests and restrictions, recognised by native law and custom, as at the date of the grant affected such estate". In 1949 the then Oba died, and the chiefs selected the present Oba, who was not a member of D.'s family. He having occupied the Iga, the members of D.'s family claimed possession of it and damages for trespass.
- H
- I

* See *R. v. Llanidloes Licensing JJ., Ex p. Davies* (ante, p. 610).

Held: the present Oba was entitled to occupy the Iga, since—

(i) the Iga had passed to the British Crown under the Treaty of Cession, which was an Act of State, and in order to ascertain what rights passed to the Crown or were retained by the inhabitants under the treaty the court looked to the conduct of the British Crown and did not construe the Treaty of Cession, and

(ii) though as recited in the Ordinance of 1947 the treaty passed to the Crown whatever rights the Oba possessed, which rights included his right to the Iga, yet whatever estate the Crown grant vested in D., it was subject, by s. 3 of the Ordinance of 1947, to interests and restrictions recognised by native law and custom, viz., to the right of D.'s successors to occupy the Iga, and the present Oba, being duly appointed, was such a successor.

Appeal dismissed.

[As to Acts of State, see 7 HALSBURY'S LAWS (3rd Edn.) 280, 281, paras. 595, 596; and for cases on the subject, see 38 DIGEST 9, 10, 26-42.]

Cases referred to:

- (1) *Vajesingji Joravarsingji v. Secretary of State for India*, (1924), L.R. 51 Ind. App. 357; 8 Digest (Repl.) 768, 359.
- (2) *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*, [1941] 2 All E.R. 93; [1941] A.C. 308; 110 L.J.P.C. 17; 8 Digest (Repl.) 762, 314.
- (3) *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399; 90 L.J.P.C. 236; 8 Digest (Repl.) 786, 466.
- (4) *Sakariyawo Oshodi v. Moriamo Dakolo*, [1930] A.C. 667; 99 L.J.P.C. 233; 144 L.T. 35; 8 Digest (Repl.) 786, 467.
- (5) *Sunmonu v. Disu Raphael*, [1927] A.C. 881; 38 Digest 665 r.
- (6) *Idewu Inasa v. Sakariyawo Oshodi*, [1934] A.C. 99; 103 L.J.P.C. 9; 150 L.T. 183; 8 Digest (Repl.) 770, 380.
- (7) *Hemmings v. Stoke Poges Golf Club*, [1920] 1 K.B. 720; 89 L.J.K.B. 744; 122 L.T. 479; 43 Digest 395, 179.

Appeal.

Appeal by Adeyinka Oyekan, Amusa Docemo, Oluyemi Docemo, H. A. Ogundimu and Babatunde Akitoye on behalf of themselves and other members of the House of Docemo from an order of the West African Court of Appeal (FOSTER SUTTON, P., VERITY, C.J., and COUSSEY, J.A.), dated Nov. 17, 1952, dismissing the appellants' appeal from a judgment of the Supreme Court of Nigeria (REECE, J.), dated Jan. 18, 1951, given in favour of the respondent, Musendiku Adele, in an action by the appellants claiming (i) a declaration of title in respect of No. 26, Upper King Street, Lagos, (ii) damages for trespass committed by the respondent on the property, and (iii) recovery of the property. The facts appear in the opinion of the Board.

Dingle Foot, Q.C., *R. Millner* and *T. O. S. Benson* for the appellants.

B. J. M. MacKenna, Q.C., and *Arthur Bagnall* for the respondent.

LORD DENNING: The principal question on this appeal is to whom does the royal palace at Lagos belong? Its modern description is No. 26, Upper King Street, Lagos, but it has been known for over two hundred years as the Iga Idunganran. It is claimed by the present Oba of Lagos as his official residence but it is claimed by the descendants of a previous Oba as their own property. The Oba has sometimes been described as the King of Lagos, but this is hardly a correct rendering. His position has no exact parallel in English institutions. He is a very influential person, whose standing is shown by the fact that he is ex officio President of the Lagos Town Council.

The dispute is a family one. The first Oba or King from whom all others have descended was named Ado. He ruled from 1630 to 1689 A.D. One important branch of his descendants is the family of Docemo who was Oba or King from 1853 to 1885. From Docemo's accession in 1853 down to 1949 every Oba (save

A one for three years) was a member of Docemo's family. The last of Docemo's line to be Oba was Falolu who was Oba from 1932 to 1949 and died on Sept. 2, 1949. On the death of Falolu, the chiefs met together to select his successor. Various names were submitted to them. The family of Docemo presented one of their men as a worthy successor but the chiefs did not select him. They selected Adeniji Adele who was not a member of the family of Docemo. He was descended from the first Oba Ado but by a different line from that of Docemo. The announcement of his succession was made public in these words:

"It is officially announced that Adeniji Adele, having been properly selected in accordance with customary law and tradition, is recognised by the Government as Head of the House of Ado."

C The new Oba Adele claimed to occupy the Iga Idunganran; but the members of the family of Docemo resisted the claim. The supporters of Adele put up notices on the verandah of the Iga saying that he was coming. They also put them outside on the walls. At about 6 o'clock in the afternoon of Oct. 1, 1949, Adele came in a car followed by the chiefs and many others, and sought to enter the Iga. The family of Docemo opposed them. They pushed them back and locked the gates. Adele's brothers got a crowbar and a hammer and forced a way in. Adele's car was then driven into the compound followed by the chiefs and many people. They went to the shrine in the Iga. The family of Docemo slipped out and got away in cars. Twelve days later, on Oct. 13, 1949, the family of Docemo brought this action against Adele in the Supreme Court of Nigeria in which they claimed a declaration of title to the Iga, £2,000 damages for trespass, and recovery of possession. The defence was that Adele was duly "capped" on Oct. 1, 1949, as the Oba of Lagos by the chiefs entitled to do so and occupied the Iga in accordance with ancient custom. The action was tried by REECE, J., who dismissed the claim. The family of Docemo appealed to the West African Court of Appeal (FOSTER SUTTON, P., VERITY, C.J., and COUSSEY, J.A.), who dismissed the appeal. The family of Docemo now appeal to Her Majesty in Council. The family of Docemo rest their claim on a Crown grant. They say that in 1861 Docemo made a Treaty of Cession with Britain whereby the territory of Lagos, including the Iga, passed to the British Crown, and that in 1870 the Crown granted the Iga to the Docemo and his family for ever. They say that, since the Treaty of Cession, 1861, there has been no Oba of Lagos except as a courtesy title, and that no rights have attached to it. G The contest is, therefore, between the family of Docemo who claim by grant from the Crown of England, and the respondent Adele who claims by native custom as Oba of Lagos.

Their Lordships find it fully established by the evidence and by the concurrent findings of the courts below that, before the Treaty of Cession, the Oba of Lagos by native custom had a right to live in the Iga. He had this right by virtue of his office. On his death the Iga did not pass to his heirs or to his family but to his successor in office. It was the traditional home of the Obas where each one of them lived. But the chiefs were also entitled to make proper use of it. For instance, the weekly meeting of chiefs was held there as also were other ceremonies.

H What, then, was the effect of the Treaty of Cession in 1861? Did it pass I the property in the Iga to the British Crown? The treaty was made

"In order that the Queen of England may be the better enabled to assist defend and protect the inhabitants of Lagos and to put an end to the slave trade . . .":

By art. 1, Docemo King of Lagos on the part of himself and chiefs made this cession:

" . . . I . . . do with the consent and advice of my Council give, transfer and by these presents grant and confirm unto the Queen of Great

Britain her heirs and successors for ever the port and Island of Lagos with all the rights profits territories and appurtenances whatsoever thereunto belonging and as well the profits and revenue as the direct full and absolute dominion and sovereignty of the said port island and premises with all the royalties thereof freely fully entirely and absolutely . . .” A

By art. 2, Docemo was allowed the use of the title of King in its usual African signification. By art. 3, Docemo was during his lifetime to receive a pension of 1,200 bags of cowries a year. B

Their Lordships desire to point out that the Treaty of Cession was an Act of State by which the British Crown acquired full rights of sovereignty over Lagos. In these circumstances, the courts of law will not take it on themselves to construe the treaty. The effect of the Act of State is to give to the British Crown sovereign power to make laws and to enforce them, and, therefore, the power to recognise existing rights or extinguish them, or to create new ones. C
In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown. It has been laid down by their Lordships’ Board that

“Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of his predecessors avail him nothing.” D

See *Vajesingji Joravarsingji v. Secretary of State for India* (1) ((1924), L.R. 51 Ind. App. 357 at p. 360 per LORD DUNEDIN), *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board* (2) ([1941] 2 All E.R. 93 at p. 98). In inquiring, however, what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law: see *Amodu Tijani v. Southern Nigeria (Secretary)* (3) ([1921] 2 A.C. 399), *Sakariyawo Oshodi v. Moriamo Dakolo* (4) ([1930] A.C. 667). Furthermore, if a dispute arises between the inhabitants as to the right to occupy a piece of land, it will be determined according to native law and custom, without importing English conceptions of property law: see *Summonu v. Disu Raphael* (5) ([1927] A.C. 881), *Idewu Inasa v. Sakariyawo Oshodi* (6) ([1934] A.C. 99); except, of course, in those cases, now growing in number, where English conceptions of individual ownership have superseded previous conceptions. E F G

The present case sets their Lordships a new problem. It concerns, not the rights of the inhabitants, but the rights of the previous ruler himself. It concerns his official residence. Did this pass to the British Crown or not? Counsel for the appellants says that it did. This is an essential preliminary to his contention that the British Crown afterwards granted it to the family of Docemo. In order to get the title in the British Crown, he relies particularly on a recital in the Crown Grants (Township of Lagos) Ordinance No. 18 of 1947 which says H

“the effect of the treaty was that, while the private rights of property of the inhabitants were to be fully respected, there passed to the Crown whatever rights the Oba possessed including whatever proprietary rights the Oba possessed beneficially and free from the usufructuary qualification of his title in favour of his subjects.” I

- A Their Lordships regard that recital as an authoritative statement by the British Crown of the effect of the treaty. It is, however, not easy to interpret. Their Lordships are inclined to think that the only rights of the Oba which passed to the Crown were the rights which he possessed in his official capacity as Oba, and not those which he possessed in his private capacity. Suppose, for instance, he had personal property of his own, such as silks, or
- B bags of cowries which are used as money. Their Lordships do not think that these would pass to the Crown, and this view is supported by the fact that the British Consul, on Feb. 11, 1862, received King Docemo and his chiefs and explained to them that, far from depriving them of their private property, the "Cession will render it more valuable" to them.

- Accepting, however, that the only rights which passed to the Crown were
- C the rights which the Oba possessed as Oba, the question is what were those rights? They would clearly comprehend any right which he had to exact tribute and revenue, to issue land certificates, and so forth. But was the right to occupy the Iga a right which he possessed as Oba? Their Lordships are inclined to think that it was. It was his official residence. It was, so to speak, public property occupied by him by virtue of his office. Their Lordships see no valid
- D distinction in law between the official residence of the Oba and any other public property which he possessed in his capacity of Oba. It all passed to the British Crown. It is true that he did not possess the Iga "beneficially and free" from the rights of others. The chiefs had the right to use it for meetings and ceremonies. But that does not mean it did not pass to the Crown. The words "beneficially, etc." in the ordinance are taken from the judgment of Viscount
- E HALDANE in *Amodu Tijani v. Southern Nigeria (Secretary)* (3) ([1921] 2 A.C. at p. 407), and appear to be inserted so as to protect the rights of the subjects, not to limit the nature of the property which passed to the Crown. Their Lordships are, therefore, disposed to approach the case on the basis that the Iga passed to the British Crown under the Treaty of Cession.

- Even so, it is quite plain that the British authorities did not take possession
- F of the Iga. They allowed the Oba Docemo to occupy it after the cession just as he did before. And in due course in 1870 they made a Crown grant of it to him. This brings their Lordships to the root question in the case. What was the effect of this Crown grant? Did the British Crown transfer the property to the family of Docemo absolutely? Their Lordships draw attention to the very English form of the Crown grant. The administrator grants or assigns
- G "to the said King Docemo, His heirs, executors, administrators and assigns for ever the above specified piece of land". Those words are familiar in English law. They would fit well into a society which had the same legal structure as England; but they do not fit at all well into the structure of Lagos. The grant is drawn up according to the English conception whereby one man is able to have the entire ownership of land himself, with power to sell it to
- H another absolutely, power to transfer it by his will to anyone he likes on his death, or, if he leaves it undisposed of on his death, it passed by law to his heir and now to his personal representatives. The inhabitants of Lagos in 1870 approached land in a very different fashion. No one man was entitled to own a piece of land absolutely. It belonged to the family for their use. The chief had charge of it on behalf of the family but he could not sell it. The idea of
- I sale did not come into the scheme of things at all. The chief had control of the land, and any member of the family who wanted to make use of it had to go to him for it, but even the chief could not make any important disposition of it without consulting the elders of the family. On his death, the new chief took over the rights and duties of control on behalf of the family. It was family land and always recognised as such. This all appears from the Report on Land Tenure in West Africa made in 1898 by RAYNER, C.J., and on Land Tenure in Lagos by Mr. HEALY, the Land Commissioner.

Many of those Crown grants were made in the English form; and much A
misunderstanding has arisen on that account. People have claimed rights under
the grants in English fashion as though thereby they gained a title superior
to the rights of the rest of the family under the local law. Several of these
cases have reached their Lordships, and it has been uniformly held that these
government grants do not convey English titles or English rights of ownership.
The words "his heirs, executors, administrators and assigns forever" are to B
be rejected as meaningless and inapplicable in their African setting. The effect
of a government grant is only to ascertain and denote the chief or headman
who has charge of the land for the time being. It leaves the interests of the
family or occupiers intact, to be determined, as theretofore, by the local law.
The cases already cited make this quite clear, for in all of them Crown grants
had been issued. Their Lordships realise that those cases were concerned only C
with the rights of the family or occupiers; whereas the present case concerns
the rights of the Oba. But there is an ordinance which confirms those decisions
and makes them of general application. It is s. 3 of the Crown Grants (Town-
ship of Lagos) Ordinance, which says that

"all grants of land situate within the township of Lagos . . . shall D
be deemed to have been validly made: and each of such grants shall be
deemed to have vested in the grantee an estate free from competing interests
and restrictions, save only such interests and restrictions, recognised by native
law and custom, as at the date of the grant affected such estate."

Applying the ordinance, it appears to their Lordships that the Crown grant E
to King Docemo in 1870 of 26, Upper King Street (on which the Iga stands),
vested in him an estate which was subject to "such interests and restrictions,
recognised by native law and custom" as affected it at that date. Their Lord-
ships are clearly of opinion that, whatsoever estate passed to King Docemo,
it was subject to the right of his successor to occupy the Iga. This right was
an interest and restriction recognised by native law and custom. It was recog- F
nised at that time and has been recognised ever since. The grant to King
Docemo took effect only subject to that right. Neither he nor his successors
took a title to the fee simple or to the freehold (to use English conceptions).
He took an estate which was more like the estate of a corporation sole than
anything else. It vested in the holder of the office for the time being. It was
not an estate like that of a trustee in trust for the holder of an office. This G
means that the present Oba is entitled to occupy the Iga; that he was entitled
to enter it as he did on Oct. 1, 1949; and that the family of Docemo were wrong
to resist him.

It was argued, however, that, even if the Oba was entitled to occupy the Iga,
nevertheless the legal title was still in the family of Docemo and they were
entitled to a declaration to that effect; that the Oba was not entitled to take H
possession by force: that he had only an equitable interest and ought to have
sought his remedy in the courts; and that his action in turning out the legal
owner was a trespass. The fallacy in this argument is that it seeks to apply
the English concepts of legal owner and equitable beneficiary to cases where
they are quite inapplicable. The simple fact is that, by native law and custom,
the duly appointed Oba was entitled to occupy the Iga and did so. It is clear I
that no cause for action in damages lies on that account: see s. 292 of the
Criminal Code* and *Hemmings v. Stoke Poges Golf Club* (7) ([1920] 1 K.B. 720).

Their Lordships are aware that in several parts of Lagos the native law has
been superseded by English conceptions of individual ownership. Nothing their
Lordships have said here affects those parts. Suffice it to say that the Iga
Idunganran is still subject to the native law and custom which gives the Oba
of Lagos the right to occupy it during his life.

* Laws of Nigeria, 1948, c. 42.

- A Accordingly, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitors: *A. L. Bryden & Williams* (for the appellants); *Hatchett Jones & Co.* (for the respondent).

- B [Reported by G. A. KIDNER, Esq., Barrister-at-Law.]

GENERAL NURSING COUNCIL FOR ENGLAND AND WALES v. ST. MARYLEBONE CORPORATION.

- C [CHANCERY DIVISION (Danckwerts, J.), June 27, 1957.]

Rates—Limitation of rates chargeable—Organisation concerned with the advancement of social welfare—General Nursing Council for England and Wales—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 Eliz. 2 c. 9), s. 8 (1) (a).

- D The General Nursing Council for England and Wales, originally formed under the repealed Nurses Registration Act, 1919, existed for the objects declared in the Nurses Act, 1957. These objects included the maintaining of a register of nurses who satisfied the conditions of admission and a roll of assistant nurses. The Act of 1957 also provided for the training of nurses, provided penalties for the false assumption of the title of registered or enrolled nurse, and imposed restrictions on the use of the titles of nurse or assistant nurse. On the question whether the council were an organisation “whose main objects . . . were . . . concerned with the advancement of . . . social welfare” within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,
- E

- F **Held:** the council were established for the purpose of making sure that the public should receive the services only of competent nurses, which was an object benefiting the public, viz., those members of it who required nursing assistance, and thus was an object concerned with the advancement of social welfare within s. 8 (1) (a) of the Act of 1955.

Dictum of LORD SANDS in *General Nursing Council for Scotland v. Inland Revenue Comrs.* (1929 S.C. 670) considered.

- G *Derbyshire Miners' Welfare Committee v. Skegness Urban District Council* (ante, p. 405) applied.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

- H (1) *General Medical Council v. Inland Revenue Comrs.*, *English Branch Council of General Medical Council v. Inland Revenue Comrs.*, (1928), 97 L.J.K.B. 578; 139 L.T. 225; 13 Tax Cas. 819; Digest Supp.
- (2) *General Nursing Council for Scotland v. Inland Revenue Comrs.*, 1929 S.C. 664; 14 Tax Cas. 645; Digest Supp.
- (3) *Derbyshire Miners' Welfare Committee v. Skegness Urban District Council*, ante, p. 405.

- I **Adjourned Summons.**

The plaintiffs, the General Nursing Council for England and Wales, applied to the court by originating summons for the determination of the question whether on a true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), the General Nursing Council was such an organisation as was therein mentioned.

G. D. Squibb, Q.C., and *W. L. Roots* for the plaintiffs.

Geoffrey Cross, Q.C., and *J. L. Arnold* for the defendant.

DANCKWERTS, J.: This case arises on an originating summons taken out on behalf of the General Nursing Council for England and Wales against the Corporation of the Metropolitan Borough of St. Marylebone for the purpose of obtaining a decision of the question whether on the true construction of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a), the plaintiffs are an organisation of the class mentioned in that sub-section. The defendant is the rating authority which is concerned with the levying of rates in the borough in question. A
B

Section 8 allows relief from the full weight of rates to bodies to which the section applies. Section 8 (1) provides:

“ This section applies to the following hereditaments, that is to say—
(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare; . . . ” C

It is common ground that the council are not established or conducted for profit, and the question arises on the subsequent words. It is not contended that the organisation represented by the council is charitable, and no reliance is placed on the words referring to religion or education; but it is contended that the main objects of the council are concerned with the advancement of social welfare, whatever that may mean. D

The main objects of the council depend on the statutes which regulate the council's existence. The council were formed under the Nurses Registration Act, 1919, which was later amended, but at the present time they are regulated by a consolidating Act called the Nurses Act, 1957. It is accepted by both plaintiffs and defendant that it is sufficient to refer to that statute for the purpose of ascertaining the objects of the council. E

Under the Nurses Act, 1957, s. 1, the body is established, and the composition of the council is settled by the terms of Sch. 1. The constitution of the council is not material to the question that I have to decide. Section 2 provides the purpose of the creation of the council: F

“(1) It shall be the duty of the council—(a) to maintain, in accordance with rules in that behalf made by them, the register of nurses established in pursuance of the Nurses Registration Act, 1919, which shall consist of—
(i) a general part containing the names of all nurses who satisfy the conditions of admission thereto; (ii) a part containing the names of nurses trained in the nursing and care of persons suffering from mental diseases; (iii) a part containing the names of nurses trained in the nursing of sick children; and (iv) such other parts as may be prescribed; (b) to maintain, in accordance with rules in that behalf made by them, the roll of assistant nurses established in pursuance of Part 1 of the Nurses Act, 1943. G

“(2) Where a person satisfies the conditions of admission to a part of the register other than the general part, his name may be included in that other part notwithstanding that it is also included in the general part. H

“(3) A certificate under the seal of the council duly authenticated stating that a person is, or was at any date, or is not, or was not at any date, duly registered or enrolled shall be evidence in all courts of law of the fact stated in the certificate.” I

Under s. 3 the council are to

“ . . . make rules for regulating the conditions of admission to the register and to the roll respectively and the conduct of any examinations which may be prescribed as a condition of admission thereto and any matters ancillary to or connected with any such examinations, and any such rules shall contain provisions . . . ”

A relating to certain things. In s. 4 there is provision for the registration of nurses trained abroad, and in s. 5 there is provision for a list of persons neither registered nor enrolled. Section 6 is not of importance. Section 7 provides for the council making rules concerning removal from, and restoration to, the register, roll and list. Section 8 relates to the closing of parts of the register. Section 9 concerns information to be obtained. Under s. 10:

B "The council shall make rules providing for the issue of certificates to persons registered or enrolled and with respect to the uniform or badge which may be worn by persons registered and persons enrolled respectively."

In s. 11 there is provision for the training of nurses by area nurse-training committees which are appointed by the Minister of Health. The expenses incurred by the area nurse-training committees with the approval of the council are to be defrayed by the council under s. 15, but in the end it appears from s. 26 that

D "All expenses incurred by the council with the approval of the Minister which are attributable to defraying expenditure incurred by area nurse-training committees (other than expenditure incurred by such committees in conducting examinations on behalf of the council) shall be defrayed by the Minister out of moneys provided by Parliament, and all other expenses incurred by the council under this Act shall be defrayed by the council."

E So that as regards committees training nurses, in the end the expenses come on the public funds, and they merely pass through the council as a temporary matter. Section 27 is of some importance, because it provides for penalties for false assumption of the title of registered or enrolled nurse, and, of course, is intended to discourage people from passing themselves off as nurses if they have not the qualifications for which the Act provides. Section 28 provides for restriction on the use of the title of nurse and assistant nurse. Section 30 confers on the council power to

F "... make rules for prescribing anything which by this Act is required or authorised to be prescribed and generally for making provision with respect to any matters with respect to which the council think that provision should be made for the purpose of carrying this Act into effect."

G It is contended on behalf of the council that the main purpose of the council is the formation of this register, and that anything else which the council are entrusted with under the Act, in effect, is merely a subsidiary object. It is said that the object of the register is to provide for the nurses concerned who appear on the register being qualified persons so that the public will be protected from being nursed by persons who are not properly qualified, and that being so, the whole system created by the Act is for the welfare of the public, or that part of the public suffering from sickness and requiring nursing for any purpose. It is said that that is a matter of social welfare, and that, therefore, the council come within the terms of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, because they are a body whose main objects are concerned with the advancement of social welfare.

I On the other hand, it has been argued on behalf of the St. Marylebone corporation that the council are not entitled to the benefit of the section, because the council are concerned at least as much with the benefit of the nursing profession by seeking to raise the standards of nurses and, therefore, their status generally; and also that it cannot be said that the benefit to the public is direct, for it is merely incidental, whereas in order to comply with the terms of the section there must be some direct relation with what has been called "the beneficiary", the beneficiary being, as I understand it to be argued in the present case, the public, or a portion of the public.

It is to be observed that the council are not, so it appears, a charitable body, at any rate for purposes of income tax. It was held in *General Medical Council v. Inland Revenue Comrs.*, *English Branch Council of General Medical Council v. Inland Revenue Comrs.* (1) ((1928), 97 L.J.K.B. 578) that the General Medical Council was not a body which could claim an exemption from taxation conferred by the Income Tax Acts on certain income of charitable bodies. Under those statutes the body seeking exemption must exist solely for charitable purposes, and the income must be applied solely for charitable purposes. Apparently the difficulty of the General Medical Council was that the council, by virtue of the registration provided for under the relevant provisions, conferred benefits on the medical profession, because they were able to obtain their fees if they were registered, and not otherwise. Nothing of that sort, it is to be observed, exists in the present case.

The body in Scotland corresponding to the council with whom I am concerned has been before the courts in regard to the question of income tax, in *General Nursing Council for Scotland v. Inland Revenue Comrs.* (2) (1929 S.C. 664). As I understand it, the General Nursing Council for Scotland has, in substance, the same constitution as the body which is before me in the present case.

Several cases on the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1), have been before the courts, and while I have studied them with interest, I do not find that any of them decides the point which is now before me. Each of them dealt with different bodies, with different constitutions and different objects. I have, therefore, to decide on the facts of this case in regard to the terms of the Act without getting a great deal of assistance from the other decisions. I have to decide whether this is a case in which the objects of the organisation are concerned with the advancement of social welfare. There is general unanimity among the judges who have had to deal with the matter that it is impossible to give a definition of social welfare, though certain special definitions are to be found in certain Acts, such as the Miners Welfare Act, 1952 (see s. 16 thereof), which I do not find of much assistance. It seems to me that social welfare must be connected with society in some way—the welfare of society—which I take to mean the welfare of the public, or a certain portion of the public. The only assistance which I get from any of the cases which have been cited is that it appears fairly clearly from the decision in *Derbyshire Miners' Welfare Committee v. Skegness Urban District Council* (3) (ante, p. 405) that it is not an objection to the application of s. 8 that a portion of the public is benefited by the activity in question and not the whole of the nation. In the present case the persons who are benefited are those who require nursing assistance. I find nothing in s. 8 which compels me to hold that only poor persons are to be regarded as the subject of social welfare. It seems to me that any class of persons in need of nursing may be the subject of welfare in the present case, but that that does not prevent the welfare being social welfare.

It is also to be observed that s. 8 does not require, like the charitable cases, that the objects shall be wholly charitable, or wholly for any particular purpose, or that the income must be strictly applicable to a charitable purpose and nothing else. It concerns “main objects”, and therefore it is claimed that regard should be had to the main purpose of the body which is under consideration, and any subsidiary or less important purposes may be disregarded in reaching a conclusion whether the body comes within the terms of the section.

Though it is perfectly true, as has been argued on behalf of the corporation, that s. 8 (1) (a) does not say “any organisation which provides benefit of welfare to the public”, on the other hand, it is to be observed that the words of s. 8 (1) (a) are not “whose objects are for the advancement of religion, education or social welfare”, but merely, “whose main objects . . . are . . . concerned with the advancement of religion, educational or social welfare”. It seems to me, therefore, that it is not essential that the organisation should be formed

A ostensibly for the purpose of advancing social welfare, and it is sufficient if the body concerned is formed with objects the result of which is the advancement of social welfare.

The point which I have in mind is put very well by LORD SANDS in *General Nursing Council for Scotland v. Inland Revenue Comrs.* (2), where he said (1929 S.C. at p. 669):

B “Here again, as it appears to me, the council is stamped as established for a charitable purpose. But again the problem of the ‘only’ presents itself.”

It must be remembered that this was a case under the Income Tax Act, 1918, s. 37 (1) (b), which required the body to be “established for charitable purposes only”. LORD SANDS continued (*ibid.*, at p. 670):

C “Can the council be said to be established for any purpose additional to the two I have indicated? Upon this question I have felt great difficulty, and I confess my mind has wavered. Admission to the register of nurses does not, as in the case of the medical register, confer any statutory privilege or advantage. But it is undoubtedly a cachet which is to the professional advantage of the nurses who obtain it. Accordingly, if this were the case

D of a professional corporation which, either by charter obtained on its application or by legislation promoted by itself, had obtained for its members a monopoly of the right to a certain professional cachet, then, even though the corporation had as objects the improvement of professional education and the increased efficiency of the profession generally in the interests of the

E sick, the corporation could not claim exemption as being a body established for charitable purposes *only*. But this is not the present situation. So far as appears, the legislation by which the council was established was not the crown of a movement promoted by the nursing profession or a certain body among them, but was the creating of a statutory body and the imposition of a system upon the profession by Parliament on its own initiative. In this

F view, as it appears to me, there is cogency in the contention that Parliament must be conceived as having established this body in the general public interest, and not in the interest of any section of the profession. Professional advantage there may be to the section who qualify, but it may be urged that this is incidental and not a purpose for which the council was established. The commissioners use the expression ‘serves the interests’. But this does

G not appear to be necessarily commensurate with ‘established for the purpose’. The existence of the office of Commissioners of Inland Revenue subserves the interests of those who adorn that office. But the office was not established for that purpose.”

H That, in my view, expresses the real purpose of the establishment of the council in the present case. They were not established for the purpose of raising the professional status of the nurses, but for the purpose of creating a system of registration so as to prevent incompetent nurses being able to victimise the public, and for making sure that the public should receive the services only of competent nurses. That seems to me to be the establishment of a body for the purpose of benefiting the public, and, therefore, for a purpose of social welfare. Accordingly, I reach the conclusion that in the present case the claim of the council to be an organisation within the terms of s. 8 (1) (a) is established.

Declaration accordingly.

Solicitors: *Pontifex, Pitt & Co.* (for the plaintiffs); *Sharpe, Pritchard & Co.* (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

RUSSELL v. SMITH.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Slade and Gorman, J.J.), July 10, 11, 1957.]

Criminal Law—Larceny—Taking—Accepting delivery of excessive quantity of goods in ignorance of mistake—Subsequent discovery of excess—Intention to appropriate formed when excess discovered—Whether excess taken when accepted or when discovered—Larceny Act, 1916 (6 & 7 Geo. 5 c. 50), s. 1 (2) (i).

A lorry driver was sent by his employer to collect a number of full sacks from C. and to deliver them to J. By error, and unknown to the driver, C. loaded on to the lorry eight more sacks than the required number. The driver discovered the mistake for the first time while unloading the sacks at J.'s premises; he then decided to keep the extra eight sacks for himself, and did so. Subsequently he sold them and kept the proceeds.

Held: the lorry driver was guilty of larceny because

(i) a man cannot take into his possession a thing of which he has no knowledge, and these extra eight sacks were therefore "taken" by the driver only when he discovered that he had them (dictum of LORD COLERIDGE, C.J., in *R. v. Ashwell* (1885), 16 Q.B.D. at p. 225 applied); and

(ii) the taking was therefore not an innocent one (*R. v. Hudson*, [1943] 1 All E.R. 642, followed; *Moynes v. Cooper*, [1956] 1 All E.R. 450, distinguished).

Appeal allowed.

[As to the theft of goods delivered by mistake, see 10 HALSBURY'S LAWS (3rd Edn.) 773, para. 1492; and for cases on the subject, see 15 DIGEST (Repl.) 1048, 1049, 10,317-10,329.

For the Larceny Act, 1916, s. 1, see 5 HALSBURY'S STATUTES (2nd Edn.) 1012.]

Cases referred to:

(1) *Moynes v. Cooper*, [1956] 1 All E.R. 450; [1956] 1 Q.B. 439; 120 J.P. 147.

(2) *R. v. Hudson*, [1943] 1 All E.R. 642; [1943] K.B. 458; 112 L.J.K.B. 332; 169 L.T. 46; 107 J.P. 134; 15 Digest (Repl.) 1049, 10,329.

(3) *R. v. Ashwell*, (1885), 16 Q.B.D. 190; 55 L.J.M.C. 65; 53 L.T. 773; 50 J.P. 181, 198; 15 Digest (Repl.) 1048, 10,325.

(4) *Merry v. Green*, (1841), 7 M. & W. 623; 10 L.J.M.C. 154; 151 E.R. 916; 15 Digest (Repl.) 1048, 10,323.

Case Stated.

This was a Case Stated by justices for the County of Somerset in respect of their dismissal, when sitting as a magistrates' court at Wiveliscombe on Feb. 14, 1957, of an information by the prosecutor charging the defendant with the larceny of eight half hundredweight sacks of pig meal. The facts, and the justices' reasons for dismissing the information, appear in the judgment of LORD GODDARD, C.J.

E. L. Gardner for the prosecutor.

John Hall for the defendant.

LORD GODDARD, C.J.: This Case Stated by justices for the County of Somerset raises yet another difficult question in regard to the law of larceny, a law which is exceedingly technical and which has been the subject of a great many decisions. The court is indebted to Mr. Hall (counsel for the defendant) for a very careful argument in this case and I would also pay a tribute to the magistrates who evidently tried this case with great care, applied their minds to the right points and submitted to the consideration of no fewer than fifteen cases

A which were cited to them, beginning in the year 1798* and going down to the year 1956. The justices seem to have entirely appreciated the point, which was whether there was here a felonious taking, and it is no reflexion on the justices that we are taking a different view to that which they took.

It is in some respects a difficult case. One of the cases which was cited to the justices, and which we shall have to consider, is *Moynes v. Cooper* (1) ([1956] 1 All E.R. 450) in this court. I might recall that the learned editor who writes in the LAW QUARTERLY REVIEW said of that case ((1956), 72 LAW QUARTERLY REVIEW 183) that *Moynes v. Cooper* (1) served

C “to emphasise the utter unreality of the present law of stealing. Cases such as *Moynes v. Cooper* (1) are a public scandal both because the courts are reluctantly compelled to allow dishonesty to go unpunished, and because of the serious waste of judicial time involved in the discussion of futile legal subtleties.”

Those are strong words, no doubt, but it would be a good thing, I think, if the law of larceny could be somewhat simplified and cleared up.

D Now the facts of this case are in quite a small compass. The defendant, the respondent in this case, was a lorry driver in the employ of a firm of cartage contractors and he was sent by his employers to the mills of a firm called Crosfields & Bodey, Ltd., there to load a cargo of pig meal and drive it to a merchant living at Crowcombe in the County of Somerset. Jennings, the merchant, had bought this pig meal from Crosfields & Bodey. Crosfields & Bodey employed the defendant's masters to transport the goods. The defendant went to Crosfields & Bodey, and the lorry was loaded. He was standing by the lorry or on the lorry, when it was loaded. By some mistake, probably due to a mistake in counting, eight half hundredweight sacks too many were put on the lorry. Nobody knew the excess had been put on to the lorry; nobody intended that the excess should be put on to the lorry. Having got these sacks on the lorry, the defendant drove to Jennings' establishment and there unloaded them. He knew F how many sacks he had got to deliver to Jennings, and Jennings knew how many sacks he was to receive. When the defendant had unloaded the sacks, there were eight sacks left in the lorry, because eight sacks too many had been put on the lorry. That was the first time that the defendant knew that he had more sacks than he ought to have had, and he thereupon formed the intention of appropriating those sacks. He took them away and sold them†. When these circumstances came to light, he was charged with feloniously stealing the sacks.

G The justices, having considered those facts, said:

H “We were of the opinion . . . that there was no ‘taking’ sufficient to amount to larceny since at the time of the taking of the eight half hundredweight sacks the defendant did not then have the intent permanently to deprive the owner thereof. Accordingly although we felt that the defendant was guilty of grave dishonesty (as we so stated at the time) we dismissed the information.”

I The whole essence of the case depends on when a man can be said to take the particular articles he is charged with stealing. We do not, of course, throw any doubt on the proposition that if a person takes property innocently and without any felonious intention and subsequently appropriates it to his own use, that is not, according to the present state of the law, larceny. The taking must be *animo furandi*.

The Larceny Act, 1916, which, as I pointed out in *Moynes v. Cooper* (1) ([1956] 1 All E.R. at p. 452), was intended to codify not only the statute law but also the common law on the subject, does not give a comprehensive definition of the

* The cases cited began with *R. v. Abrahams*, (1798), 2 Leach 824.

† The defendant sold the eight sacks of meal for £4 and kept the money for himself.

word "take". Having given the well-known definition of larceny, which I need not read, the Larceny Act, 1916, s. 1 (2) (i), provides:

"the expression 'takes' includes obtaining the possession—(a) by any trick; (b) by intimidation; (c) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained."

That, it is to be observed, says what "taking" includes, but it may include other things. I can certainly say, in favour of counsel for the defendant's argument, that it cannot be said in this case that the man obtained possession of the goods

"under a mistake on the part of the owner with knowledge on the part of the taker that possession had been so obtained",

because neither of them knew at the time that possession of these eight sacks had been parted with by the owners and that the sacks had been put on the lorry. It was not until the lorry was unloaded that the defendant became aware (Crossfields, of course, at this time were not aware) that eight too many sacks had been put on the lorry. He then formed the intention, and that was the first time that he could form the intention, because until that time he did not know that he had got eight more sacks than he ought to have had. It is perfectly true he knew he had got the actual sacks but, as far as he knew when he drove off the lorry, those were the sacks that he had to deliver to Jennings.

Now the facts in *Mognes v. Cooper* (1) ([1956] 1 All E.R. 450), which has been considerably canvassed in this case, were these. There was a pay clerk who had authority not only to pay wages but to calculate the wages which were due to particular employees, and she miscalculated the amount, but intended that the sum which she calculated should be given to the workman as his wages. She sent the wages in a pay packet and when the man received the pay packet he did not open it; he received the packet and put it in his pocket, and what he received was what the clerk intended he should receive. It was not that the clerk put some money into the packet by mistake thinking, for instance, that she had put in £5 and in fact she had put in £6; she put in what she did put in deliberately, thinking that that was the amount of money that she was obliged to pay to this man that day, and he took it without knowing that more was in that packet than ought to have been. Consequently we held in that case that the taking was an innocent taking, because what he took was what the clerk meant him to take, and, therefore, although he acted dishonestly by misappropriating the money when he found what had happened, he was not guilty of larceny. We distinguished that case from *R. v. Hudson* (2) ([1943] 1 All E.R. 642), a decision of the Court of Criminal Appeal. Being a decision of the Court of Criminal Appeal *R. v. Hudson* (2) is binding on this court, as indeed it would have been if it had been a decision of the Divisional Court.

The facts in *R. v. Hudson* (2) were that the appellant received a letter which was intended for someone else. He kept it for some days, and then, on opening it, he found inside a cheque, inadvertently made out in his name, which he thereupon appropriated to his own use. It was held that, although, when the letter was delivered to the appellant, he had no *animus furandi* with regard to the contents, he was properly convicted of larceny. He received it innocently in the sense that it came to him through the post.

In giving the judgment of the court, the court considered *R. v. Ashwell* (3) ((1885), 16 Q.B.D. 190) which has always been regarded as a most unfortunate case because it was argued before fourteen judges, seven of whom were one way and seven of whom were another. The court quoted with approval ([1943] 1 All E.R. at p. 644) CAVE, J.'s judgment, which reads (16 Q.B.D. at p. 203):

"In my judgment a man cannot be presumed to assent to the possession of a chattel; actual consent must be shown. Now a man does not consent

A to that of which he is wholly ignorant; and I think, therefore, it was rightly decided that the defendant in *Merry v. Green* (4) ((1841), 7 M. & W. 623) was not in possession of the purse and money until he knew of their existence."

STEPHEN, J., said (16 Q.B.D. at p. 216):

B "If a man picks up a purse containing money some seconds must usually pass before he can open the purse and discover and determine to appropriate the money. I think, however, that for legal purposes it is neither possible nor desirable to attempt to go into such a refinement as this. If a man finds a purse, picks it up, opens it, finds money in it, and thereupon determines to keep it for himself, it appears to me that the whole process ought to be regarded as one action, taking place at one time, as for many purposes the fractional parts of a day are not regarded by the law."

C Then the judgment in *R. v. Hudson* (2) ([1943] 1 All E.R. at p. 644) continues, dealing with the particular facts:

D "This man [the appellant] received an envelope. What he did with it for some days I do not know—it is not disclosed in the evidence. He opened it, and when he opened it he discovered a cheque in it that was palpably valuable and equally palpably belonged to somebody else. At that moment he could for the first time allow his intelligence to operate. He could then form his intent. Before he could not. His intelligence began to operate at once; and he said then and there: 'I am going to appropriate and take away from the rightful owner property that he has not consented to give me and which I do not intend to return to him. I intend permanently to deprive him of his property' . . . It appears to me to come within the words of LORD COLERIDGE, C.J., in *R. v. Ashwell* (3) (16 Q.B.D. at p. 225): 'In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it.' That is what this man did in this case. As soon as he saw what he had got, he made up his mind to steal it and he did steal it. He did all that was necessary to cause him to complete the offence of larceny."

G In my judgment that case is applicable here and is binding on this court. The defendant did not know what he had got until, by the emptying of the lorry at the buyer's premises, he found he had got eight sacks too many. He was never intended to have eight sacks too many and he never intended to take eight sacks too many. He was intending to take the consignment which the buyer had ordered into the possession of the buyer. When he found he had more than he ought to have had, then, for the first time, he became aware of the mistake which had been made and of the addition that had been made. I do not think a man can take a thing into his possession, or come into possession of a thing, of which he has no knowledge. If somebody leaves something in my house and I do not know that he has left it, it does not seem to me that it can be said that I am in possession of that property. If it happened to be stolen goods, leaving out any question of guilty knowledge, the prosecution would surely fail at once, if it were once shown that the property was left in my house without my knowledge. Very often the prisoner in a case of receiving contends that he did not know that the goods were there. If the driver did not know the goods were there, how can he be said to have been in possession of them?

H I In giving judgment in *Moynes v. Cooper* (1) I dealt with *R. v. Hudson* (2) and I said ([1956] 1 All E.R. at p. 452):

"Before parting with the case, we ought to refer to *R. v. Hudson* (2), on which the prosecutor placed reliance. That case has been the subject of a good deal of criticism (see, for instance, RUSSELL ON CRIMES (10th Edn.), Vol. 2, pp. 1158-1161) on the question whether the charge ought not to have been for obtaining an altered cheque by false pretences. The appellant had certainly been guilty of some crime. He was charged with stealing a cheque

which had come to him by post and was intended for another person of the same surname, but there was no initial either on the envelope or cheque. The appellant, knowing that the cheque was not intended for him, got the drawer to insert his initial on the cheque, which he kept and cashed. This would seem to be closely akin to stealing by finding, as, when he found the cheque in the envelope, he could easily have discovered the true owner. In our opinion *R. v. Hudson* (2) is not an authority for the present case, as, in *R. v. Hudson* (2) neither the cheque nor the envelope was intended by the sender for the appellant."

That neither the cheque nor the envelope was intended by the sender for the accused is the reason why *R. v. Hudson* (2) was decided as it was. In this case these eight sacks were not intended to be put into the defendant's lorry; they were not intended to be delivered to the consignee when the rest of the property was delivered. I think it is very much akin to a finding. If a person by inadvertence places sacks in the lorry, it is not very much different to having lost the sacks. In my opinion, therefore, there was a taking. The taking took place when this man discovered that he had the sacks, which were never intended to be given to him and which he must have known were never intended to be given to him at all, except in the sense that they were put on the lorry by mistake.

For these reasons I think that there was a taking here and the case must go back to the magistrates with a direction that an offence was committed and that it is their duty to convict.

SLADE, J.: I agree, and I should like to associate myself with the tribute which the Lord Chief Justice has paid to the magistrates in Somerset who formed the petty sessional court in this case for the care with which they heard the case and with which they have stated this Case. Although we are differing from them, I confess that my own mind has wavered more than once in the course of the argument, and for that I am indebted to the way in which Mr. Hall (counsel for the defendant) has put the argument before us. I think the case is covered by the decision of the Court of Criminal Appeal in *R. v. Hudson* (2) ([1943] 1 All E.R. 642) and I agree with my Lord's judgment and the reasons he gave.

GORMAN, J.: I agree, and I do not desire to add anything.

Appeal allowed. Case remitted to the magistrates with a direction to convict.

Solicitors: *Reed & Reed*, agents for *Clarke, Willmott & Clarke*, Taunton (for the prosecutor); *McKenna & Co.*, agents for *Moger, Couch & Ligertwood*, Wiveliscombe (for the defendant).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

PRACTICE DIRECTION.

CHANCERY DIVISION (COMPANIES COURT).

Company—Practice—Advertisement of petition for relief under Companies Act, 1948 (11 & 12 Geo. 6 c. 38), s. 210, or for winding-up—Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), r. 28.

The advertisement pursuant to r. 28 of the Companies (Winding-up) Rules, 1949, of a petition for an order under s. 210 of the Companies Act, 1948, shall state that the petition is for an order under that section but need not contain any further particulars of the relief sought; but where an order for winding-up of the company is sought in the alternative to relief under s. 210 the advertisement shall so state.

By direction of the judge.

MAURICE BERKELEY,

June 24, 1957.

Registrar.

A NORRIS v. EDMONTON CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Slade and Gorman, JJ.), July 8, 9, 1957.]

Town and Country Planning—Enforcement notice—No appeal against notice—Subsequent summons for contravention—Matter not raised by appeal cannot be raised as defence to prosecution—Town and Country Planning Act, 1947 (10 & 11 Geo. 6 c. 51), s. 23 (4), s. 24 (1), (3).

On Jan. 18, 1956, an enforcement notice was served on the occupier of certain land requiring him to discontinue within twenty-eight days the use of the land for car breaking, car repairs and car sales. The occupier did not appeal under s. 23 (4) of the Town and Country Planning Act, 1947, against this notice and did not discontinue such use of the land. On Dec. 4, 1956, an information was preferred against him under s. 24 (3) of the Act of 1947 that he had unlawfully made default in complying with the requirements of the notice. At the hearing of the information on Jan. 15, 1957, the occupier sought to call evidence to show user of the land prior to the date when his occupation began in order to prove that his use of the land did not constitute development. The evidence was not admitted on the ground that it was not open to him to raise in proceedings under s. 24 (3) of the Act, matters which he could have raised in an appeal under s. 23 (4). He was convicted. On appeal against conviction,

Held: the conviction must stand because—

(i) an objection which could have been, but was not, taken on an appeal under s. 23 (4) of the Town and Country Planning Act, 1947, against an enforcement notice, could not afterwards be raised as a defence to a prosecution for contravention of the notice.

Perrins v. Perrins ([1951] 1 All E.R. 1075) followed.

(ii) the objection that the user did not constitute development could have been taken on an appeal against the enforcement notice.

East Riding County Council v. Park Estate (Bridlington), Ltd. ([1956] 2 All E.R. 669) applied; *Keats v. London County Council* ([1954] 3 All E.R. 303) not followed.

Per CURLIAM: the case of *Keats v. London County Council* is irreconcilable with *East Riding County Council v. Park Estate (Bridlington), Ltd.*, and must be taken to be overruled by the latter case (see p. 805, letter G, post).

Appeal dismissed.

[For the Town and Country Planning Act, 1947, s. 23 (4) and s. 24 (1) and (3), see 25 HALSBURY'S STATUTES (2nd Edn.) 525, 527.]

Cases referred to:

(1) *East Riding County Council v. Park Estate (Bridlington), Ltd.*, [1956] 2 All E.R. 669; [1957] A.C. 223.

(2) *Keats v. London County Council*, [1954] 3 All E.R. 303; 118 J.P. 548; 3rd Digest Supp.

(3) *Perrins v. Perrins*, [1951] 1 All E.R. 1075; [1951] 2 K.B. 414; 115 J.P. 346; 2nd Digest Supp.

I Case Stated.

This was a Case Stated by justices for the County of Middlesex in respect of their adjudication as a magistrates' court sitting at Tottenham on Jan. 15, 1957. An information was preferred on Dec. 4, 1956, by the Edmonton Borough Council against the appellant under the Town and Country Planning Act, 1947, s. 24 (3), alleging that on the land forming the rear part of No. 160, Town Road, Edmonton, he did unlawfully make default in complying with the requirements of an enforcement notice dated Jan. 16, 1956, served on him by the respondents requiring him to discontinue within twenty-eight days the use of the land for

car breaking, car repairs and the sale of cars and to restore the land to its condition (as a domestic yard to a dwelling-house) before such development took place contrary to s. 23 and s. 24 of the Town and Country Planning Act, 1947. A

At the hearing of the information on Jan. 15, 1957, the following facts were found. An enforcement notice dated Jan. 16, 1956, in respect of his use of a yard at the rear of No. 160, Town Road, Edmonton, was served on the appellant on Jan. 18, 1956. On Jan. 16, 1956, and on all subsequent material dates the appellant, as was accepted by the parties, was the occupier of the yard in question and used it for car breaking, car repairs and the sale of cars. On Oct. 17, 1956, the appellant was the occupier of the yard and was continuing to use it for car breaking and car repairs contrary to the enforcement notice. The appellant did not appeal against the enforcement notice to the justices under s. 23 (4) of the Town and Country Planning Act, 1947, and he had neither discontinued the said use of the yard nor restored the land to its condition before the development took place as required by the enforcement notice. B C

The appellant contended that he was entitled to call evidence of the user of the yard prior to the date when he became occupier, in order to prove that his said use of the land did not constitute development within the meaning of the Town and Country Planning Act, 1947, namely, that it did not constitute a material change of use within the meaning of that expression in s. 12 of that Act. D

The respondents contended that the appellant was not entitled to call such evidence because it was not open to him to raise in proceedings under s. 24 (3) of the Town and Country Planning Act, 1947, matters which he could have raised in an appeal under s. 23 (4). The justices accepted the respondents' contention and refused to admit the appellant's evidence as to the user of the yard prior to the date of the enforcement notice. He was found guilty and fined £5 and he now appealed. E

D. G. Widdicombe for the appellant.

D. J. Turner-Samuels for the respondents.

LORD GODDARD, C.J.: This is a Case Stated by justices for the County of Middlesex before whom the present appellant was summoned for making F

"default in complying with the requirements of an enforcement notice dated Jan. 16, 1956, served by the Edmonton Borough Council requiring him within the time specified therein to discontinue the use of the said land for car breaking, car repairs and sale of cars and to restore the land to its condition before such development took place as a domestic yard to a dwelling-house, contrary to s. 23 and s. 24 of the Town and Country Planning Act, 1947." G

The case is one of some difficulty and complexity and I wish that the appropriate Ministry would take notice of the difficulties which have arisen in the application of this somewhat obscure Act. **VISCOUNT SIMONDS** in the most recent case in the House of Lords, *East Riding County Council v. Park Estate (Bridlington), Ltd.* (1) ([1956] 2 All E.R. 669 at p. 670) described that case as raising an exceptionally difficult point, and one on which there are authorities which it is not easy to reconcile one with another. H

The enforcement notice reads:

"Whereas you are the occupier of land situate at and forming the rear part of 160, Town Road, Edmonton, N.9, and whereas on or about October, 1955, the land above described was developed by the use thereof for car breaking, car repairs and sale of cars, and whereas such development before-mentioned was carried out without the grant of planning permission required under Part 3 of the Town and Country Planning Act, 1947. Now therefore the Mayor Aldermen and Burgesses of the Borough of Edmonton acting by the council of the said borough on behalf of the County Council of the Administrative County of Middlesex as Local Planning Authority in exercise I

- A of the powers contained in s. 23 and s. 24 of the said Act of 1947 hereby give you notice to discontinue the use of the said land for car breaking, car repairs and sale of cars and to restore the land to its condition before such development took place as a domestic yard to a dwelling-house within twenty-eight days of the date on which this notice takes effect. This notice shall, subject to the provisions of s. 23 of the said Act, take effect on the expiration of
- B twenty-eight days after the service thereof upon you."

That is dated Jan. 16 of last year, and it calls in perfectly clear terms for the discontinuance of the use of this land to take place within twenty-eight days of Jan. 18, the date on which the notice was served.

- C The appellant did not appeal against the notice. It has been contended here that he could not appeal. When he was summoned for not complying with the notice he contended that he was

- "entitled to call evidence of the user of the yard prior to the date when he became occupier in order to prove that his said use of the land did not constitute development within the meaning of the Town and Country Planning Act, 1947, namely, that it did not constitute a material change of use within the meaning of that expression in s. 12 of the said Act of
- D 1947."

The justices held that he was not entitled to call that evidence because, if he desired to raise that point, he should, under the Act, have appealed to the justices against the enforcement notice by separate proceedings, and, as he did not, the notice was effective and could not be challenged on that ground.

- E No one suggested that the notice was defective in form. No one suggested that it was directed to the wrong person. No suggestion was made that the court could look on the notice as a nullity in the sense that it was bad on its face because it did not comply with some provision of the Act. A person who is served with what purports to be a notice but is not such a notice as the Act requires, can ignore it because it does not comply with the Act. He can treat
- F the piece of paper served on him as a nullity and take no notice of it. That point, however, is not taken here. The appellant desired to take the point that there was no development, and that, therefore, he could not be called on to do that which the notice required him to do.

Section 23 (4) of the Town and Country Planning Act, 1947, reads:

- G "If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing sub-section, appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that
- H no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates; (b) if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring land to its condition before the development took place, or for securing compliance with the conditions,
- I as the case may be, shall vary the notice accordingly; (c) in any other case shall dismiss the appeal."

Then s. 24 (1) provides:

"If within the period specified in an enforcement notice, or within such extended period as the local planning authority may allow, any steps required by the notice to be taken (other than the discontinuance of any use of land) have not been taken, the local planning authority may enter on the land and take those steps . . . and if that person, having been entitled

to appeal to the court under the last foregoing section, failed to make such an appeal, he shall not be entitled in proceedings under this sub-section to dispute the validity of the action taken by the local planning authority upon any ground which could have been raised by such an appeal."

Section 24 (3) provides:

"Where, by virtue of an enforcement notice, any use of land is required to be discontinued, or any conditions are required to be complied with in respect of any use of land or in respect of the carrying out of any operations thereon, then if any person, without the grant of permission in that behalf under this Part of this Act, uses the land or causes or permits the land to be used, or carries out or causes or permits to be carried out those operations, in contravention of the notice, he shall be guilty of an offence . . ."

Two points are raised in this case. Counsel for the appellant, who has argued this case with great care and has called our attention to all the necessary cases, has submitted that his client's contention that there had been no development, because he was only using the land in the same way as it had been used by his predecessor, was a point which could not be dealt with by the justices by way of appeal. For that purpose he cited *Keats v. London County Council* (2) ([1954] 3 All E.R. 303). In that case this court, in a judgment delivered by PARKER, J., to which I was a party, decided that on an appeal to a court of summary jurisdiction under s. 23 the court of summary jurisdiction must assume that the development had taken place. That case seems to me, however, to be inconsistent with the latest decision on this Act, a decision of the House of Lords, by which we are bound, in *East Riding County Council v. Park Estate (Bridlington), Ltd.* (1) ([1956] 2 All E.R. 669) in which the House of Lords have decided that any objection (other than an objection on the ground that the notice is a nullity as not complying with the provisions of the Act) that can be taken to the notice is one which the justices have power to entertain.

The words of s. 23 (4) of the Town and Country Planning Act, 1947, are:

" . . . (a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof . . ."

It appears to me that the House of Lords have decided that if a person is objecting that he did not need planning permission for whatever reason, his remedy is to appeal to the justices in petty session. LORD EVERSHED, who was a party to the decision of the House of Lords, said ([1956] 2 All E.R. at p. 684):

"The words in s. 23 (4), 'no such permission was required in respect thereof', are clearly capable of application to any case in which permission was not, in truth, required under the Act of 1947, whether because the development was of a kind which, by the terms of the Act, called for no permission, or because the development, by reason of the date when it was carried out, was outside the scope of the Act altogether."

I am doing the appellant no injustice if I say that what he desired to contend was that the development was of a kind which called for no permission under the Act because it was altogether outside the scope of the Act by reason of the date when it was carried out. But whether he desired to contend that it was not development at all or that it was not a development to which the Act applied, it seems to me that the House of Lords has said that that is a matter which the justices can deal with on an appeal. The leading judgment in the case was that of VISCOUNT SIMONDS, and I think LORD SIMONDS, taking his judgment altogether, was clearly deciding in exactly the same way that LORD EVERSHED decided.

The next point that arises is: Can this point be raised afterwards when the man is prosecuted for not complying with the notice, or is the prevention which

- A is put on his raising the point only applicable if he is sued for the expenses of the local authority in carrying out the removal or remedying the development which is said to have taken place? That point seems to me to have been decided by this court in terms in *Perrins v. Perrins* (3) ([1951] 1 All E.R. 1075), which, so far as I know, has not been subject to any criticism in any higher court; it may be simply because the exact point has not been raised in any higher court.
- B At any rate, the decision is binding on us, and the case decided that, if a matter which could be raised by way of appeal had not been raised by appeal, it could not afterwards be raised as a defence when a prosecution was brought for disregarding the notice. The way in which I put it in delivering the leading judgment of the court in *Perrins v. Perrins* (3), was (*ibid.*, at p. 1077):
- C “That provision seems to have been expressly enacted to limit the defences that might be pleaded. It leaves it open for a person sued to take other objections, for instance, that the work done by the local authority was unnecessary, in the sense that they have done more work than was necessary, or that the work was done at an unreasonable cost [that is, if they are suing for the cost], or something of that kind, but it does not entitle him to take objection to the notice. If he is not entitled to take objection to the notice when he is summoned for the cost of doing the work, it would be very odd if he could still take objection when he is prosecuted under sub-s. (3) for failing to observe the terms of the notice . . . The offence [i.e., the offence against s. 24 (3) of the Act of 1947] is the doing of something in contravention of a notice which the previous section says shall be effective at the end of twenty-eight days unless an appeal is brought. Therefore, it is not for the justices, when a person is prosecuted for the offence of contravening the notice, to go into the question whether the notice was good or bad. When once the notice has become effective, it is the duty of the recipient, who has had the opportunity of appealing against it and has not appealed, to abide by it.”
- F That decides that if there was a matter which could be taken to appeal, under s. 23 of the Town and Country Planning Act, 1947, a man cannot raise that matter as a defence if he is prosecuted for disobeying the enforcement notice.
- I should like to say with regard to *Keats v. L.C.C.* (2) that my view is that it is irreconcilable with *East Riding County Council v. Park Estate (Bridlington), Ltd.*
- G (1) in the House of Lords, and although their Lordships did not refer to *Keats v. L.C.C.* (2) in their speeches, that case must, I think, be taken to be overruled by their decision. I cannot reconcile the reasoning of this court in *Keats v. L.C.C.* (2) with the reasoning of the House of Lords in the *East Riding* case (1). With regard, however, to the point that is raised here, *Perrins v. Perrins* (3) is binding on us. Therefore, we must give effect to it and hold that the justices
- H were right. As this is a criminal cause or matter (the appellant being summoned on an information and dealt with for a default) it is a great misfortune, I think, that this case cannot go to the House of Lords. There are still obscure questions under this section, and now that I have called attention prominently to *Keats v. L.C.C.* (2), it is very desirable that an opportunity should be given to their Lordships to consider that case. Unfortunately, the law does not allow an
- I appeal from this court in a criminal cause or matter, but I hope that possibly some opportunity may be taken to try to clear up by legislation the obscure position which arises under this Act. The provision [s. 23 (4) of the Act of 1947] about this appeal to justices against an enforcement notice is a curious one; but no doubt there is a very good reason for it. As LORD EVERSHED pointed out in his speech (see [1956] 2 All E.R. at p. 684), it is very desirable that owners of property should not be involved in the long period of uncertainty as to their rights which might be the consequence of their having to wait for steps to be

taken under s. 24 of the Act. As it is, in my opinion the justices came to a right decision and, therefore, this appeal must be dismissed. A

SLADE, J.: I agree, and I desire to add only this: The justices refused to hear evidence tendered on behalf of the appellant on the ground that it related to a point which could have been raised in an appeal. I agree that it could have been raised in an appeal under s. 23 (4) of the Town and Country Planning Act, 1947. The question then arises whether it could not also have been raised before the justices in proceedings for contravention of the enforcement notice. I respectfully agree with my Lord that this court is bound by its decision in *Perrins v. Perrins* (3) ([1951] 1 All E.R. 1075). Had the matter been *res integra* I should have required to hear argument on the true construction of s. 24 (1) and (3). Section 24 (1) specifically enacts that where the local planning authority themselves proceed to carry out the work required to be done by the notice they can recover the cost of so doing from the owner as a civil debt, and provides: B

“ . . . and if that person, having been entitled to appeal to the court under the last foregoing section, failed to make such an appeal, he shall not be entitled in proceedings *under this sub-section* to dispute the validity of the action taken by the local planning authority upon any ground which could have been raised by such an appeal.” D

“ This sub-section ” is sub-s. (1).

Sub-section (3) of s. 24 deals with the offence which is the subject of this appeal, and that sub-section contains no such embargo as appears in sub-s. (1). That point, however, is not open to this court in view of its decision in *Perrins v. Perrins* (3), and I agree on both grounds with the opinion expressed by my Lord, and that this appeal should be dismissed. E

GORMAN, J.: I agree.

Appeal dismissed.

Solicitors: *C. Grobel, Son & Co.* (for the appellant); *Town clerk*, Edmonton (for the respondents).

[*Reported by E. COCKBURN MILLAR, Barrister-at-Law.*]

A PIGNEY v. POINTERS TRANSPORT SERVICES, LTD.

[NORWICH ASSIZES (Pileher, J.), June 5, 6, 7, 19, 1957.]

Damages—Remoteness—Negligence—Accident sustained by deceased due to negligence of employers—Suicide by deceased at later date—Whether chain of causation between injury and death broken by suicide—Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 1.

In July, 1955, P. was injured in an accident which occurred in the course of his employment by the defendants, and in circumstances in which they were liable to P. for negligence. After the accident P. suffered from anxiety neurosis and depression caused by it. These so sapped his powers of resistance that in January, 1957, he hanged himself. He was not at the time insane according to the test of the M'Naghten rules. P.'s widow sued the defendants for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908.

Held: P.'s widow was entitled to damages for the following reasons—

(i) the damage sustained by her was damage due to P.'s death and that was directly traceable to P.'s injury in the accident for which the defendants were responsible (dictum of SCRUTTON, L.J., in *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. at p. 577 applied) and P.'s felonious act in taking his own life did not break the chain of causation, and

(ii) although it was against public policy to allow any man to benefit by his own felonious act, yet it was not against public policy that the widow should recover damages since the damages awarded in this action did not form part of P.'s estate.

Beresford v. Royal Insurance Co., Ltd. ([1938] 2 All E.R. 602) distinguished.

[As to remoteness of damages, see 23 HALSBURY'S LAWS (2nd Edn.) 729, para. 1022; and for cases on the subject, see 36 DIGEST (Repl.) 195, 1030, 1031.]

As to the rule that a person may not recover a benefit resulting from his own crime, see 1 HALSBURY'S LAWS (3rd Edn.) 10, para. 15.]

Cases referred to:

- (1) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; sub nom. *Polemis v. Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 36 Digest (Repl.) 38, 185.
- (2) *Cavanagh v. London Transport Executive*, (Oct. 23, 1956), *The Times*.
- (3) *Pym v. Great Northern Ry. Co.*, (1863), 4 B. & S. 396; 32 L.J.Q.B. 377; 8 L.T. 734; 122 E.R. 508; 36 Digest (Repl.) 208, 1097.
- (4) *Beresford v. Royal Insurance Co., Ltd.*, [1936] 2 All E.R. 1052; *revsd.* C.A. [1937] 2 All E.R. 243; [1937] 2 K.B. 197; *affd.* H.L., [1938] 2 All E.R. 602; [1938] A.C. 586; 107 L.J.K.B. 464; 158 L.T. 459; Digest Supp.
- (5) *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 29 Digest 369, 2969.
- (6) *Amicable Society v. Bolland*, (1830), 4 Bli. N.S. 194; 5 E.R. 70; *revsg.* S.C. sub nom. *Bolland v. Disney*, (1827), 3 Russ. 351; 29 Digest 369, 2968.
- (7) *Moore v. Woolsey*, (1854), 4 E. & B. 243; 24 L.J.Q.B. 40; 24 L.T.O.S. 155; 119 E.R. 93; 29 Digest 368, 2959.
- (8) *In the Estate of Crippen*, [1911] P. 108; 80 L.J.P. 47; 104 L.T. 224; 23 Digest 167, 1834.
- (9) *White v. White*, [1949] 2 All E.R. 339; [1950] P. 39; 113 J.P. 474; 2nd Digest Supp.
- (10) *Swan v. Swan*, [1953] 2 All E.R. 854; [1953] P. 258; 117 J.P. 519; 3rd Digest Supp.
- (11) *Dixon v. Sutton Heath & Lea Green Colliery, Ltd.* (No. 2), (1930), 23 B.W.C.C. 135; Digest Supp.

Action.

On July 28, 1955, Reginald Pigney, a lorry driver employed by the defendants, Pointers Transport Services, Ltd., haulage contractors for about twenty-six years, was injured while assisting in the unloading of excavator buckets from his lorry at the defendants' premises. He brought an action against the defendants claiming damages for personal injuries on the ground of the defendants' negligence. From July 26, 1956, to Oct. 16, 1956, he underwent treatment in a mental hospital as a voluntary patient. On Jan. 15, 1957, before the action had been tried, Mr. Pigney committed suicide. His widow and administratrix of his estate, Dorothy Hilda Pigney, then commenced an action against the defendants under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934. On Apr. 2, 1957, it was ordered by Master LAWRENCE that Mr. Pigney's action be continued by Mrs. Pigney, and on May 9, 1957, the two actions were consolidated by order of Master BURNAND. On June 6, 1957, at Norwich Assizes, PILCHER, J., gave judgment on the issue of liability, finding that the defendants were liable for the accident and injury which Mr. Pigney sustained in July, 1955. On June 19, 1957, at Chelmsford Assizes, PILCHER, J., gave judgment on the issue of damages.

Martin Jukes, Q.C., and J. D. W. Hayman for the plaintiff.

F. H. Lawton, Q.C., and R. M. O. Havers for the defendants.

Cur. adv. vult.

June 19. PILCHER, J., read the following judgment in which he stated the facts and continued: Being of the opinion that the accident sustained by the deceased, Mr. Pigney, and the consequent injury to his head were due to the negligence of the defendants, the next question was whether there was, in law, a sufficient nexus between the injury which the deceased received at the time of the accident in July, 1955, and his suicide in January, 1957, to enable the plaintiff, that is to say the widow, to succeed in the claims which she put forward under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934.

The actual injury which Mr. Pigney sustained when the jib fell on his head consisted of a fairly serious cut on the top of his head, which had to be stitched up. It was stitched up and it apparently healed perfectly. Mr. Pigney was, to some extent, concussed; he was kept, I think, in hospital for a few days and thereafter he made a perfectly good recovery from the physical injury to his scalp. The medical evidence which I had before me consisted of certain reports from a Mr. Howard, the surgeon, and two reports from Mr. Dunne, the psychiatric registrar at the hospital in Norwich. I also heard Mr. Dunne's evidence given from the witness-box.

On that evidence, to which I will refer in a little greater detail presently, I am well satisfied that, since his accident, and up to the time of his death, the deceased suffered from a condition of acute anxiety neurosis with depressive features, and I am also satisfied that this mental condition was brought about by his accident. Before the accident, although of a somewhat worrying temperament, the deceased had not allowed a series of distressing family bereavements in the preceding years to upset his mental balance. On the evidence of Mr. Dunne I am satisfied that the state of acute anxiety neurosis and depression induced by the accident and injury which persisted until the date when he took his own life, had so sapped the deceased's powers of resistance that he was no longer able to face comparatively trivial worries, with the result that he deliberately hanged himself.

It is reasonably clear that, when he did this, he was not insane under the M'Naghten rules. Mr. Dunne did not say in terms whether a state of acute anxiety neurosis with depressive features was technically a disease of the mind. I should, however, infer that the deceased must have known what he was doing

A when he took his own life and must have known that what he was doing was wrong. To put the matter in ordinary language, the deceased took his life in a fit of depression brought about by a condition of acute anxiety neurosis induced by the accident and injury he sustained eighteen months before.

B On these facts I have to make up my mind whether the suicide of the deceased constituted a *novus actus interveniens* which serves to break the chain of causation between his injury and his death, or whether, on the ordinary principles which govern remoteness of damage in cases of tort, the death of the deceased man was caused by the injury he received due to the defendants' lack of care for his safety. I have no doubt on the evidence that the deceased would not have committed suicide if he had not been in a condition of acute neurotic depression induced by the accident. In this sense, the injury which he sustained in the accident was a *causa sine qua non* of the accident. It is equally clear that the immediate cause of his death was that he hanged himself in a fit of acute depression. That he might do this was clearly a matter which could not reasonably have been foreseen by the defendants.

C The deceased was a man who was, before the accident, inclined to worry over certain matters, and it may be that this fact contributed to some extent to the development of this state of acute anxiety neurosis which was brought about by his accident and physical injury. This, however, is a matter which does not assist the defendants, because they must take the man as they find him. If the deceased had been rendered insane by law, as judged by the standard laid down in the M'Naghten rules, and had then committed suicide, no difficulty would arise on the assumption that his state of insanity was attributable to the accident.

E The chain of causation would then be complete.

The medical evidence in the present case would not, however, justify a finding that the deceased was insane in this sense. Dr. Dunne in his evidence said this:

F "I think that the suicide was the logical outcome of the acute anxiety neurosis with depressive features for which I treated the man and I thought I had cured him. When I first took him on Dr. Mackeith told me he had suicidal tendencies. He sent his notes with the patient. There is nothing to which I can attribute his suicide but the depressive features accompanying the anxiety neurosis. Before the accident history shows that he was worrying. He did not then develop acute anxiety neurosis but adjusted himself to the worries."

G Then he said:

H "In my view under the M'Naghten rules the deceased was sane when he committed suicide. I do not think he had the degree of will power which the normal man would have, and that when he hanged himself the balance of his mind was disturbed. I think there was a direct connexion between the accident and the subsequent suicide. I think his emotional balance was disturbed, and not his intellectual balance."

When he was cross-examined Dr. Dunne said:

I "The accident upset his emotional balance and the lack of emotional balance remained until his death. He brooded over his troubles abnormally. I do not think that the matters referred to by Mrs. Pigney in evidence as worrying him immediately before his suicide would have touched off the act of suicide if his emotional balance had not been upset by the accident."

Then finally he said in answer to me:

"Once Pigney had developed the neurosis due to the accident comparatively trivial matters produced a crisis, whereas before he had developed this neurosis he had successfully got over far more serious troubles."

That, in substance, is Dr. Dunne's evidence.

Then Mrs. Pigney, his widow, gave evidence of his condition between the accident and his death, and, broadly speaking, what she said was this. Having described how he was kept in hospital for a period, and how he attempted to go back to work towards the end of 1956, she said:

"He was admitted to this psychiatric hospital by Mr. Dunne who was in charge in July, 1956, as a voluntary patient, he remained there until the middle of October, 1956, and when he came back for a fortnight he seemed a lot better. Then the Suez crisis came which depressed and worried him a great deal. He said about that time 'If I am to live in Hell why didn't it'—that is to say the accident—'kill me?' He sweated terrifically at night before he went to this mental home."

She also said:

"By September, 1956, the only physical trouble due to the accident were headaches and inability to sleep. My husband felt there was a stigma attaching to him because he had been in this mental hospital."

On Sunday, Jan. 13, 1957, she had a conversation with her husband which, looked at in the light of after events, might have tended to show that he then had formed some intention of taking his own life. That, in substance, is the evidence on which I had to reach a conclusion in this case.

What the situation would seem to be is this, that, owing to the acute depressive neurosis from which he was suffering, he magnified his trivial worries, and his powers of resistance were sapped so that life became intolerable to him and he hanged himself.

In *Re Polemis & Furness, Withy & Co.* (1) ([1921] 3 K.B. 560), SCRUTTON, L.J., says (*ibid.*, at p. 577):

"... the fact that the damage it [namely, the negligent act] in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connexion with the negligent act, except that they could not avoid its results."

The damage sustained by the plaintiff in her action under the Fatal Accidents Act was damage due to the death of her husband whereby she lost his support. Whilst the death of the deceased was not the kind of damage that one would expect to result from the injury he received, I am satisfied that his death was, to use SCRUTTON, L.J.'s words, "directly traceable" to the physical injury which he sustained due to the lack of care of the defendants for his safety.

Whilst each case must depend on its own facts, I should mention *Cavanagh v. London Transport Executive* (2) (Oct. 23, 1956, *The Times*), which was decided by DEVLIN, J. In that case, DEVLIN, J., awarded damages under the Fatal Accidents Act to the widow of a man who, having received head injuries in a street accident, lived for sixteen months and then committed suicide. That case was complicated by the fact that the deceased himself had been contributorily negligent in a substantial degree. DEVLIN, J., held that the chain of causation between the negligent act for which the defendants were liable, and the man's subsequent death, was not broken by the fact that he took his own life whilst apparently sane in law. Moreover, it would appear from the report in "*The Times*" that the evidence of the deceased man's mental condition between the accident and his suicide went no further, if, indeed, it went as far as did the evidence in the case with which I am dealing, to show that the suicide was causally connected with the injuries received in the accident.

That a sane man's death by suicide can in law "result" from an injury previously sustained, even though the suicide may not occur until some time after the injury, is clear from a large number of cases decided under the Workmen's Compensation Acts. As I have said, every case must depend on its own

A facts. I am satisfied, on the evidence called in the case before me, that the cause of the deceased's death was the injury that he sustained which, in its turn, induced a state of acute anxiety neurosis with depressive features which persisted for eighteen months and caused him to take his own life.

B The next point which I have to consider is whether the fact that the deceased took his own life at a time when he was, as I find, sane under the M'Naghten rules debars his widow and administratrix from successfully prosecuting her claim against the defendants under the Fatal Accidents Act, 1846, on grounds of public policy. It was submitted on behalf of the defendants that, inasmuch as the immediate cause of the deceased's death was that he feloniously took his life by his own hand at a time when he was sane in law, public policy should step in and debar the plaintiff in her capacity as a dependent widow, suing under the C Fatal Accidents Acts, from recovering any benefit in proceedings brought by her under these Acts. The material portion of s. 1 of the Fatal Accidents Act, 1846, is in the following terms:

D "Whosoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

E On my findings, the deceased's death was caused by the wrongful neglect of the defendants, and that wrongful neglect was such as would have entitled the deceased, had he survived, to maintain an action and recover damages against the defendants for the injury which he sustained. Indeed, the deceased during his lifetime brought such an action and this action is still being prosecuted before me on the deceased's behalf by his widow, as his administratrix. In F this action, moreover, it is conceded that the defendants are liable to pay compensation.

It will be observed that the last words which I have quoted from s. 1 of the Act of 1846 are:

G "... notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

H It is, I think, quite clear that the Fatal Accidents Act, 1846, created a new cause of action. Section 1 of the Act sets out the circumstances in which such new cause of action may be maintained, and the concluding words of the section to which I am referring were, no doubt, introduced in order to ensure that the rights of dependants to maintain their actions should not be defeated by the fact that no criminal proceedings had been instituted in cases where the act, neglect or default resulting in the death of the deceased amounted to a felony.

I It was argued on behalf of the plaintiff that these concluding words of s. 1 also made it clear that, even if it could properly be said that the death of the deceased in the present case was "caused under such circumstances as amounted in law to felony", the words of the section in terms made it clear that such an event was not to be allowed to defeat a dependant's claim under the Act. This may be so, but I prefer to base my decision on the grounds already stated, namely, that the deceased's irrational and, no doubt, felonious act in taking his own life did not break the chain of causation between his accident and his death.

It is, as I have said, quite clear that the Fatal Accidents Act, 1846, created a new cause of action, and, as ERLE, C.J., said in *Pym v. Great Northern Ry. Co.* (3) ((1863), 4 B. & S. 396 at p. 406):

"The statute . . . gives to the personal representative a cause of action beyond that which the deceased would have if he had survived, and based on a different principle."

Under the Act the dependants of the deceased, on proper proof, are awarded statutory compensation to which they would not, apart from the statute, have been entitled. The compensation so granted forms no part of the estate of the deceased and is in no sense derivative from the estate of the deceased so as to be a "benefit" derived from his estate.

The argument advanced on behalf of the defendants that it would be against public policy on the facts of the present case to permit the plaintiff to succeed is based on the decision of the House of Lords in the well-known case of *Beresford v. Royal Insurance Co., Ltd.* (4) ([1938] 2 All E.R. 602). That case was tried before SWIFT, J., and a jury ([1936] 2 All E.R. 1052), with the result that the plaintiff, who was the personal representative of a Major Rowlandson, was found entitled to recover from the defendant insurance company, a large sum of money on a life policy taken out by him some years before his death. Major Rowlandson shot himself three minutes before a substantial premium on his life policy fell due, and it was clear that he committed this felonious act deliberately and because he was in financial difficulty, and was satisfied that the defendants were not prepared to give him any further extension of time in which to pay the premium which was overdue. Accordingly, he deliberately shot himself in order that the policy moneys might be collected by his personal representative for the benefit of his creditors. Although the policy on Major Rowlandson's life granted by the defendants contained a clause which, on its true construction, and on the facts of the case, bound the insurers to pay even if the assured committed suicide whilst sane, the Court of Appeal held ([1937] 2 All E.R. 243) that in the circumstances of that case it was against public policy that the assured's personal representative should be entitled to recover on the policy. Against this decision the plaintiff appealed unsuccessfully to the House of Lords.

Having carefully considered the speeches of the noble Lords in *Beresford's* case (4), I am well satisfied that that case is readily distinguishable from the case which I am considering. The fact that *Beresford's* case (4) concerned an insurance policy, whilst not directly relevant where public policy is in question, should not, I think, be lost sight of. Major Rowlandson deliberately took his own life in circumstances which he had reason to believe would have enabled his personal representative to collect the money due under his life policy. LORD ATKIN says ([1938] 2 All E.R. at p. 604):

"On ordinary principles of insurance law, an assured cannot by his own deliberate act cause the event upon which the insurance money is payable. The insurers have not agreed to pay on that happening. The fire assured cannot recover if he intentionally burns down his house, nor the marine assured if he scuttles his ship, nor the life assured if he deliberately ends his own life. This is not the result of public policy, but of the correct construction of the contract. In the second place, this doctrine obviously does not apply to insane suicide, if one premises that the insanity in question prevents the act from being in law the act of the assured."

LORD ATKIN went on to say (*ibid.*, at p. 605) that, on a true construction of the policy, Major Rowlandson's executors were entitled to recover the sum due under the policy. He then proceeded to consider whether, in all the circumstances, Major Rowlandson's executors ought to be debarred from recovering on grounds of public policy. He cited a number of insurance cases: *Cleaver v. Mutual Reserve Fund Life Assn.* (5) ([1892] 1 Q.B. 147); *Amicable Society v. Bolland* (6) ((1830), 4 Bli. N.S. 194), and *Moore v. Woolsey* (7) ((1854), 4 E. & B. 243). He then referred to a passage from SIR SAMUEL EVANS, P.'s judgment in *In the*

A *Estate of Crippen* (8) ([1911] P. 108 at p. 112) and also to other cases in the Probate Court. The principle which he extracted from these cases would seem to be, put quite shortly, that it was against public policy to allow any man to benefit himself by his own felonious act.

LORD ATKIN went on to say ([1938] 2 All E.R. at p. 607):

B “The remaining question is whether the principle applies where the criminal is dead and his personal representative is seeking to recover a benefit which takes shape only after his death. It must be remembered that the money becomes due, if at all, under an agreement made by the deceased during his life for the express purpose of benefiting his estate after his death. During his life, he had power of complete testamentary disposition over it. I cannot think the principle of public policy to be so narrow as not to include the increase of the criminal’s estate amongst the benefits of which he is deprived by his crime. His executor or administrator claims as his representative, and, as his representative, falls under the same ban.”

D In *Beresford’s* case (4), if the plaintiff had succeeded, Major Rowlandson’s felonious act in shooting himself would have benefited his estate in that the plaintiff as his executor would have received the money payable under the policy. LORD MACMILLAN, who was the only other member of the House in *Beresford’s* case (4) who gave his own reasons for dismissing the appeal, clearly felt some doubt about the matter although he did not dissent. He said (*ibid.*, at p. 609):

E “The first question must always be: what is the principle of public policy which would be infringed by the enforcement of the contract? In the present instance, the principle which, it is said, would be infringed is the principle that no court ought to assist a criminal to derive benefit from his crime. It has also been put in this form—that no court ought to enforce stipulations tending to induce the commission of a crime. That there are such principles of public policy, to which the courts ought to give effect, I do not doubt. In the present case, would the enforcement of the respondents’ obligation enable a criminal to take benefit from his crime? Or can it be said that the obligation now sought to be enforced was one which held out an inducement to commit a crime, to wit, the crime of *felo de se*?”

LORD MACMILLAN went on (*ibid.*, at p. 611):

G “I feel the force of the view that to increase the estate which a criminal leaves behind him is to benefit him. To enforce payment in favour of the assured’s representative would be to give him a benefit, albeit in a sense a post-mortem benefit—namely, the benefit of having, by his last and criminal act, provided for his relatives or creditors. No criminal can be allowed to benefit in any way by his crime. I return to the simple question: Ought the courts to enforce a contract to pay a sum of money to a person’s representatives in the event of his committing *felo de se*? In my opinion, I am bound to answer this question in the negative, both on principle and, so far as the courts of this country are concerned, by authority. I should add that I desire to reserve my opinion as to the position of third parties who have bona fide acquired rights for value under such policies.”

I It will thus be seen that the noble Lords in *Beresford’s* case (4) all took the view that the claim of Major Rowlandson’s personal representative failed because it was against public policy to allow the plaintiff, as personal representative of the deceased, to succeed in his derivative claim, for to do so would involve permitting a felon by his crime to benefit his own estate. In the case before me, the plaintiff widow and administratrix is prosecuting a statutory cause of action under the Fatal Accidents Act, 1846, which does not benefit the estate of her deceased husband. The damages awarded under the Act form no part of her

husband's estate. This seems to me to afford a short answer to the submission that the case with which I am concerned is covered by *Beresford's* case (4). I am clearly of opinion that it is not. I am equally of opinion that public policy does not require that a right of action granted by statute to a dependant should be barred simply because the immediate cause of the death of the breadwinner was that he took his own life whilst sane.

I have assumed so far that the plaintiff was in law sane when he took his own life on the assumption that the test to be applied is that laid down in the M'Naghten rules. The matrimonial case of *White v. White* (9) ([1949] 2 All E.R. 339) was cited as authority for the proposition that, in all branches of the law, when sanity is in issue, the test must be that laid down in the M'Naghten rules. It is, however, to be observed that in *Swan v. Swan* (10) ([1953] 2 All E.R. 854), SOMERVELL, L.J. (ibid., at p. 861), appears to have thrown some doubt on the accuracy of this proposition. It is, moreover, clear that in many cases decided under the Workmen's Compensation Acts widows of workmen have recovered under the Acts when their husbands, having sustained injuries for which they were entitled to recover compensation under the Acts, later committed suicide when suffering from depressive neurosis or kindred affections of the mind which did not amount to insanity under the M'Naghten rules.

When public policy is in question, it is incumbent on the court to raise the point even if it is not taken by a party, and I merely refer to these cases decided under the Workmen's Compensation Acts, of which *Dixon v. Sutton Heath & Lea Green Colliery, Ltd.* (No. 2) (11) ((1930), 23 B.W.C.C. 135), is an example, to remark that it is at least odd that the point based on public policy which was argued before me was not raised by the court or a party in any of these cases, nor was it raised by DEVLIN, J., or the defendants in *Cavanagh's* case (2) to which I have already referred. I conclude that this was because the point did not commend itself either to the interested party or to the court.

[His LORDSHIP dealt with the question of damages and, in the original action brought by the deceased, awarded the plaintiff £500, to include £243 14s. 6d. agreed special damage. On the plaintiff's claim under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, she being fifty-three years of age and her husband being fifty-five years of age at his death and her dependency (after giving credit for the cost of food) being between £5 and £6 weekly, His LORDSHIP awarded £200 under the Act of 1934 and, under the Fatal Accidents Acts, 1846 to 1908, £1,800 damages and £48 17s. 6d. agreed funeral expenses.]

Judgment for the plaintiff.

Solicitors: *John Holt* (for the plaintiff); *Mills & Reeve*, Norwich (for the defendants).

[Reported by G. A. KIDNER, ESQ., Barrister-at-Law.]

A CHURCH COMMISSIONERS FOR ENGLAND v. KANDA
AND ANOTHER.

[COURT OF APPEAL (Morris and Pearce, L.JJ.), June 25, 26, July 5, 1957.]

B *Landlord and Tenant—Lease—Repair—Breach of repairing covenant—Notice to remedy breach served on tenant—Counter-notice served by tenant—Assignment of lease—Leave obtained to commence proceedings against tenant only—Judgment in default of appearance against assignee—Whether judgment irregular—Law of Property Act, 1925 (15 & 16 Geo. 5 c. 20), s. 146 (1)—Leasehold Property (Repairs) Act, 1938 (1 & 2 Geo. 6 c. 34), s. 1 (3).*

C K. was assignee of a lease of a dwelling-house for a term of ninety-seven years from the end of 1868. The lease contained a lessee's repairing covenant and a proviso for re-entry for the breach of any covenant. On Feb. 2, 1956, a schedule of repairs required was served on K. by the landlord and also a notice under the Law of Property Act, 1925, s. 146 (1)*, requiring that breaches of the covenant to repair be remedied. K. served a counter-notice pursuant to s. 1 of the Leasehold Property (Repairs) Act, 1938. D On Jan. 14, 1957, the landlord obtained the leave of the court (as required by s. 1 (3)† of the Act of 1938) to commence proceedings against K. to enforce the right of re-entry and for damages for breach of the covenant to repair. On Jan. 14, or Jan. 15, 1957, K. assigned the lease to B. On Jan. 28, 1957, the landlord issued a writ indorsed with a statement of claim claiming possession and damages for breach of covenant against K. E On Feb. 1, 1957, formal notice of the assignment by K. was given to the landlord. K. was not served with the writ. On Feb. 27, 1957, the landlord obtained leave ex parte to amend the writ and to join B. as a defendant. B. was served with the amended writ, possession and damages for breach of covenant being claimed against him and the claim for possession against K. being withdrawn. F No application was made under the Act of 1938 for leave to commence proceedings against B. On Mar. 27, 1957, B. not having entered an appearance, the landlord obtained judgment against him in default of appearance. B. applied to have the judgment set aside on the grounds (i) that the requirements of s. 146 of the Law of Property Act, 1925, had not been fulfilled as no notice thereunder had been served on B., and (ii) that G no leave had been obtained under s. 1 (3) of the Leasehold Property (Repairs) Act, 1938, to bring the action against B.

Held: (i) it was not necessary for the landlord to serve on B. a new notice under s. 146 of the Law of Property Act, 1925, since service of the notice under s. 146 on K., who was the lessee at the time when the notice was given, was sufficient compliance with s. 146 (1), and

H (ii) the judgment should nevertheless be set aside because, as K. had served a counter-notice on the landlord, the action could not lawfully be brought against B. without leave being obtained pursuant to s. 1 (3) of the Leasehold Property (Repairs) Act, 1938, and no such leave had been obtained. Appeal allowed.

I [For the Law of Property Act, 1925, s. 146, see 20 HALSBURY'S STATUTES (2nd Edn.) 739 et seq.

For the Leasehold Property (Repairs) Act, 1938, s. 1, see 13 HALSBURY'S STATUTES (2nd Edn.) 914.

For the Landlord and Tenant Act, 1954, s. 51, see 34 HALSBURY'S STATUTES (2nd Edn.) 430.]

* The terms of s. 146 (1) are printed at p. 819, letter D, post.

† The terms of s. 1 (3) are printed at p. 820, letter B, post.

Interlocutory Appeal.

This was an appeal by the second defendant, Austin St. Clair Bridgwater, from an order of BARRY, J., made on May 8, 1957. The learned judge allowed an appeal from an order of Master LAWRENCE, dated Apr. 17, 1957, setting aside a judgment for the plaintiffs, the Church Commissioners for England, entered against the second defendant on Mar. 27, 1957, in default of appearance by him, and ordered that the said judgment should stand.

M. Share for the second defendant, Austin St. Clair Bridgwater.

B. R. Braithwaite for the plaintiffs, the Church Commissioners for England.

Cur. adv. vult.

July 5. **MORRIS, L.J.**, read the following judgment: The Church Commissioners for England, the respondents to this appeal, are the owners of the freehold reversion of premises known as 21, Shirland Road, Paddington. There is an outstanding lease of those premises which was granted on June 10, 1868. The lease was for a term of $97\frac{1}{2}$ years from Mar. 25, 1868. The yearly rental was £9. The lessee, who was one Kellond, covenanted to keep the property in repair and to do certain work of decoration. The lease contained a proviso for re-entry in the event of default being made in the performance of the covenants. At some unascertained date prior to January, 1956, the term of years granted by the lease became vested in Mr. S. Kanda as assignee.

It is alleged by the Church Commissioners that in January, 1956, the premises were out of repair in such manner as to constitute a breach of covenant. A schedule of wants of repair was served on Mr. Kanda on Feb. 2, 1956. On the same date a notice under the Law of Property Act, 1925, s. 146 (1), was served on Mr. Kanda by the agents of the Church Commissioners. The notice was addressed:

“ S. Kanda, 21, Shirland Road, London, W.9, or other the person persons or company the lessee or lessees for the time being of the premises known as 21, Shirland Road, Paddington, London (hereinafter referred to as ‘ the said premises ’) and to all other persons whom it may concern.”

The notice recited that there had been and were breaches of the covenants contained in the lease, that the particular breaches complained of were comprised in the particulars specified in the schedule of wants of repair which was annexed: it required the breaches of covenant to be remedied, and the works of repair and amendment to be carried out in accordance with the schedule. The notice further contained the following words:

“ The lessee is entitled under the Leasehold Property (Repairs) Act, 1938, as amended to serve upon the commissioners a counter-notice claiming the benefit of the said Act. Such notice may be served upon the said commissioners at the office mentioned below at any time within twenty-eight days from the date of service hereof.”

At the same time the agents to the Church Commissioners wrote a letter to Mr. Kanda in the following terms:

“ We enclose a statutory notice under s. 146 of the Law of Property Act, 1925, and we would be obliged if you would return the duplicate notice duly receipted. We are prepared to advise the Church Commissioners to allow two months as a reasonable time for compliance with the schedule. Failing compliance with this schedule within the time mentioned, which will expire on Apr. 2, 1956, we shall have no course but to advise the Church Commissioners to take the necessary proceedings.”

A On Feb. 15, 1956, Mr. Kanda wrote a letter to the agents to the Church Commissioners in the following terms:

“ Re 21, Shirland Road, W.9. With reference to your letter referring to some repairs of above quoted house I state hereby that during the winter time such a repair cannot be done, and I claim also the benefit of the Leasehold Property (Repairs) Act, 1938.”

B In spite of the intimation contained in the letter from the agents in reference to the period of two months which would expire on Apr. 2, 1956, no work of repair appears to have been done by Mr. Kanda and no action appears to have been taken by the Church Commissioners. Towards the end of the year, however, steps were taken to obtain the leave of the court to take proceedings. On Dec. 4, 1956, an affidavit was sworn by Mr. Guest who is employed as a building surveyor by the firm of chartered surveyors and valuers who act as the agents for the Church Commissioners. Mr. Guest deposed that he had made an inspection of the premises on Jan. 25, 1956, and that the schedule of wants of repair had been prepared by him so as to set out the repairs which he considered should be carried out in order to comply with the covenants in the lease. In para. (4) of his affidavit he stated:

E “ That I estimate the cost of carrying out the said repairs to be in excess of £500. That, in my opinion, the value of the reversion to the said lease has been substantially diminished by the said wants of repair and the immediate remedying of the said wants of repair is requisite for preventing further substantial diminution in the value of the said reversion. If the said wants of repair are not remedied within a short period of time serious deterioration will be suffered by the fabric of the said premises and I have formed the opinion that the said wants of repair can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work.”

F Mr. Guest further deposed that he had inspected the premises on Nov. 21, 1956, and that none of the said wants of repair set out in the schedule had been remedied. On Jan. 14, 1957, an application by way of originating summons was made to PEARCE, J., as judge in chambers, by the Church Commissioners for leave to commence proceedings against Mr. Kanda. Mr. Kanda was the respondent to the application. An order was made in the following terms:

G “ Upon hearing counsel for the applicant and for the respondent and upon reading the affidavit of Albert Edwin Guest filed herein it is ordered that the applicants do have leave to commence proceedings against S. Kanda (male) to enforce their right of re-entry and to damages for breaches of covenant to repair premises known as No. 21, Shirland Road, Paddington, in the County of London, contained in a lease dated June 10, 1868, and that the applicant do have the benefit of s. 146 (3) of the Law of Property Act, 1925. Costs of this application to be the applicant's and to be taxed and paid by the respondent. Fit for counsel.”

I At that date, however, it appears that Mr. Kanda was in the course of disposing of his interest in the property. In a letter dated Jan. 11, 1957, from the solicitors for the Church Commissioners to the solicitors for Mr. Kanda, it was said that the writers had been informed that Mr. Kanda was in the course of disposing of his interest in the property and that completion had been fixed for Monday, Jan. 14. Attention was called to the fact that proceedings were pending against Mr. Kanda with a view to obtaining forfeiture of the lease. In a letter dated

Jan. 16, 1957, from the solicitors for Mr. Kanda to the solicitors to the Church Commissioners it was stated: A

"Both Mr. Kanda and the new purchaser, Mr. T. A. St. Clair Bridgwater, called on us on Monday last and notwithstanding the position the purchaser wishes to proceed. We gather that the purchaser is arranging to put in hand the necessary works to be done to the property as quickly as possible and will no doubt be writing to you as to this himself shortly." B

Mr. Kanda assigned the lease to Mr. Bridgwater for £300. No permission to assign was in this case necessary. The deed of transfer appears to have been on or about Jan. 14 or 15, 1957.

Pursuant to the leave granted by the order of Jan. 14 a writ was issued on Jan. 28, 1957, against "S. Kanda (Male)." By the statement of claim which was indorsed on the writ the relevant facts were recited and the claim was for possession of the premises, for damages for breach of covenant, and for sums by way of rent and mesne profits. C

On Feb. 27, 1957, formal leave to amend by joining Mr. Bridgwater was obtained from Master GRUNDY, but there was no application to the learned judge for leave pursuant to the Act of 1938. By the amended statement of claim on the writ the claim for possession as against Mr. Kanda was dropped and possession was claimed against Mr. Bridgwater together with damages for breach of covenant, and together with certain claims for rent and mesne profits. The amended writ was served on Mr. Bridgwater on Mar. 14, 1957. He failed to enter an appearance and the Church Commissioners obtained judgment in default of appearance. It was adjudged that the Church Commissioners recover possession of the premises, a sum of 7s. 5d. as arrears of rent, a sum of £1 8s. 7d. by way of mesne profits from Jan. 28, further mesne profits from the date of judgment to the date of possession and damages for breach of covenant to be assessed. That judgment was obtained on Mar. 27. Mr. Bridgwater then applied to have the judgment set aside. By an affidavit sworn on Apr. 14, 1957, he stated that the reason why he had not appeared was that he had been in this country only two years and that he is an engineering student, aged twenty-one years, from the West Indies, and that he did not completely understand the legal position arising as a result of the writ. He admitted that when he took the assignment he had been handed a document which was a list of the repairs which were required to be carried out to the premises. His reasons for not entering an appearance do not seem to me to be very convincing. He was taking an assignment with knowledge of the schedule of wants of repair: he had asked Mr. Kanda's solicitors to act for him at the time of the assignment, and it seems surprising that he did not take legal advice when he was served with the writ. In his affidavit he stated as follows: D E F G

"On Mar. 30, 1957, I instructed Mr. H. G. Cane, a builder, of 26, Methwold Road, North Kensington, to inspect the premises, No. 21, Shirland Road, and for this purpose I handed to him Exhibit 'A.S.B.2' [the list of repairs] and as a result of his inspection of the said premises I am advised and verily believe that the cost of executing the said schedule of repairs if the same are justified by the terms of the repairing covenant in the lease would be not more than £95. (7) I have had no time to take fuller professional advice as to the terms of the said repairing covenant or the state of repair existing at No. 21, Shirland Road aforesaid. I do not admit that there have been breaches of the covenant as alleged or at all." H I

Mr. Guest swore an affidavit on Apr. 9, 1957, in which he said that having inspected the premises on Apr. 8, it appeared that no work of repair of any kind had been carried out since his inspection on Nov. 21, 1956. He said that the property had in his view seriously deteriorated and that in his opinion at least

A £1,500 would have to be spent on it to put it into a state of repair to comply with the covenants of the lease.

On Apr. 17 Master LAWRENCE made an order setting aside the judgment dated Mar. 27, 1957, as being an irregular judgment. The main ground of the decision of the learned master was that the judgment was irregular in that the only leave of the court given under the Act of 1938 was leave to sue Mr. Kanda and that no
B leave to sue Mr. Bridgwater had been given. The Church Commissioners appealed to the learned judge in chambers, who by order dated May 8, 1957, set aside the order of Master LAWRENCE and ordered that the judgment against Mr. Bridgwater should stand. The learned judge held that the lessors were under no necessity to serve a fresh notice under s. 146 on Mr. Bridgwater and that they had satisfied the requirements of s. 146 by serving a notice on Mr. Kanda, who was the
C lessee at the date the notice was served. The learned judge considered that the provisions of the Act of 1938 were inapplicable so far as Mr. Bridgwater was concerned.

Appeal is now brought to this court. The first point submitted by counsel on behalf of Mr. Bridgwater is that no notice under the Law of Property Act, 1925, s. 146, had been served on Mr. Bridgwater and that in the absence of such a
D notice he could not be sued. Section 146 (1) is in the following terms:

“A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—(a) specifying the particular breach complained of; and
E (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and (c) in any case, requiring the lessee to make compensation in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.”

Sub-section (5) provides:

F “For the purposes of this section . . . (b) ‘Lessee’ includes an original or derivative under-lessee, and the persons deriving title under a lessee; also a grantee under any such grant as aforesaid and the persons deriving title under him.”

G We were also referred to s. 196 (2), which provides:

“Any notice required or authorised by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.”

H Counsel for the Church Commissioners submitted that a notice had been properly served on Mr. Kanda and that Mr. Kanda was the “lessee” on whom the notice had to be served. He submitted that if a notice is properly and validly served on a lessee who later assigns, then, so far as the Act of 1925 is concerned and so far as the particular breaches complained of are concerned, no
I further notice need be served on the assignee before commencing an action claiming re-entry or forfeiture as against the assignee. In my judgment, if there was proper service on Mr. Kanda, then when he thereafter assigned to Mr. Bridgwater there was no necessity to serve a new notice on Mr. Bridgwater before commencing proceedings against him to enforce the right of re-entry or forfeiture. I agree with the learned judge that the requirement of s. 146 (1) is satisfied if the appropriate notice is given to the person who is “the lessee” at the time the notice is given. That was, in my judgment, the position so far as the Act of 1925 was concerned.

The next point taken by counsel for Mr. Bridgwater depends on the provisions of the Leasehold Property (Repairs) Act, 1938. That Act restricts the enforcement of repairing covenants in long leases of small houses. Section 1 of that Act provides that a lessee who is served with a notice under s. 146 of the Act of 1925 may serve a counter-notice. Section 1 (3) provides:

“Where a counter-notice is served by a lessee under this section, then, notwithstanding anything in any enactment or rule of law, no proceedings, by action or otherwise, shall be taken by the lessor for the enforcement of any right of re-entry or forfeiture under any proviso or stipulation in the lease for breach of the covenant or agreement in question, or for damages for breach thereof, otherwise than with the leave of the court.”

Sub-section (6) provides:

“The court may, in granting or refusing leave for the purposes of this section, impose such terms and conditions on the lessor or on the lessee as it may think fit.”

Sub-section (5) provides: “Leave for the purposes of this section shall not be given unless the lessor proves” and then follow a number of sub-headings. Amendments to the Act of 1938 were made by the Landlord and Tenant Act, 1954, s. 51. It is to be observed that, whereas under the provisions of s. 146 (1) a notice must be served on the lessee before enforcing a right of re-entry or forfeiture, under s. 1 (2) of the Act of 1938 such a notice must also be served, where the Act applies, before claiming damages for breach of covenant to repair. Applying the provisions of s. 1 (3), counsel for Mr. Bridgwater submits that assuming (contrary to his first submission) that no new notice under s. 146 (1) of the Act of 1925 was required to be served on Mr. Bridgwater, the position was that Mr. Kanda as lessee had been served with a notice under s. 146 (1) and that Mr. Kanda had served a counter-notice pursuant to s. 1 of the Act of 1938: that it followed that no proceedings could be taken by the Church Commissioners for the enforcement of any right of re-entry or forfeiture or for damages, otherwise than with the leave of the court. He submitted that no leave to bring proceedings against Mr. Bridgwater had been given.

No application for leave to sue Mr. Bridgwater had ever been made. It has not been and could not be contended by counsel for the Church Commissioners that the leave granted by Master GRUNDY on Feb. 27, 1957, was leave for the purpose of or pursuant to the provisions of the Act of 1938. That was not an originating summons: it was an ex parte application to the master. Counsel submits, however, that once the court had given leave to bring proceedings, then the provisions of s. 1 (3) had met with compliance. He submitted with force that when PEARCE, J., gave leave on Jan. 14 to commence proceedings against Mr. Kanda he gave such leave because there was proof to satisfy s. 1 (5). Counsel submitted that once the court had authorised proceedings there was no reason why a new party to the proceedings should not be added. He submitted that the real purpose of s. 1 of the Act of 1938 was to prevent proceedings being brought unless there was proof to satisfy s. 1 (5), but that once there had been such proof then the only reason for the necessity of obtaining the leave of the court had been satisfied.

It may well be that, if the court is satisfied that an action should be brought against a lessee, the court would be likely to be satisfied that an action should be brought against an assignee who has gone into possession following an assignment from the lessee. There might, however, be circumstances in which an assignee who had gone into possession had proceeded at once to remedy all disrepair and to bring it about that the premises were in a condition that satisfactorily complied with the covenants of a lease. It might be, therefore (and it is to be remembered that the provisions now under consideration only apply

A where more than three years of the term of a lease remain unexpired), that a court would not necessarily be disposed to give leave to take proceedings against an assignee. Furthermore an assignee might wish to be heard on the question whether as against him the lessor should be entitled to the benefit of s. 146 (3) of the Act of 1925 (see s. 2 of the Act of 1938).

None of these considerations, however, can affect the application of the words of the section or govern its interpretation. The words "no proceedings" are very definite. The permission given by PEARCE, J., was in terms a permission to sue Mr. Kanda. The only proceedings which were authorised were proceedings against Mr. Kanda. When it was decided to sue Mr. Bridgwater it seems to me that proceedings were being taken against him for the enforcement of a right of re-entry for breach of covenant and for damages for breach of covenant. The words of s. 1 (3) seem to me to require that those proceedings could only be brought with the leave of the court. It may well be that, had application been made in February for leave to commence proceedings against Mr. Bridgwater by joining him as a defendant to the action already commenced against Mr. Kanda, it would not have been difficult to persuade the court to give leave. But if after leave to sue Mr. Kanda had been given it had been decided not to sue him at all, but to sue Mr. Bridgwater it seems to me that no order of the court was in existence which gave leave to bring such proceedings. As it is, Mr. Kanda, in respect of whom leave was obtained, has not been served with the writ. The words are very definite: "no proceedings . . . otherwise than with the leave of the court". There are proceedings against Mr. Bridgwater. No leave of the court for those proceedings has been either sought or obtained.

Counsel for the Church Commissioners submitted that the order made by PEARCE, J., should be construed as giving a general leave to bring proceedings for forfeiture and for damages. But the order is explicit. After hearing counsel for Mr. Kanda the court gave leave to commence proceedings against Mr. Kanda. Though the Church Commissioners knew before Jan. 14, 1957, that Mr. Kanda was proposing to assign and knew shortly after Jan. 14 that an assignment had probably taken place, formal notice of the transfer to Mr. Bridgwater was not sent until Feb. 1, 1957. The next step taken was on Feb. 27, 1957, when leave was sought and obtained ex parte from the practice master to amend the writ. But at that date the provisions of the Leasehold Property (Repairs) Act, 1938, s. 1, applied. There had been service by the lessors on the lessee of such a notice as is specified in the Law of Property Act, 1925, s. 146 (1). That was the notice served on Mr. Kanda. He was the lessee at the time the notice was given. Mr. Kanda had served a counter-notice to the effect that he claimed the benefit of the Act of 1938.

Rejecting as I do the submission that after the assignment to Mr. Bridgwater a new notice such as is specified in the Law of Property Act, 1925, s. 146 (1), should have been served on him, the provisions of s. 1 (3) of the Act of 1938 then operated with the result that "no proceedings by action or otherwise" could be taken by the Church Commissioners either to enforce their right of re-entry or forfeiture or to claim damages for breach of covenant to keep or put the premises in repair "otherwise than with the leave of the court".

I Counsel for Mr. Bridgwater addressed a further submission which was based on the provisions of the Landlord and Tenant Act, 1927, s. 18 (2), but in view of the conclusion that I have reached I need not deal with it.

In the result I consider that counsel for Mr. Bridgwater fails on his main submission, but that the point taken under the Act of 1938 succeeds. This is the point on which the learned master decided the case. But it is only fair to the learned judge to point out that in the argument before him counsel appears to have concentrated on the argument that a new notice under s. 146 (1) should

have been served on Mr. Bridgwater. The learned judge rejected that submission and I agree with his conclusion. The point under the Act of 1938 which was the basis of the learned master's decision appears to have been submerged by counsel for Mr. Bridgwater in his argument before the learned judge. The point is, however, raised in the notice of appeal and has been argued before us and it is not one that we can ignore.

The view that I have formed makes it unnecessary for me to express any concluded opinion whether, if the judgment had been regular, it was appropriate to set it aside so as to give Mr. Bridgwater the opportunity of defending. The view of the learned master was that even if the judgment were regular, he would have been prepared to set it aside on terms or to have given relief from forfeiture on terms. The learned judge, on the other hand, thought that no sufficient reasons entitling Mr. Bridgwater to leave to defend had been shown. As the learned judge rightly pointed out, Mr. Bridgwater's case has many features of weakness. He took an assignment with full knowledge of the facts: he knew about the schedule of wants of repair. When served with a writ he failed to enter appearance: even though he may be a young and inexperienced West Indian student, if he chose to embark on this transaction and had been in touch with solicitors it is difficult to understand why he did not take proper action when he was sued. Furthermore his affidavit, which does not read very convincingly, shows that, in spite of all that he knew, it was three days after judgment was signed against him before he consulted a builder. There is a striking disparity between the figure suggested by Mr. Bridgwater and that suggested by the Church Commissioners as being the cost of doing requisite work to the premises. No view as between the parties can, however, at this stage be formed. Though Mr. Bridgwater does not very satisfactorily explain his inaction, I incline to the view that I would nevertheless have been reluctant to deprive him of any opportunity of defending the action and if necessary of seeking relief from forfeiture.

I think that the appeal succeeds and that the order made by the learned master should be restored.

PEARCE, L.J.: I agree.

Appeal allowed.

Solicitors: *Scott, Winter & Co.* (for Mr. Bridgwater); *Trower, Still & Keeling* (for the Church Commissioners for England).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

A

R. v. CONFIRMING AUTHORITY OF THE DERBY
BOROUGH JUSTICES, *Ex parte* BLACKSHAW.

[QUEEN'S BENCH DIVISION (Lord Goddard, C.J., Slade and Gorman, JJ.),
July 11, 1957.]

B *Licensing—Licence—Ordinary removal—Death of licensee, after grant of removal
subject to confirmation, but before confirmation—Whether personal repre-
sentative of deceased licensee can be granted confirmation of removal—
Licensing Act, 1953 (1 & 2 Eliz. 2 c. 46), s. 22, s. 25.*

Justices granted an ordinary removal of an off-licence. Subsequently,
but before the next meeting of the confirming authority, the licensee died.

C At the next meeting of the confirming authority the licensee's executrix
applied for confirmation of the removal, but the confirming authority
refused to adjudicate on the ground that in view of the licensee's death
they had no jurisdiction. The next transfer sessions after the licensee's
death had not taken place at the time of the confirming authority's refusal
to adjudicate. On application for mandamus to the confirming authority,

D **Held:** in the circumstances the licence remained in existence for the
purpose of enabling the executrix to apply for confirmation of the removal
order made in the lifetime of the deceased licensee; the confirming authority
had, therefore, jurisdiction to grant confirmation, and an order of mandamus
would be granted.

M'Donald v. Hughes ([1902] 1 K.B. 94) and *Cooke v. Cooper* ([1912] 2

E K.B. 248) applied.

[As to the ordinary removal of a justices' licence, see 19 HALSBURY'S LAWS
(2nd Edn.) 29, 30, paras. 67-69; and for cases on the subject, see 30 DIGEST
(Repl.) 39, 40, 300-311; as to jurisdiction of the confirming authority where
the applicant has died before the confirmation, see 19 HALSBURY'S LAWS (2nd
F Edn.) 58, para. 157, text and note (r); and for a case on the subject, see 30 DIGEST
(Repl.) 26, 163.]

For the Licensing Act, 1953, s. 22, s. 25, see 33 HALSBURY'S STATUTES (2nd
Edn.) 171, 176.]

Cases referred to:

- G (1) *M'Donald v. Hughes*, [1902] 1 K.B. 94; 71 L.J.K.B. 43; 85 L.T. 727;
66 J.P. 86; 30 Digest (Repl.) 54, 403.
(2) *Cooke v. Cooper*, [1912] 2 K.B. 248; 105 L.T. 818; sub nom. *Cooke v.*
Bolton JJ., 81 L.J.K.B. 648; 76 J.P. 67; 30 Digest (Repl.) 64, 476.

Application for order of mandamus.

H The executrix of Harriett Short, deceased, applied for an order of mandamus
to the Confirming Authority for the County Borough of Derby to consider her
application for confirmation of an order for the ordinary removal of an off-
licence. The order for removal, subject to confirmation, was made by the
licensing justices on Feb. 7, 1957, on the application of Harriett Short. Harriett
Short died on Mar. 4, 1957, having by her last will and testament appointed the
applicant herein her executrix. The next meeting of the confirming authority
I after the grant of the removal took place on Mar. 29, 1957, and at that meeting
the applicant applied for confirmation. The confirming authority intimated
that they would have confirmed the removal order on the merits of the case,
but refused to adjudicate on the application on the ground that they had no
jurisdiction to do so by reason of the death of Harriett Short. The executrix
applied for mandamus to the authority to consider her application. The next
transfer sessions after the death were held on May 9, 1957, and on the application
of the applicant the licence was then transferred to her. On the application for

mandamus the confirming authority neither filed an affidavit as to their reasons for declining jurisdiction, nor appeared. A

Richard Elwes, Q.C., and *H. G. Talbot* for the applicant executrix.

The respondent confirming authority did not appear and were not represented.

LORD GODDARD, C.J.: The point which arises is that a Mrs. Short, who was the holder of the justices' off-licence at 62, Green Lane, and was in fact the manageress of a company which owned the property, applied on Feb. 7, 1957, to the licensing justices for an ordinary removal of the licence to 97, Normanton Road, Derby. The application was granted subject to confirmation; the removal order therefore had to be confirmed. On Mar. 4, 1957, before the confirming authority met, Mrs. Short died, and the applicant, her executrix, a Mrs. Blackshaw, appeared at the confirming authority's meeting on Mar. 29, 1957, and applied for confirmation of the order of removal. The justices said that they would have granted confirmation, so her counsel, who was present, tells us, but considered that they had no jurisdiction to grant it. B C

The justices have not put before this court any affidavit setting out why they considered that they had no jurisdiction. It would have been helpful to the court if they had, because they probably have a good deal of experience in these cases, and we should have liked to have known the reason why the justices held that they had no jurisdiction. As they have neither filed an affidavit here nor appeared, it is reasonable to suppose that they have come to the conclusion that they were wrong. However, that is not enough; we must see that they were wrong before we grant a mandamus for them to hear and determine. D

Meanwhile, the applicant has been to the transfer sessions and a transfer of the licence to her has been granted; but that occurred after the date of the meeting of the confirming authority and the owners of the property and the applicant do not want to have to wait until next year, when the confirming authority meet again—they only meet once a year—before they can get the removal order confirmed. E

Section 25 of the Licensing Act, 1953, deals with cases of ordinary removal and provides by sub-s. (2) that "The application shall be made by the person wishing to hold the licence after removal" and it provides for the applicant to give certain notices. Section 25 (4) reads: F

"The justices shall not grant an ordinary removal unless they are satisfied that no objection to the removal is made—(a) where the licence is a justices' on-licence, by the owner of the premises from which it is sought to remove the licence or the holder of the licence; (b) where the licence is a justices' off-licence, by the holder of the licence, or by any person other than the owner of the said premises and the holder of the licence, or, as the case may be, other than the holder of the licence, whom the justices consider to have a right to object to the removal." G

There was no objection in this case. Then sub-s. (5) is: H

"Subject to the preceding provisions of this section, licensing justices shall have the same power to grant an ordinary removal as they have to grant a new justices' licence."

That means that the justices must take into consideration the same things as they would if a new licence were being applied for, and, in particular, whether there is a sufficiency or a deficiency in the licensed premises in the district to which it is suggested that the licence should be removed. Those are considerations for the licensing authority, and no doubt the confirming authority can take into account the same matters. I

Section 22 (1) of the Act of 1953 provides:

"Where the holder of a justices' licence dies . . . s. 120 of this Act shall not prohibit the sale or exposure for sale of intoxicating liquor by the

- A personal representatives . . . during a period ending with the next transfer sessions, or, if the next transfer sessions are held within fourteen days after the death . . . the next transfer sessions but one ”;

in other words, that shows that the licence is kept alive and that the executors have a right to go to the next transfer sessions and to apply for a transfer of the licence either to one of the executors or to anybody whom the executors bring forward as a person to whom the transfer should be granted.

- B It has been held* that, if a person applies to licensing justices for the grant of a new licence and, before that licence has been confirmed, the applicant dies, the executors cannot apply for confirmation of that licence, or for transfer, because there never was a licence in existence; the licence would only come into existence on confirmation. The question which we have to decide is whether we can apply that principle to a case of an application for the removal of an existing licence.

- C In *M'Donald v. Hughes* (1) ([1902] 1 K.B. 94) a licensed person died and the executrix was continuing to carry on the premises under the provisions of s. 3 of the Licensing Act, 1872, which corresponds in most respects with the section which I have just read; at any rate it enabled the executrix to carry on.
- D While the licence was being carried on by the executrix, a police raid took place on the premises and there was a prosecution of the executrix, as a licensed person, for permitting gaming on the premises; it was objected that the executrix was not a licensed person. The court considered that she stood in exactly the same position as the licensed person. LORD ALVERSTONE, C.J., in giving judgment, said ([1902] 1 K.B. at p. 96):

- E “In my opinion, after the death of a person holding such a licence, the licence continues to exist for a certain time, provided that the representatives of the licensed person come to the next special sessions (held more than fourteen days after the death of the licensed person) for a licence; and the effect of the interpretation clause is to say that the representative of the deceased person is entitled to act as if he or she were a licensed person during that period—that is to say, as if he or she were holding the licence.”

I need not read the rest of the judgment.

The licensee died on Mar. 4, 1957, and the application was made to the confirming authority within fifteen days thereafter; during which period there had not been a transfer sessions and the licence had not been transferred.

- G In *Cooke v. Cooper* (2) ([1912] 2 K.B. 248), which was concerned with the question whether an executrix of a licence holder could continue an appeal against the refusal of justices to renew a licence, LORD ALVERSTONE, C.J., said (*ibid.*, at p. 250):

- H “There is no reason why this case should not go back to the justices to be dealt with. The case is governed by the principle of the decision in *M'Donald v. Hughes* (1). On the death of a licence holder the licence is not absolutely void. It remains in existence for the purposes of the representatives of a deceased licensee getting a renewal in his place, and being held liable if they carry on the business in breach of the Licensing Acts. In my opinion this licence remains in existence for the purpose of enabling the representatives to maintain this appeal.”

I The court were not saying that the licence only existed for the purpose of enabling the representatives to get a transfer, but also that it enabled them to maintain an appeal, because it was for the protection of the licence and the licence was still in existence.

Different considerations apply if a new licence has not been confirmed, so that the licence never comes into existence, but I think that the principle in

* In *R. v. Richmond Confirming Authority*, *Ex p. Howitt*, [1921] 1 K.B. 248.

Cooke v. Cooper (2) is enough to support the argument of counsel for the applicant that, the licence being still in existence and an order having been made by the licensing justices that it should be removed, the confirming authority can consider, on the application of the executrix, the application for confirmation. A

For these reasons, in my opinion, the order of mandamus should go.

SLADE, J.: The only doubt that I have felt in this case arose from the fact that not only has the court not had the benefit of any argument on behalf of the confirming authority, but to this moment the court does not know the ground on which the confirming authority declined jurisdiction. My Lord has already recited the facts and the position is that the licensee during her lifetime had in fact obtained an order for removal and her personal representative, without first applying for a transfer of the licence to herself, applied for confirmation to the confirming authority. It is possible that the confirming authority may have taken their view, rightly or wrongly, and declined jurisdiction, because they felt that, after the death of the licensee, the licence remained in force for the benefit of the licensee's personal representative only for the purpose of securing a transfer of the licence to the personal representative. That, of course, would be a licence in respect of the premises for which the licence was granted and not a removal, which postulates a licence for some other premises. B C D

I cannot speculate on that. I felt doubt because I do not know the grounds on which the confirming authority acted, although I am quite satisfied that they would not decline jurisdiction capriciously or arbitrarily. In the absence of any argument of that kind, I am certainly not prepared to dissent from a judgment which holds that the principle in *Cooke v. Cooper* (2) ([1912] 2 K.B. 248) applies to a case of this kind, particularly as I realise the grave injustice which might operate on the personal representative and, therefore, on the estate of the deceased licensee, in that, having regard to the fact that the next transfer sessions is a long way ahead, they were precluded from taking other steps for removal; in this case the lease has expired through effluxion of time. I therefore agree. E F

GORMAN, J.: I agree with my Lords and I would add that in the statement that was filed pursuant to the Rules of the Supreme Court, Ord. 59, r. 3 (2)*, it appears that

"the chairman [of the confirming authority] whilst intimating that the confirming authority would have confirmed the said order on the merits of the case, refused to adjudicate on the said application on the ground that they had no jurisdiction to do so by reason of the death of the said Harriett Short." G

It seems to me that what the confirming authority were saying there was that they could not confirm this removal, because the death of the licensee had in law affected the position as far as seeking confirmation of that removal was concerned. H

On the authorities here, it is quite clear that that is not right. By s. 22 of the Licensing Act, 1953 (which I do not propose to read), certain powers are given to an executor of a deceased licensee during the period up to the holding of the next transfer sessions or the next transfer sessions but one. I feel it is not without importance to point out that the confirming authority in this case met before the expiry of that time, and in *M'Donald v. Hughes* (1) ([1902] 1 K.B. 94 at p. 96), LORD ALVERSTONE, C.J., says: I

"In my opinion, after the death of a person holding such a licence, the licence continues to exist for a certain time . . ."

* I.e., the statement setting out the grounds on which the applicant claimed relief.

A There is, therefore, no question of default, if that is the correct word, in the application being made in this case by the executrix of the licensee before there has been a meeting of the next transfer sessions or the next transfer sessions but one. It was held in these two cases, as my Lord pointed out, that certain powers were conferred on the executrix of the licensee.

B No case has been quoted which specifically provided for the position where the application is for a removal of a licence, but there are two passages in *M'Donald v. Hughes* (1) and *Cooke v. Cooper* (2) ([1912] 2 K.B. 248) which, in my view, make it clear that it is not going too wide on the authorities to say that the executrix has the right to apply for confirmation of the removal of the licence. The first passage is per LORD ALVERSTONE, C.J., in *M'Donald v. Hughes* (1) ([1902] 1 K.B. at p. 97), where he said:

C "In my opinion, a person holding the licence till the next special sessions after the death of the licensee is a licensed person within the meaning of the Act . . .";

and the second one is in *Cooke v. Cooper* (2), where LORD ALVERSTONE, C.J., again says ([1912] 2 K.B. at p. 250):

D "On the death of a licence holder the licence is not absolutely void. It remains in existence for the purposes of the representatives of a deceased licensee getting a renewal in his place, and being held liable if they carry on the business in breach of the Licensing Acts. In my opinion this licence remains in existence for the purpose of enabling the representatives to maintain this appeal."

E Although there is no case exactly in point, that which has been held in those two cases makes it clear that one is not going outside those two cases by saying that there is the same power in the personal representative of the deceased licensee making application for the confirmation of a removal, a removal having been already sanctioned by the justices.

That being so, I agree completely with what my Lords have said.

Order of mandamus to issue.

Solicitors: *Corbin, Greener & Cook*, agents for *Blackhurst, Parker & Co.*, Preston (for the applicant executrix).

[Reported by HENRY SUMMERFIELD, ESQ., Barrister-at-Law.]

TURSI v. TURSI.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), June 24, 25, 26, July 11, 1957.]

Divorce—Foreign decree—Judicial separation—Recognition by English court—Petition in England for divorce on ground of desertion—Three years' desertion prior to foreign decree—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 7 (3), s. 18 (1) (b).

Divorce—Desertion—Termination—Judicial separation—Decree of foreign court of domicile—Recognition of decree by English court—Three years' desertion prior to foreign decree—Matrimonial Causes Act, 1950 (14 Geo. 6 c. 25), s. 7 (3), s. 18 (1) (b).

Statute—Construction—Amendment—Extension of court's jurisdiction in matrimonial causes by new enactment—Former statutory provisions thereafter read with new enactment as a new whole and not limited to former interpretation.

The words "decree of judicial separation" in s. 7 (3) of the Matrimonial Causes Act, 1950, include a decree of a foreign court, so that a period of desertion immediately preceding the institution of proceedings before the foreign court is deemed immediately to precede the presentation of a petition for divorce in England, if the parties have not resumed cohabitation and the decree has been continuously in force since it was granted (see p. 837, letter E, post).

The parties were married in Italy in January, 1942, and in the middle of the same year the husband deserted the wife. In 1947 the wife obtained in Italy a decree of judicial separation on grounds, in effect, of the husband's desertion and cruelty. In 1949 the wife came to England where she had lived ever since. The husband was at all times domiciled in Italy. The parties had never resumed cohabitation and the decree of the Italian court had been continuously in force. The wife now petitioned under s. 18 (1) (b) of the Matrimonial Causes Act, 1950, for a decree of divorce on the ground of the husband's desertion for three years preceding the presentation of the present petition; alternatively she contended that by virtue of s. 7 (3) of the Act of 1950, the period of desertion immediately preceding the institution of the proceedings in Italy should be deemed immediately to precede the presentation of the petition now before the court.

Held: the wife was entitled to a decree since (i) although the decree of the Italian court would be recognised in England (*Ainslie v. Ainslie*, (1927), 39 C.L.R. 381, applied), and would, therefore, prevent the husband's desertion continuing to run at the date of the present petition (*Harriman v. Harriman*, [1909] P. 123, applied), yet (ii) the fact that the husband had deserted the wife for three years immediately before the date of that decree was sufficient, by virtue of s. 7 (3) of the Matrimonial Causes Act, 1950, to enable her to be granted a divorce in England.

Per CURLIAM: when in a field such as that of matrimonial causes a far-reaching change in the court's jurisdiction has been enacted, statutory provisions formerly existing may be considered anew in the framework in which they then stand, so as to ascertain the present law from the new whole (see p. 836, letter F, to p. 837, letter B, post).

[As to desertion preceding a decree of judicial separation or its equivalent, see 12 HALSBURY'S LAWS (3rd Edn.) 243, para. 455, note (a); and for cases on the subject, see 27 DIGEST (Repl.) 356, 2944.

As to the termination of desertion by a decree of judicial separation or its equivalent, see 12 HALSBURY'S LAWS (3rd Edn.) 263, para. 500, note (t), and 267, para. 511, note (a); and for cases on the subject, see 27 DIGEST (Repl.) 362-364, 2998-3013.

- A As to the enforcement of foreign judgments, see 7 HALSBURY'S LAWS (3rd Edn.) 141, para. 250, note (f); and for cases on the subject, see 11 DIGEST (Repl.) 512, 1272.

For the Matrimonial Causes Act, 1950, s. 7 (3), s. 18 (1) (b), s. 21, see 29 HALSBURY'S STATUTES (2nd Edn.) 396, 405, 409.]

Cases referred to:

- B (1) *Ainslie v. Ainslie*, (1927), 39 C.L.R. 381; 27 S.R.N.S.W. 524; [1927] Argus L.R. 301; 11 Digest (Repl.) 514, 778.
 (2) *Wilson v. Wilson*, (1872), L.R. 2 P. & D. 435; 41 L.J.P. & M. 74; 27 L.T. 351; 11 Digest (Repl.) 468, 1010.
 (3) *Harriman v. Harriman*, [1909] P. 123; 78 L.J.P. 62; 100 L.T. 557; 73 J.P. 193; 27 Digest (Repl.) 363, 3005.
 C (4) *Herod v. Herod*, [1938] 3 All E.R. 722; [1939] P. 11; 108 L.J.P. 27; 159 L.T. 530; 27 Digest (Repl.) 360, 2978.
 (5) *Robinson v. Robinson*, [1919] P. 352; 88 L.J.P. 126; 122 L.T. 222; 27 Digest (Repl.) 704, 6726.
 (6) *Joseph v. Joseph*, [1953] 2 All E.R. 710; 3rd Digest Supp.
 (7) *Corbett v. Corbett*, [1957] 1 All E.R. 621.
 D (8) *Day v. Day*, [1957] 1 All E.R. 848.
 (9) *Food Controller v. Cork*, [1923] A.C. 647; 92 L.J.Ch. 587; 130 L.T. 1; 10 Digest (Repl.) 992, 6829.
 (10) *Re Winget, Ltd., Burn v. Winget, Ltd.*, [1924] 1 Ch. 550; 93 L.J.Ch. 286; 131 L.T. 240.

E Petition.

The wife in this case petitioned for divorce in which she alleged in substance that she was married to the husband on Jan. 19, 1942, in Rome, where she and the husband lived after the marriage; that on Mar. 31, 1933, she gave birth to a son, of whom the husband was the natural father, and that the child was legitimated by the subsequent marriage of the parties; that she was now resident in England where she had resided for the three years immediately preceding the presentation of this petition; and

"That on June 9, 1947, the Italian Civil Tribunal of Rome, Italy, in proceedings for legal separation brought by the [wife] against the [husband] found the [husband] guilty and pronounced legal separation and granted the custody of the . . . child . . . to the [wife]. That the [husband] has deserted the [wife] without cause for a period of at least three years immediately preceding the presentation of this petition or alternatively three years preceding the aforementioned decree of legal separation, which decree has ever since remained continuously in force and the [wife] and the [husband] have never since resumed cohabitation."

- H The wife accordingly prayed that the discretion of the court might be exercised in her favour and the marriage dissolved. The suit was undefended.

On Feb. 18, 1957, an application was made by the wife for an adjournment, and SACHS, J., directed that the papers be sent to the Queen's Proctor for argument on the questions raised by the petition.

G. L. S. Dobry for the wife.

- I J. P. Comyn for the Queen's Proctor.

Cur. adv. vult.

July 10. SACHS, J., read the following judgment: The facts in this case are as follows. Both husband and wife are Italian by birth and save that the wife has resided here since 1949, both have lived consistently in Italy where they are domiciled. From 1932 onwards for a period of about ten years they lived together from time to time. An illegitimate son was born to them in March, 1933, and this was the commencement of the longest period that they cohabited—a

matter of three years. Thereafter until January, 1942, the periods when they lived apart seem to have been greater than those when they lived together. On Jan. 19, 1942, they married in accordance with the rites of the Roman Catholic Church at a parish church in the city of Rome. After some three weeks, however, the husband left the wife and did not come back for a matter of four months. On his return the parties lived together for three or four weeks; and then in mid-1942 the husband once more went away. Since then the parties have never lived together and the wife has only on one occasion ever seen the husband. There is no doubt but that the husband, when leaving the wife on the second occasion in 1942, deserted her.

In June, 1944, the wife, whilst still in Italy, met a Mr. Stavinski, whom she has stated was an officer in the Eighth Army. Not long afterwards she commenced to commit adultery with him. Then, in October, 1946, she commenced proceedings under the appropriate sections of the Italian Civil Code to obtain a judicial separation. After certain adjournments for the purposes of reconciliation, that petition was heard on June 9, 1947, the husband having entered no appearance nor taken any step to take advantage of the reconciliation opportunities which the court offered. The cause was heard by three judges of the Civil Tribunal of Rome, who exercise the equivalent in matrimonial matters of a High Court jurisdiction at first instance: indeed there is in Italy no other court of first instance dealing with such matters which has a higher status. After hearing evidence and the argument addressed on behalf of the petitioner and of the Public Attorney, the court acceded to the petition and made a decree, the nature of which I will refer to in more detail later.

The wife stated that the only reason why she asked for a decree was to enable her son and herself to obtain passports to leave Italy, and I accept her evidence on that point as being true. At the hearing she did not disclose her own adultery with the above named man, nor in Italian law was it necessary for her so to do: according to the evidence before me adultery is in Italy a criminal offence but is not a bar to an application for judicial separation. At some other date in 1947 Stavinski left Italy and came to this country. In 1949 the wife followed him over here, and once more commenced to commit adultery with him. At that time she had abandoned any idea that her husband might return to live with her and she herself had come to wish to marry Stavinski. Later they started to live together as man and wife and are still continuing so to do. They desire to marry if the wife obtains a decree on this petition, which is dated June 15, 1955.

The decree of June 9, 1947, in addition to pronouncing for the separation of husband and wife on account of the guilt of her husband, gave the custody of the son to the wife and condemned the husband in certain costs, but made no provision for maintenance by the husband of the wife who had specifically waived any right thereto. As previously indicated, the husband continued to keep away from his wife after the decree, just as he had for the four preceding years and it is convenient at this stage to state that on my view of the facts the husband's continuing absence from his wife after the decree was due to his continuing intention to desert her and was in no way influenced by the pronouncement or continuing existence of that decree. It should next be mentioned that the wife having been resident in this country for more than three years before the date of the presentation of the petition, has become qualified to avail herself of that jurisdiction of this court to grant her a decree of divorce which springs from s. 18 (1) (b) of the Matrimonial Causes Act, 1950. It is also right to state that on the evidence before me and on it appearing that the husband has remained in Italy, it is clear that his domicile continues to be Italian, and it follows that the wife still has the same domicile.

On these facts there falls for decision yet another of the problems arising by virtue of the incidence of s. 18 (1) (b) of the Matrimonial Causes Act, 1950, the

- A immediate successor of s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949. The predecessor of s. 18 (1) (b) produced a departure of a far-reaching nature from the broadly based concept that jurisdiction in divorce depends on the domicile of the parties: and incidentally it has not unnaturally attracted in many countries the criticism of those concerned with the application of private international law to marriages. It provides that women of all countries can, after three years' residence here, obtain a divorce under the law of this country, irrespective of their domicile and irrespective of the fact that their husbands have never visited this country and have never had the remotest link with it. Its provisions are thus calculated to attract to this country women who have been born, brought up, married and lived in the country of their husband's domicile and to whom continued application of the matrimonial law of that country might not seem unduly unreasonable. It lays down that the courts of this country are thus to give decrees of divorce that, as in the present case, would not necessarily be recognised in the country of domicile, and maybe also not be recognised in many other civilised countries. These matters are so clear that it must be taken by the courts that the legislature intended them, and that the problems arising under the above sub-section should be considered in the light of that intention.

Before dealing with the real points on which this case turns, I should refer in more detail to the nature of the Italian decree. It is one which is referred to in the courts there as a "separazione legale". It was granted to the wife on account of the guilt of the husband, that guilt consisting, according to the tenor of the decree, of desertion and cruelty. Its effect is that as from its date neither party is compelled to live with the other; it can be brought to an end by the parties becoming reconciled, but it cannot be rescinded by unilateral action on either side. In all its essentials it coincides closely with the old ecclesiastical divorce a mensa et thoro by which the parties were decreed and declared

"to be divorced and separated from bed, board and mutual cohabitation . . . until they shall be reconciled to each other."

- F It accordingly corresponds with considerable exactitude to a decree of judicial separation as pronounced by the courts in this country. At one stage it was argued on behalf of the wife that the Italian decree was not a final order by reason of the possibility that it might become discharged at a later time. As that argument was only lightly pressed, it is sufficient to state that I respectfully adopt the view of ISAACS, J. (who later became first Chief Justice, and then Governor-General, of the Dominion of Australia), in *Ainslie v. Ainslie* (1) ((1927), 39 C.L.R. 381 at p. 390), where in regard to the test whether a judgment is final he states:

- H "The true rule is to see whether or not the legislature has by its enactment left the order entirely floating, so to speak, as a determination enforceable only as expressly provided and in the course of that enforcement subject to revision, or whether the order has been given the effect of finality unless subsequently altered."

Add to that passage the words "or rescinded", as it is clear from the context was intended by him, that rule plainly results in the Italian court's order being a final one.

- I The first point of substance to be decided is whether the courts of this country, in matrimonial proceedings brought by virtue of s. 18 (1) (b), recognise as effective a decree of judicial separation properly pronounced by the domiciliary court, when the wife has been resident in this country three years but the husband remains domiciled in the country which pronounced the decree. There is no decision of the courts here on this point, but in Australia the courts have had to consider a similar problem in a case in which both husband and wife had become domiciled in the state in which proceedings were pending. That case

is distinguishable from the present one, first, in that the husband there had changed his domicile and both he and his wife were resident in the same state, New South Wales, and secondly, because the case deals with the effect of a decision of a court of petty sessions of the state of their previous domicile, Western Australia, and not with that of the High Court. Each of those distinctions made the case one where the arguments for extra-territorial recognition were weaker than in the present instance. In *Ainslie v. Ainslie* (1), the proceedings came before a judge of first instance of the State of New South Wales, the Court of Appeal of New South Wales (26 S.R.N.S.W. 567), and the Supreme Court of Australia (39 C.L.R. 381). Of the eleven judges who gave their views on whether or not the order of a court of petty sessions in Western Australia had extra-territorial effect, six held that it had such effect and five held that it did not. The reasoning on which the decision of the six judges was founded is best exemplified in the judgment of ISAACS, J. (39 C.L.R. at p. 388): that of the five judges who took the other view appears most clearly from the judgment of FERGUSON, J. (26 S.R.N.S.W. at p. 574).

The arguments considered in *Ainslie's* case (1) and repeated here may in substance be divided into those which relate to general principles and those which put forward the conveniences and inconveniences of a decision either way. As regards principles the main argument pressed against recognition of decrees of judicial separation outside the country of domicile in which they are granted went thus. So far the courts of this country have accorded recognition to a foreign domiciliary decree only when it affected the status of the parties: decrees of judicial separation do not affect status; accordingly no such decrees should be here recognised. Whilst appreciating, of course, the practical distinction between those decrees that cut the bond of marriage and those that leave it subsisting, this proposition, stated in the way in which it appears to attract those who put it forward, to my mind savours somewhat of a blend of dogma and absence of precedent. It is the fact that so far the courts here have not accorded recognition to domiciliary decrees for judicial separation: but until now they have not been asked so to do—and indeed it is not surprising that before the Act of 1949 the occasion for such a request did not arise. The argument against recognition as thus stated seems rather to beg the question of principle.

The argument for extra-territorial recognition springs from the fact that by the almost universal view of all civilised countries a special quality attaches to the decrees of the domiciliary High Court touching any contract of marriage between persons domiciled in the country of those courts, when that contract has validly resulted in married status. It is that special quality which is "recognised" in the sense that the domiciliary decrees are treated as operative in other countries. The most drastic way in which a decree of a domiciliary court can affect a marriage is by dissolving it, and if recognition extends to the most drastic decree a fortiori it must cover a decree of lesser effect. It is on the basis of this line of reasoning that is founded the passage in the judgment of ISAACS, J., where he says (39 C.L.R. at p. 392):

"But if the law of the domicile (and I make no distinction here between 'domicile' and 'domicil') gives to a divorce a vinculo a force recognised everywhere, it must unquestionably give binding force everywhere—subject, of course, to local law to the contrary—to a judgment rendered by a court having jurisdiction both *jure gentium* and *jure municipii*, and regulating personal rights and obligations consistent with the existence of a status of marriage."

Similarly, STARKE, J. (*ibid.*, at p. 409), states:

"If the forum domicilii can affect the status of the married persons it must, a fortiori, have jurisdiction to affect the personal rights of the parties arising out of that status in proceedings relating to the separation of the

- A spouses or the restitution of their conjugal rights (DICEY, CONFLICT OF LAWS, 3rd Edn., p. 296)."

I respectfully adopt this reasoning and consider that it should be applied here, unless there is anything in the arguments as to "inconvenience" which can override its application.

- B Accordingly I now turn to the points made as to the respective inconveniences which fall to be suffered according to whether the Italian decree is held to have or not to have extra-territorial effect. It was urged on behalf of the wife that it would be wrong, where there was a foreign decree of judicial separation by a domiciliary court, that thereafter the spouses in the course of their travels through or sojourns in other countries should in effect be burdened by a notional stamp on their passports "Married, but . . .", and that their rights inter se should be thus affected in those various countries. Once outside the boundaries of the country of domicile it was argued that it was right that they should apply to the courts of each successive country in which they might come to be, for any desired relief from being obliged to live with each other. To my mind decrees of judicial separation are in substance granted to afford protection to one spouse against the other; and it is a corollary of the above argument that in each successive country the wife who had secured the protecting decree of the domiciliary court would have to prove over again the facts which entitled her to protection against an assertion by the husband of marital rights. Very often the difficulties in securing the attendance of witnesses would obviously make such a course impracticable—even if expense did not preclude it. To my mind the need for such repeated proof would indeed be a burden far less tolerable than any suggested in the argument against recognition. Nor do I think it open in this particular case, the wife having obtained the decree, to rely on any special motives in her own mind in relation to the reasons why she obtained it. Again it is argued that other countries may grant decrees of judicial separation on grounds that differ from those which can support a parallel claim here. Provided, however, that nothing in the laws and procedure of the foreign court offends our ideas of natural justice, it seems to me that this argument should not prevail in relation to such decrees any more than it did in the even more important matter of recognition of foreign decrees of divorce.
- F

Finally as regards the "grounds of inconvenience" arguments adduced against extra-territorial recognition, I turn to that which at one time appeared to me the most cogent of those put forward by FERGUSON, J. (26 S.R.N.S.W. at p. 577):

- G "No court in New South Wales has power to set it [the order of the petty sessional court of Western Australia] aside, so that if it is in force here, then however conclusively the husband—or the wife in another case—might be able to establish his or her right to have it set aside, it must remain in force, governing their matrimonial relations in their new domicile, unless they are prepared to go back for relief to the country they have quitted. In this case that country is Western Australia; it might equally well be America or Russia or Japan. I cannot believe that we are bound to tell a man and wife domiciled in this country that so far as their rights and obligations as man and wife are concerned, they must go to the courts of a foreign country to regulate them, although they have definitely abandoned their domicile in that country, and owe no allegiance to its laws."
- H
- I

Apart from the fact that in the present case the court is not dealing with "a man and wife domiciled in this country", it is pertinent to observe that in *Ainslie's* case (1) the courts were dealing with a petty sessional order capable of variation or rescission on unilateral application of one of the parties, whilst here I am dealing with a High Court decision and one that is incapable of any such unilateral alteration or rescission. That distinction becomes all the more relevant

where, as here, the court adjudicating on the recognition of a foreign domiciliary decree itself administers a law under which there is similarly no way of obtaining a variation or rescission of the decree of judicial separation on account of events subsequent to that decree. (Neither counsel for the Queen's Proctor nor counsel for the wife was able to point to any way in which in this country decrees of judicial separation could, whilst the marriage subsists, be varied or rescinded by unilateral application to the court on any ground arising from facts occurring after the decree. Determination of the decree by or on reconciliation is a different thing: as also is the falling of the decree by virtue of a dissolution of the marriage itself.) A High Court which after all appropriate investigation makes a decree of such finality, can hardly adopt as a ground for non-recognition of a parallel decree of a foreign High Court, the fact that after no less investigation, it makes its decree equally final. That seems in the present case to afford a complete answer to the point as put by FERGUSON, J.

Accordingly I consider that the arguments as to convenience, when taken as a whole, are balanced in favour of extra-territorial recognition of the Italian decree. Further such recognition seems to conform to the view of justice and reason stated by LORD PENZANCE in *Wilson v. Wilson* (2) ((1872), L.R. 2 P. & D. 435 at p. 442):

"Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws."

Though when expressing that view he was dealing only with jurisdiction in matters of divorce, the words seem no less apt in relation to the recognition of decrees of judicial separation. It thus seems right on principle to recognise, in the sense above considered, decrees of judicial separation pronounced by foreign domiciliary courts in cases such as the present—at any rate so long as the domicile of the parties remains unchanged. It may be added that decrees of judicial separation are granted throughout a wide range of countries where the Christian tenets prevail; that in a number of those countries, as in Italy, the only relevant decree that the courts pronounce touching a marriage contract which is neither void nor voidable, is that of judicial separation, and that non-recognition of those decrees would mean that no decrees at all of those countries concerning such marriages would be here recognised.

The next point for decision is whether the decree of the Italian court, once it has been recognised, should be taken as automatically barring the wife from establishing that her husband was in desertion, or should the question whether the husband continued after the decree to be in desertion be regarded as one of fact to be decided on the evidence as a whole. This turns on a consideration of what is the true ratio decidendi of *Harriman v. Harriman* (3) ([1909] P. 123), the decision of the full Court of Appeal that separation orders in magistrates' courts cause a husband's desertion to cease to run, a decision from which it is of course a fortiori clear that decrees of the High Court of judicial separation have a like effect. On the one hand FLETCHER MOULTON, L.J. (*ibid.*, at p. 137), said:

"It is impossible to hold that a husband is committing a marital offence by non-cohabitation when he has not the right to cohabit".

On the other hand, BUCKLEY, L.J. (*ibid.*, at p. 148) put the matter as follows:

"The case then stands thus—that the wife establishes that her husband has been absent by way of desertion for eight months and has remained absent after she had obtained an order that she was no longer bound to cohabit with him. He may have remained absent in obedience to the order or may have remained absent with a continuing intention to desert";

A and proceeds on the evidence to come to the former conclusion in the absence of evidence to the contrary.

The view put succinctly by FLETCHER MOULTON, L.J., is the one also adopted by FARWELL, L.J. (ibid., at p. 146) and KENNEDY, L.J. (ibid., at p. 154). The view put forward by BUCKLEY, L.J., seems to be consistent with the expressions used by COZENS-HARDY, M.R. (ibid., at p. 131) and VAUGHAN WILLIAMS, L.J. (ibid., at p. 133). To that extent it seemed open to me to consider whether the court could adopt what might be termed to be the "*Herod v. Herod** line of approach" and treat the question in the present case of whether desertion continued after the decree as a question of fact. In 1919, however, the point fell for consideration by HORRIDGE, J., in *Robinson v. Robinson* (5) ([1919] P. 352) and he came to the conclusion that this line of approach was not open—though obviously with a view to an appeal, he found that the husband's intention to desert continued. The last-named decision has now stood for something like thirty years and it is for me in the circumstances to follow it without further considering the point, which may, however, still be open in an appellate court. Accordingly on the principle stated by VAUGHAN WILLIAMS, L.J. ([1909] P. at p. 133) I hold that the Italian decree prevented, as from its date, the husband continuing to be in desertion.

In the above circumstances it is unnecessary for me to deal with the further point raised by the Queen's Proctor—that on an analogy from *Joseph v. Joseph* (6) ([1953] 2 All E.R. 710) the wife had in any event, by seeking the decree of the Italian court, put herself into the position of having in effect agreed to living apart from her husband. I only pause to note that in *Joseph v. Joseph* (6) it seems (from what is stated in the later case of *Corbett v. Corbett* (7) ([1957] 1 All E.R. 621 at p. 625) that the get there in question was one to which both parties had assented; and also that in a case such as the present care must be taken not to confuse on the one hand consent to a separation and on the other recognition of desertion having taken place coupled with a desire to seek the appropriate remedy. As, under what can be called the rule in *Harriman's case* (3), the Italian decree of judicial separation precludes the wife from asserting that her husband's desertion continued to run to the date of the petition, she must fail in this present cause unless she can find some statutory provision that prevents the application of that rule.

Thus arises the final point: Can the wife avail herself of s. 7 (3) of the Matrimonial Causes Act, 1950, by which in the circumstances there set out

G ". . . a decree of judicial separation or an order under [the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949] having the effect of such a decree shall, if . . . the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce."

H The provisions now contained in that sub-section first appeared in s. 6 (3) of the Matrimonial Causes Act, 1937†, and were intended to limit the operation of that part of the rule in *Harriman's case* (3) to which I have referred above. The question whether the words "a decree of judicial separation" cover the decree granted to the wife in Rome is the only one on which, after the conclusion of the helpful addresses of counsel, there remained any real doubt in my mind. The main argument for the wife runs as follows. If by the law of this country the wife is at the disadvantage that the Italian decree brings into operation the rule in *Harriman's case* (3), it would be both absurd and unjust so to interpret s. 7 (3) that she cannot have the advantage of a statutory provision intended to limit the operation of that rule. The main argument against the wife is that at the time the provisions of the first predecessor of s. 7 (3) of the Matrimonial

* (4), [1938] 3 All E.R. 722.

† 11 HALSBURY'S STATUTES (2nd Edn.) 840.

Causes Act, 1950, came into effect (by virtue of s. 6 (3) of the Act of 1937) the words "a decree of judicial separation" in the relevant sub-section would have been construed as referring only to the decrees of the High Court of this country and they must continue to be so construed. Both arguments are of powerful persuasive effect. Counsel for the Queen's Proctor whilst putting forward the view that it is open to the court to give effect to either argument, submitted with some force that the more cautious and proper decision lay in adopting the narrower construction of s. 7 (3) so as to exclude from its beneficial operation the Italian decree.

In support of the argument for the narrower construction of s. 7 (3) can be urged the fact that it comes naturally to the mind, as a matter of first impression; that in 1937 the likelihood of a foreign decree of judicial separation having to be considered by these courts was so small as not to be within the contemplation of Parliament; and that as the words "judicial separation" in the Matrimonial Causes Act, 1950, s. 21 (the successor of the feme sole provisions of s. 194 of the Supreme Court of Judicature (Consolidation) Act, 1925*, as substituted by Sch. 1 to the Law Reform (Married Women and Tortfeasors) Act, 1935, and amended by Sch. 1 to the Married Women (Restraint upon Anticipation) Act, 1949), seem *prima facie* to be directed solely to an English decree, it would be wrong to accept a different definition for s. 7. Indeed I am inclined to assume that in 1938 the courts would (despite s. 13 of the Act of 1937)† have adopted the narrower construction if the point had then come before them. Starting with that assumption, can it be said that the position has been changed by that amendment of the court's jurisdiction by s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1949, which for the first time gave the court jurisdiction over marriages where the husband had never had a domicile in this country?

I have earlier adverted to the far-reaching nature of that change in the law, to the effects which follow, and to the fact that the legislature must have considered and recognised both the nature and effects of the change. When in a field such as is covered by the Matrimonial Causes Act, a far-reaching change is enacted in the court's jurisdiction, are thereafter the pre-existing statutory provisions in that field necessarily all to be construed in precisely the same way as when the lesser jurisdiction prevailed, or can, where appropriate, some of those provisions be given a broader interpretation in the light of the extended jurisdiction? This is a question on which I would have much preferred to have the benefit of some guiding authority. The researches of counsel, however, made in response to a specific request, have been unable to find one. In its absence I have with diffidence—and regretting in company with WILLMER, J. (see *Day v. Day* (8), [1957] 1 All E.R. 848 at p. 853) the absence of a right of appeal by the Queen's Proctor—come to the conclusion that the court may in appropriate instances, of which this seems to me one, proceed to construe the provisions of the relevant statutes as a new whole. Some support for this approach to the question may perhaps be found first in the statement (albeit referring to a different set of circumstances) of LORD WRENBURY in *Food Controller v. Cork* (9) ([1923] A.C. 647 at p. 668) (in relation to a consolidation Act‡):

"But I derive little, if any, assistance from the knowledge that, for instance, a particular section is in terms identical with a section which as the law previously stood was found in a framework different from that in which it is now found. To ascertain the present law it is necessary to consider such a section in the framework in which it now stands. In other words, I have to consider the statute law as it is."

* 11 HALSBURY'S STATUTES (2nd Edn.) 834.

† 11 HALSBURY'S STATUTES (2nd Edn.) 843.

‡ The Companies (Consolidation) Act, 1908.

A and next, to a lesser degree, in the application of that statement, again in a very different field, by RUSSELL, J., in *Re Winget, Ltd., Burn v. Winget, Ltd.* (10) ([1924] 1 Ch. 550 at p. 556).

Pursuant to this conclusion, the relevant sections now in force require to be looked at as a whole with, so to speak, a post 1949 Act eye. Taking the Matrimonial Causes Act, 1950, as it is, regard must be had to the fact that provisions as to the jurisdiction of a court over subject-matter are normally in the forefront of a statute, preceding the provisions as to the grounds on which suitors can be granted relief. It thus seems to me that the accidents of legislative history should not prevent s. 18 having the same effect as if it were part of a normal set of initial sections as to jurisdiction, in the light of which those that follow should be given a reasonable interpretation. On that basis I see no need in relation to s. 7 (3) to assume that the legislature, when opening by s. 18 (1) (b) the courts to those who had never been domiciled here, was so inadequately advised as not to be made aware of the chances of *Ainslie v. Ainslie* (1) being followed in England. Nor do I see good reason for overriding the normal presumption that the legislature does not intend to produce results so absurd or so manifestly unjust as those for which the Queen's Proctor felt constrained to argue.

D As to so much of the Queen's Proctor's argument as was founded on s. 21, I would add that it is not for me to decide how in relation to international private law the provisions of that section may or may not produce a conflict between *lex fori*, *lex rei sitae*, and *lex domicilii* as regard property or its devolution. Even if in the end "judicial separation" had to be differently construed in a section relating to property and its devolution to the same words in a section relating to the right to relief on a petition for divorce, it would not affect my view of the latter. For the above reasons I consider that the words "decree of judicial separation" in s. 7 (3) cover the Italian decree here under consideration. Thus in the present case the fact that the husband deserted the wife for the three years immediately before the date of the Italian decree, is by virtue of the above sub-section sufficient to enable her here to be granted a decree of divorce.

F In conclusion I would mention that on behalf of the Queen's Proctor it has been pointed out that r. 4 of the Matrimonial Causes Rules, 1957, does not make obligatory the disclosure in a petition of proceedings before a foreign court, and it has been suggested that consideration of an amendment is accordingly desirable. That suggestion seems worthy of support.

Decree nisi.

Solicitors: *E. H. Silverstone & Co.* (for the wife); *Queen's Proctor.*

[Reported by A. T. HOOLAHAN, Esq., Barrister-at-Law.]

ENGLISH v. GUNTER & CO., LTD.

[COURT OF APPEAL (Hodson, Parker and Ormerod, L.JJ.), July 5, 8, 1957.]

Master and Servant—Wages—Regulation—Catering worker—Minimum remuneration—Night worker—Specific jobs involving three hours' work—Requirement of remaining on premises thirteen hours—Whether entitled to be paid for thirteen hours—Catering Wages Act, 1943 (6 & 7 Geo. 6 c. 24), s. 1 (2), s. 4 (3)—Wages Regulation (Unlicensed Place of Refreshment) Order, 1949 (S.I. 1949 No. 433), Sch. 1, para. 24, para. 26.

The defendants employed the plaintiff at their unlicensed place of refreshment. He was required to attend daily from 7 p.m. till 8 a.m. the following morning and was provided with a couch and blankets for sleeping and with supper and breakfast. His duties, which occupied about three hours each week-day night, were to see that on the departure of staff lights and gas fires were turned off and windows and doors closed, to draw solid fuel fires, to lay two boilers ready for re-lighting the following morning and to hose down two urinals. He had also to light the two boilers on week-day mornings so that hot water was available when the staff arrived at 8 a.m., and on Sundays he had to light the boilers at a later hour. On occasion he had to admit a van returning with surplus food from an evening function elsewhere. He was not required to patrol the premises but, apart from the duties previously mentioned, was free to sleep or do what he liked provided that he remained on the premises. In fact he did not do work for more than forty-seven hours a week*. He claimed wages on the basis that he was employed at a catering establishment subject to the Catering Wages Act, 1943, and the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949 (S.I. 1949 No. 433), and that he was entitled to be remunerated for thirteen hours a day seven days a week at the rates of wages, of overtime and of special time prescribed by the order.

Held: although the plaintiff was a person to whom the order, S.I. 1949 No. 433, applied by virtue of para. 24 of Sch. 1 thereto, yet he was not entitled to remuneration at the rates prescribed by the order in respect of the whole of the time that he spent on the defendants' premises, because he was employed to do work for less than forty-seven hours weekly and to submit to a restriction on his movements by being on the premises and available for work during the rest of the time, but was not employed to do work throughout the whole of the time that he was required to be on the premises.

Appeal dismissed.

[**Editorial Note.** The Wages Regulation (Unlicensed Place of Refreshment) Order, 1949 (S.I. 1949 No. 433), prescribed minimum remuneration per week of forty-seven hours for workers to whom the order applied, and prescribed overtime rates for work in excess of forty-seven hours. Special time was payable under the order, as an addition to remuneration, for work between certain hours or in excess of a certain minimum. Schedule 1 to the order, which prescribed the rate of remuneration and defined the workers to whom the order applied, was revoked and replaced as from May 4, 1951, by S.I. 1951 No. 637. Sub-paragraph (g) of para. 24 as so substituted was in the same terms as before. New rates of remuneration were provided by S.I. 1952 No. 861 as from May 23, 1952. The existing orders were superseded by the Wages Regulation (Unlicensed Place of Refreshment) Order, 1953 (S.I. 1953 No. 1611) as from Nov. 30, 1953. In Sch. 1 to this order para. 23 (g) is in the same terms as para. 24 (g) of Sch. 1 to the Order of 1949. New rates of remuneration were substituted as

* Overtime rates might be applicable for work in excess of forty-seven hours weekly; see Editorial Note.

A from Apr. 4, 1955, by S.I. 1955 No. 386, but this instrument did not amend para. 23 of Sch. 1 to S.I. 1953 No. 1611. These instruments cover the whole period relevant to the present decision, viz., Oct. 24, 1949, to Oct. 24, 1955.

For the Catering Wages Act, 1943, s. 1 (2) and s. 4 (3), see 9 HALSBURY'S STATUTES (2nd Edn.) 105, 107.

B For information as to the current wages regulation orders relating to catering undertakings, see 7 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-Issue) 141 and SERVICE.]

Appeal.

C The plaintiff was employed by the defendants at their unlicensed place of refreshment at 5 and 6, Stanhope Gate, London. He was required to remain on the premises from 7 p.m. to 8 a.m. each night and to carry out certain duties involving, it was found, about three hours' work a night. For the remainder of the time he was free to do what he pleased provided he remained on the premises. He brought an action against the defendants claiming arrears of remuneration on the basis that he should have been paid for thirteen hours a day (latterly fifteen hours on Sundays) by virtue of the Catering Wages Act, 1943, and the relevant Wages Regulation (Unlicensed Place of Refreshment) D Orders made thereunder. The remuneration that he claimed was based on the prescribed rate per week of forty-seven hours, overtime rates and special time. On Jan. 18, 1957, STABLE, J., dismissed the action holding that the plaintiff was not employed on activities falling within the relevant orders and that his working hours were never in excess of forty-seven hours a week, which period the remuneration that he was paid covered. The plaintiff appealed to the Court of E Appeal.

J. E. Artro-Morris for the plaintiff.

R. I. Threlfall for the defendants.

F **HODSON, L.J.:** This is an appeal by the plaintiff from the judgment of STABLE, J., given on Jan. 18, 1957. The plaintiff's claim was for remuneration under the Catering Wages Act, 1943. He was employed by the defendants at 5 and 6, Stanhope Gate, where the defendants had an unlicensed place of refreshment. Part of the plaintiff's claim was barred by the Limitation Act, 1939, but the effective claim is from Oct. 24, 1949, to Oct. 24, 1955, which is not so barred.

G The basis of the plaintiff's claim is that he was employed for thirteen hours a day for seven days a week and latterly for fifteen hours a day on Sundays. The Minister has power to make orders fixing the wages of workers to whom the Act applies. Section 1 (2) of the Catering Wages Act, 1943, provides as follows:

H "The workers to whom this Act applies are all persons employed in any undertaking, or any part of an undertaking, which consists wholly or mainly in the carrying on (whether for profit or not) of one or more of the following activities, that is to say, the supply of food or drink for immediate consumption, the provision of living accommodation for guests or lodgers or for persons employed in the undertaking and any other activity so far as it is incidental or ancillary to any such activity as aforesaid of the under- I taking."

Section 4 deals with the establishment of a wages board. Sub-section (3) of that section provides:

"Where the Minister receives a wages board recommendation, he may, if he thinks fit, by order provide for the establishment of a wages board in respect of such workers and such employers as may be described in the order."

The Minister made an order, S.I. 1949 No. 433, which has been followed by subsequent orders, with the result that, if the plaintiff is entitled to the benefit of those orders, on the hours of work stated by him he is *prima facie* entitled to £2,051 19s. 7d. over and above the wages actually paid to him, which latterly amounted to £7 8s. per week. A

It is difficult to describe the plaintiff's actual job. The learned judge in substance accepted what the defendants said in their defence, that he was required to attend at their premises daily at 7 p.m., and required to pass the night there; he was provided with blankets and a couch on which to sleep and also with supper and breakfast. After his arrival at the premises, his duties were to see that on the departure of the defendants' staff lights and gas fires were turned off and windows and doors closed; he was further required to draw solid fuel fires and to lay two boilers ready for re-lighting the following morning and to hose down two urinals. When he had done that, he had nothing further to do until the following morning, except that on occasion he was required to admit to the premises the defendants' van returning with surplus food from an evening function held elsewhere. On the following morning, except on Sundays, he was required to light two boilers so that hot water would be available when the staff arrived at 8 a.m.; on Sunday mornings he had to light the boilers but at a later hour. B
C
D

The learned judge found that, whatever the real working hours of the plaintiff were, they were never in excess of forty-seven hours in a week, so that, whether the plaintiff came within the Catering Wages Act, 1943, or not, he was entitled to nothing. Although the calculation is not an exact one, it appears that he was in fact working, in the ordinary sense of the word, about three hours a night. E

The first question is whether the plaintiff was within the order. He was clearly within the section of the Act of 1943 which I read first, and the learned judge so held. It was submitted, however, that by virtue of the combined effect of paras. 24 and 26 of Sch. 1 to the Order* No. 433 the activities, if they can be so called, of the plaintiff were not within the scope of the order at all. I have had great difficulty in understanding this argument, which was accepted by the learned judge. F

Paragraph 24 of Sch. 1 to S.I. 1949 No. 433 read as follows:

"Subject to the provisions of para. 25 the workers to whom this Schedule applies are all workers employed in Great Britain in a catering undertaking who are employed by the person or body of persons carrying on that undertaking and who are so employed . . . G

"(1) for the purposes of such of the activities of the undertaking as are carried on at an unlicensed place of refreshment or in the course of a catering contracting business . . . and who are engaged on any of the following work, that is to say:

"(a) the preparation of food or drink; (b) the service of food or drink; (c) work incidental to such preparation or service; (d) work connected with the provision of living accommodation for workers; (e) transport work; (f) work performed at any office or at any store or warehouse or similar place or at any garage or stable or similar place; (g) any work other than that specified in sub-paras. (a) to (f) hereof performed on or about the premises or place where food or drink is prepared or served including work in connexion with any service or amenity provided on or about such premises or place." H
I

Sub-paragraph (g) might be expected to cut down the scope of the introductory para. (1), but, as I see it, it does nothing of the kind. The suggested

* I.e., the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949 (S.I. 1949 No. 433); see Editorial Note, p. 838, letter H, ante, for the instruments relevant to the period of remuneration in issue in this case.

A limitation put forward in this case on behalf of the defendants is contained in para. 26, which defines, amongst other things, the catering undertaking which is mentioned in the beginning of para. 24. The definition, so far as it is material, is as follows:

B “ ‘Catering undertaking’ means any undertaking or any part of an undertaking which consists wholly or mainly in the carrying on, whether for profit or not, of one or more of the following activities, that is to say, the supply of food or drink for immediate consumption . . . ”

C That is said to have the effect of limiting the scope of the order to persons directly concerned with the supply of food or drink for immediate consumption, which it is said the plaintiff was not. I see no justification for that contention. It seems to me indeed to be directly contrary to the other orders which in other cases provide for the remuneration of persons who might be said not to be directly concerned with the provision of food, etc. Looking at the orders dealing with licensed residential establishments and licensed restaurants*, one finds barmen, cloakroom attendants, telephone operators and valets included. The plaintiff, therefore, in my opinion clearly had brought himself within the scope of the order.

D In my view the plaintiff's claim fails for the second reason which the learned judge gave, namely, that he did not work any period in excess of the forty-seven hours I have mentioned. It is true that the plaintiff was required to remain on the premises during the number of hours stated by him, but for most of the time he was doing no work at all and was either asleep or indulging in such recreation as he thought fit. It cannot, therefore, be said that, for the purposes of the Catering Wages Act, 1943, or this order, he was entitled to be paid for the time when he was doing no work at all. It would be a remarkable result of the Act if we were driven to such a conclusion. A man may be required, as a term of his employment, to be at certain hours within a particular radius so that he may be called for duty if required. A seaman on a ship is always liable to be so called, but I do not think that it necessarily follows from this that, because the terms and circumstances dictate the presence of the worker and cause him to be in a certain place during certain hours, he is within the scope of orders such as these, and accordingly entitled to be paid for those hours of restriction as if they were hours of work.

F For those reasons I would dismiss this appeal.

G **PARKER, L.J.:** I agree. Like my Lord, I find it impossible to say that the plaintiff does not come within the provisions of the relevant orders. Workers to whom the orders apply have to fulfil two conditions. First, they must be employed for the purpose of such of the activities of the undertaking as are carried on at an unlicensed place of refreshment, and, secondly, they must also be engaged in certain work set out in sub-paras. (a) to (g) of para. 24 of Sch. 1 to the order, S.I. 1949 No. 433. That the plaintiff was engaged on work within sub-para. (g) is, I think, perfectly clear; but it is said that he was not employed for the purposes of one of the activities of the undertaking, treating “activities” there in the same sense as that in which the word is used when it determines whether an undertaking is to be treated as a catering undertaking.

H I think that the proper approach to the question is to ascertain, first, whether the undertaking, Gunter & Co., Ltd., was a catering undertaking, as it clearly was, and then to see whether the plaintiff was employed for the purposes of such of its activities as were carried out at the place of refreshment, in this case

* See Wages Regulation (Licensed Residential Establishment and Licensed Restaurant) Order, 1954 (S.I. 1954 No. 1058) as amended by Wages Regulation (Licensed Residential Establishment and Licensed Restaurant) (Amendment) Order, 1955 (S.I. 1955 No. 267), which latter order was subsequently revoked and replaced by the Wages Regulation (Licensed Residential Establishment and Licensed Restaurant) (Amendment) Order, 1956 (S.I. 1956 No. 226).

Stanhope Gate: in other words, the employment being defined by the first condition is employment at a place, in this case an unlicensed place of refreshment. Accordingly, I think that it is clear that the plaintiff comes not only within sub-para. (g), but also within para. (1)*. A

That being the position, the next question is whether the plaintiff was employed for more than forty-seven hours a week. He certainly did not do work for more than forty-seven hours a week, and the learned judge has so found; but it is contended on his behalf that he was employed on weekdays from 7 p.m. until 8 a.m. the next morning and from 7 p.m. on Saturdays until 10 a.m. the next morning, something like ninety-three hours a week. It is said that he was not during that time his own master in that he was required to stay on the premises all the time and, therefore, it is said, he was on duty all the time. The hours for which a servant is employed must depend on the exact terms of the contract of employment. He may be required to work for certain definite hours, in which event there is no difficulty: he is employed for those hours whether or not there is work for him to do all the time. On the other hand, the servant may be merely required to carry out certain defined jobs, in which case his hours of work would normally be those actually and reasonably occupied in carrying out those jobs. In either of those cases, no difficulty arises. The difficulty arises, however, when, though the employment is merely to do definite jobs, a restriction is placed on him so that, when the jobs are done, he is nevertheless not his own master. In such cases it seems to me that it must be a question of degree, and therefore one of fact whether the contract is not then one for a definite number of hours. B C D

To take an example, a servant may be required to live within five miles of his place of work so that, if called on, he is quickly available for work. It could not then be said that he was employed to work for twenty-four hours, even though to some extent he has submitted to a restriction on his movements. He would be merely holding himself available for work if and when required. E

In the present case it is true that the plaintiff had to stay on the premises, but the jobs that he was employed to do were finished by about 10 p.m., and thereafter he had nothing to do until about 5.30 a.m., except about once a week when he let a van in and out. He was not required to patrol the premises or to stay awake. In those circumstances I think that the learned judge was right in drawing the inference that the plaintiff was not employed to work for thirteen hours a day and fifteen hours on Sunday, but he was employed to do definite jobs, merely submitting to a restriction on his movements in order that he might be available to work if and when any work was required of him. I am gratified that such an inference can be drawn, because it seems absurd on the face of it that a man who is allowed to sleep should, during his sleeping hours, earn not only overtime but also what is called special time. I would dismiss this appeal. F G

ORMEROD, L.J.: I agree that this man's employment comes within the relevant order and I agree with my Lords' remarks on that aspect of the case. On the further question whether the hours which the plaintiff remained on the premises by the terms of his contract are hours in respect of which he was entitled to be remunerated because of the orders under the Catering Wages Act, 1943, the learned judge found that, week in and week out, the plaintiff never worked a working week in excess of forty-seven hours. What hours an employee is engaged on duties which entitle him to be remunerated under the orders is, as I see it, a question of fact. Using the term in its widest sense, it may be true to say that the plaintiff was on duty during the hours in respect of which he claims, i.e., those which he spent on the premises, because it was a term of his contract with the defendants that he should remain there during the night. But to say that during those hours (when, as the learned judge found, he was H I

* The text of sub-para. (g) and of para. (1) is printed at p. 840, letter G, ante.

A expected to do not more than about three hours' work per night) he was employed in the sense of being entitled to remuneration is in my view to give an entirely unrealistic meaning to the word "employment".

The real position, as PARKER, L.J., has already said, is that this man submitted to a restriction of his freedom, so that he would be available to perform certain duties which it might fall to him to perform from time to time. In respect of those duties and of the time which he spent on them he was, of course, entitled to be remunerated. The learned judge has found, however, that such time never exceeded forty-seven hours per week, and for the rest of the time he was simply holding himself available to work if necessary, but otherwise was entitled to sleep or to amuse himself in any way he found appropriate, provided that he remained on the premises. As I see it, that cannot in any ordinary meaning of the term imply that he was employed during those hours and therefore entitled to remuneration. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Kearnton & Co.* (for the plaintiff); *Lawrance, Messer & Co.* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

PRACTICE DIRECTION.

RESTRICTIVE PRACTICES COURT.

Restrictive Trade Practices—Representation order—Applications for representation orders by members of trade associations—Restrictive Practices Court Rules, 1957 (S.I. 1957 No. 603), r. 49.

By virtue of the power conferred on me by r. 49 of the Restrictive Practices Court Rules, 1957, I hereby give the following general direction:—

All applications in England and Wales for representation orders that the members of a trade association shall be represented by the association shall until further order be dealt with by the clerk of the court who may at his discretion either dispose of the same or adjourn them to the judge.

PATRICK DEVLIN,

President.

July 18, 1957.

BROWN, JENKINSON & CO., LTD. v. PERCY DALTON
(LONDON), LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Morris and Pearce, L.J.J.), May 16, 17, 20, July 3, 1957.]

Contract—Illegality—Enforcement of illegal contract—Letter of indemnity given by shipper in consideration of shipowner's issuing clean bill of lading when clausued bill should have been issued—Claim by consignee in regard to defective condition of goods met by shipowner—Ex turpi causa non oritur actio.

Shipping—Bill of lading—Goods shipped in defective condition—Clean bill of lading issued by shipowner in consideration of letter of indemnity from shipper—Compensation for loss to consignee owing to defective condition paid by shipowner—Claim by shipowner against shipper, on letter of indemnity, unenforceable—Ex turpi causa non oritur actio.

The plaintiffs as agents for shipowners agreed with the defendants for the shipment of one hundred barrels of concentrated orange juice f.o.b. London to Hamburg, freight to be paid by the defendants. The defendants stipulated that they should have clean on board bills of lading. The barrels were in fact old and leaking, as the defendants knew and as the plaintiffs learnt when the barrels were brought to the dock. At the request of the defendants the plaintiffs agreed to issue and did issue bills of lading describing the goods as in "apparent good order and condition", the defendants agreeing to indemnify the shipowners against all losses or damage arising from the issue of clean bills of lading. Owing to the condition of the barrels a considerable quantity of the orange juice leaked away before they were delivered to the ultimate purchasers. The shipowners having paid the amount of the loss so arising assigned to the plaintiffs their rights under the agreement of indemnity. The plaintiffs, when they issued clean bills of lading, knew that bankers would not ordinarily advance money against bills of lading unless the bills were clean bills of lading, but the plaintiffs had not contemplated that anyone should be defrauded by the issue of these bills of lading and did not know what was intended to be done with the bills of lading by any purchasers of the goods from the defendants.

Held (LORD EVERSHED, M.R., dissenting): the court would not enforce the defendants' promise to indemnify the shipowners, since the promise arose out of a transaction which contained all the elements of the tort of deceit and was thus given for an unlawful consideration, viz., the plaintiffs' making at the request of the defendants a false representation, which they both knew to be false but on which they intended that others should act; and the fact that the plaintiffs did not contemplate that anyone would be defrauded did not render the agreement enforceable by them.

The principle *ex turpi causa non oritur actio* stated in *Holman v. Johnson* ((1775), 1 Cowp. at p. 343) and *Alexander v. Rayson* ([1936] 1 K.B. at p. 182) applied.

Per MORRIS, L.J.: the practice of giving indemnities on the issuing of clean bills of lading is not uncommon . . . there may perhaps be some circumstances in which indemnities can properly be given. Thus, if a shipowner thinks that he has detected some faulty condition in regard to goods to be taken on board, he may be assured by the shipper that he is entirely mistaken; if he is so persuaded by the shipper, it may be that he could honestly issue a clean bill of lading while taking an indemnity in case it was later shown that there had, in fact, been some faulty condition.

- A Each case must depend on its circumstances (see p. 853, letter E, post; see also per PEARCE, L.J., at p. 857, letters D to H, post).

Appeal allowed.

[**Editorial Note.** The principle that, if a plaintiff has to rely on an illegal transaction in order to show his cause of action, he shall not have aid from the court, has been considered recently in *Marles v. Philip Trant & Sons, Ltd.* ([1953] 1 All E.R. 651, particularly at pp. 658, 659) and *St. John Shipping Corp'n. v. Joseph Rank, Ltd.* ([1956] 3 All E.R. 683, particularly at pp. 686, 687) with which the present decision may be compared in relation to that principle.

- B As to illegal contracts and the principle that the court will not assist a party implicated in the illegality, see 8 HALSBURY'S LAWS (3rd Edn.) 125, para. 216, text and note (g), and 126, para. 218; and for cases on the subject, see 12 DIGEST (Repl.) 266, 2050-2053.

C As to the effect of the words "shipped in good order and condition", in a bill of lading, see 30 HALSBURY'S LAWS (2nd Edn.) 388, para. 560.]

Cases referred to:

- D (1) *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*, [1942] 1 All E.R. 142; [1942] A.C. 435; 111 L.J.P.C. 17; 166 L.T. 172; 2nd Digest Supp.
- (2) *Shackell v. Rosier*, (1836), 2 Bing. N.C. 634; 2 Hodg. 17; 3 Scott, 59; 5 L.J.C.P. 193; 132 E.R. 245; 12 Digest (Repl.) 266, 2050.
- (3) *Silver v. Ocean Steamship Co., Ltd.*, [1930] 1 K.B. 416; 99 L.J.K.B. 104; 142 L.T. 244; Digest Supp.
- E (4) *Compania Naviera Vasconzada v. Churchill & Sim, Same v. Burton & Co.*, [1906] 1 K.B. 237; 75 L.J.K.B. 94; 94 L.T. 59; 41 Digest 379, 2254.
- (5) *Brandt v. Liverpool, Brazil & River Plate Steam Navigation Co., Ltd.*, [1924] 1 K.B. 575; 93 L.J.K.B. 646; 130 L.T. 392; 41 Digest 379, 2257.
- F (6) *United Baltic Corp'n., Ltd. v. Dundee, Perth & London Shipping Co., Ltd.*, (1928), 32 Lloyd's Rep. 272.
- (7) *Dent v. Glen Line, Ltd.*, (1940), 45 Com. Cas. 244; 2nd Digest Supp.
- (8) *Holman v. Johnson*, (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 313, 2404.
- (9) *Alexander v. Rayson*, [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; 30 Digest (Repl.) 434, 772.
- G (10) *Pearce v. Brooks*, (1866), L.R. 1 Exch. 213; 35 L.J.Ex. 134; 14 L.T. 288; 30 J.P. 295; 12 Digest (Repl.) 294, 2264.
- (11) *Berg v. Sadler & Moore*, [1937] 1 All E.R. 637; [1937] 2 K.B. 158; 106 L.J.K.B. 593; 156 L.T. 334; Digest Supp.
- H (12) *Scott v. Brown, Doering, McNab & Co., Slaughter & May v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; 61 L.J.Q.B. 738; 67 L.T. 782; 57 J.P. 213; 12 Digest (Repl.) 267, 2060.

Appeal.

This was an appeal by the defendants, Percy Dalton (London), Ltd., from a judgment of His Honour JUDGE BLOCK, at the Mayor's and City of London Court on Jan. 24, 1957, whereby he gave judgment for the plaintiffs, Brown, Jenkinson & Co., Ltd., for £147 together with interest at the rate of five per cent. per annum from July 2, 1956, until the date of judgment.

The plaintiffs were at all material times the agents of Hamburg-London Linie (referred to hereinafter as "the shipowners") who owned the motor vessel *Titania*. On Apr. 4, 1956, the defendants shipped a hundred barrels of concentrated orange juice aboard the *Titania* in London for carriage to Hamburg. At the time of shipment the plaintiffs noted that the barrels containing the orange

juice were in an old, frail and leaking condition, but they issued a clean bill of lading on receiving from the defendants a letter of indemnity, dated Apr. 4, 1956, whereby the defendants agreed to indemnify the shipowners against all losses or damage which might arise from the issuance of a clean bill of lading. The condition of the barrels resulted in short delivery, and, in consequence of a clean bill of lading having been issued, the shipowners had to pay compensation to insurers, who had paid the ultimate purchasers of the goods and were subrogated to the purchasers' rights and remedies. By an agreement dated Oct. 1, 1956, notice of which had been given to the defendants, the shipowners assigned to the plaintiffs the benefit of the indemnity of Apr. 4, 1956, and the right to enforce it. The plaintiffs claimed from the defendants the sum of £147 (being the amount paid to the receivers' insurers) and interest thereon. By their defence the defendants pleaded, among other things (i) that the letter of indemnity was given in pursuance of a conspiracy to defraud, and (ii) further or alternatively, that the promise by the defendants to indemnify the shipowners was given in consideration of the shipowners fraudulently misrepresenting the condition of the goods. By their reply the plaintiffs alleged that the letters of indemnity such as that received by them from the defendants were valid and so recognised by persons engaged in the trade or business of shipping cargoes. The learned county court judge gave judgment for the plaintiffs on the ground that no special damage was proved and that, therefore, the tort of deceit was not committed by the plaintiffs.

T. G. Roche, Q.C., and *T. M. Eastham* for the defendants, the shippers.

Eustace Roskill, Q.C., and *B. J. Brooke-Smith* for the plaintiffs, the shipowners' agents.

Cur. adv. vult.

July 3. The following judgments were read.

MORRIS, L.J.: The question which is raised in this appeal is whether on the facts of this particular case an agreement to indemnify against the consequences of issuing a clean bill of lading is enforceable. The case is one in which the issuing of a clean bill of lading was not justified having regard to the condition of the goods which were shipped. The plaintiffs act as loading brokers and chartering agents for certain shipping lines, including the Hamburg-London Linie. The defendants had some barrels of concentrated orange juice which they wished to ship to Hamburg on the motor vessel *Titania*, one of the ships of that line. They communicated with the plaintiffs, and following a telephone conversation they wrote to the plaintiffs on Mar. 28, 1956. The material parts of that letter are as follows:

"We would confirm our telephone conversation of today and detail hereunder specification and our requirements: 1. Consignment: one hundred barrels concentrated orange juice—marked 'V'. 2. Weight: We are having these barrels weighed before delivery into the wharf, and shall instruct our driver to give you the weight as soon as this is done. 3. Consignee: Unto 'Order' yourselves as agents for the shipper."

Then, para. 4 was as to the bills of lading. One bill was to be returned to the defendants, and one non-negotiable copy was to go forward in ship's bag. Paragraph 4 continued:

"Bills to be marked 'notify Vipa Internationale Handelsovernemings' [at an address in Rotterdam,], stamped freight paid, as we shall pay freight here in London. We also require clean on board bills of lading."

A Paragraph 5 read: "Charges to f.o.b. and freight will be paid by us." Then, in para. 6, it was said that the value was approximately £1,000.

It is to be noted that the defendants stipulated that they would require clean on board bills of lading. Thereafter the defendants sent a hundred barrels to the docks. The representative of the cargo superintendents who acted for the plaintiffs in superintending the loading of the ship saw the barrels on their arrival at the docks. They were old and they were leaking: liquid was seeping between the seams. The tally clerk described the casks on his tally card as being "old and frail" and he recorded that some were leaking. The barrels were clearly not in good condition. The plaintiffs informed the defendants of the state of the barrels. The facts of the situation required that a claused bill of lading should be issued. The defendants, however, required a clean bill of lading, and, accordingly, the plaintiffs, acting on behalf of the master of the ship, signed a bill of lading recording that the hundred barrels were "shipped in apparent good order and condition". The plaintiffs were only prepared to issue such a bill if they had the promise of the defendants to indemnify "the master, vessel, the owners or their representatives" against all losses or damage which might arise from the issuance of a clean bill of lading. The defendants gave such an indemnity. Paragraph 1 is in the following terms:

"(i) We the undersigned hereby certify that we are aware that in connexion with the undermentioned goods, viz., one hundred barrels concentrated orange juice mark 'V', shipped on Apr. 4, 1956, per m.v. Titania on bill of lading No. 5 at London and destined for Hamburg the following has been noted at time of shipment: old and frail containers in leaking condition. (ii) With a view, however, to avoid any misunderstanding with third parties we request that no mention be made of the above in the bills of lading covering these goods."

Then, paras. 2, 3 and 4 read:

"2. On the other hand, we herewith undertake unconditionally and irrevocably to indemnify the master, vessel, the owners or their representatives against all losses or damage of any nature whatsoever which might arise from the issuance of clean bills of lading for the said goods. 3. We do hereby irrevocably authorise the said master, vessel, the owners and their representatives, in the event of third parties bringing forward any claims against them, to make any arrangements with said parties for our account, which said master, shipowners or representatives may deem advisable. 4. Finally we, the undersigned declare that we give our unqualified consent to a copy of this document being issued, if required, to receivers, underwriters and other persons, who, in the opinion of the master, shipowners or their representatives, may directly or indirectly be concerned."

That letter of indemnity was signed on behalf of the defendants on Apr. 4, 1956. It is on this contract that the claim of the plaintiffs is brought. The indemnity was given to the shipowners, but they have assigned the benefit of it and the right to enforce it to the plaintiffs. The plaintiffs cannot be in any better position, so far as concerns the defences raised, than the shipowners.

Mr. Broome, a director of the plaintiffs who gave evidence on their behalf, was commendably frank and candid. Some of his answers, in cross-examination, can usefully be mentioned because they state the central facts with clarity.

"Q.—It does not require a tremendous amount of skill to know whether a barrel is leaking or not, does it? A.—No. Q.—And will you once again agree with me—because I do not want to lose this point—that if barrels are leaking they cannot be in apparent good order and condition? A.—Yes.

Q.—Let us now take the purpose of a bill of lading. So far you have told His Honour that you are prepared to do this—that is, to make a false bill of lading—in order to assist the shippers? A.—Yes. Q.—Will you agree with me, however, that a bill of lading, to use my friend's own words, is a 'negotiable document'? A.—Yes. Q.—And it may either find itself in the hands of the original purchaser or anybody else to whom the bill is indorsed? A.—Yes. Q.—Do not answer if you are not prepared to, because it is largely a question of law, but do you know, in fact, that the words 'in apparent good order and condition' by owners is a representation to the person who ultimately gets hold of the bill that the goods are in that condition? A.—I prefer to say that is a legal point. Q.—Then we will leave out the legal point and put it as a question of fact, because in due course I shall be able to show His Honour the authorities on that. You know perfectly well that persons who get hold of the bill of lading, either as the original purchasers or as purchasers who have subsequently re-purchased, are entitled to look to the bill of lading to see if it is a clean one or a dirty one, a claused one? A.—Yes. Q.—Again without going into any legal considerations, you know that whether or not a bill of lading is clean or claused is a matter of importance to persons dealing in the goods? A.—Yes, I agree with that . . .

"Q.—We know from this correspondence that Vipa's bank—Vipa being the purchaser—was Slavenburgs? A.—That was mentioned, yes. Q.—I am suggesting to you that the person who puts up the money (the banker) is very often only prepared to put up money if, in fact, the goods are shipped with a bill of lading which is clean, and is not prepared to put up the money if there is a claused bill of lading? A.—That is the reasons shippers ask us to issue clean bills of lading in exchange for an indemnity. Q.—I am very satisfied with that answer. You agree that bankers will not put up the money where there is a claused bill of lading, and that is the reason, you say, why shippers ask for a clean bill, which you give them as against an undertaking of indemnity? A.—Yes.

"His Honour JUDGE BLOCK: Is this about right: you know that bankers are apt not to advance money except on clean bills, and that is the reason you are asked to give clean bills against an indemnity? A.—Yes.

"Q.—And for that reason you accede to the request so as to assist the shippers, if I may finish it off? A.—Yes . . .

"Q.—You intended to disclose on this negotiable instrument, the bill of lading, that the containers were old and frail? A.—Yes. Q.—Please do not think me unnecessarily offensive, but you were prepared to make the bill of lading false by not clausing it in that way, but by allowing it to read 'in apparent good order and condition' providing you received a letter of indemnity from the shippers? A.—We were prepared to issue a clean bill of lading providing we got a letter of indemnity from the shippers, yes. Q.—You were prepared, were you not, to issue a document which you knew to be false, because it did not have the clausing and it just had the words 'in apparent good order and condition'? A.—Yes. Q.—And that you knew at the time to be false? A.—Yes, you are right. Q.—Again look at p. 61 [of the correspondence], a letter of July 5, from your company, and again signed by you? A.—Yes. Q.—In the second paragraph you will see: ' . . . in order to cover the owners we had to inform you that it was necessary to clause the bills of lading, unless you were prepared to give us an indemnity'? A.—Yes. Q.—'We informed you fully of the state of the consignment at the time of shipment, and naturally in order to cover the owners we had to inform you that it was necessary to clause the bills of lading, unless you'—that is the shippers—'were prepared to give us an indemnity'. Is that right? A.—Yes."

- A Some remaining facts, including facts which were not at the time known to the plaintiffs, can be briefly mentioned. The defendants had bought from a Mr. George Dawson certain barrels of orange juice which had previously been owned by the Ministry of Food. Mr. Dalton, the managing director of the defendants, has a farm in Kent, and the barrels of orange juice were taken there. As Mr. Dalton knew, and as could be seen, the barrels were pretty old and weather worn,
- B and some were leaking. The barrels were seen at the farm by the representative (Mr. Visser) of Vipa Internationale Handelsoverneming of Rotterdam, whom for convenience I will refer to as "Vipa". Vipa bought the hundred barrels which formed the shipment in question in this case. So far as material, the terms of the contract were that the goods were to be put on board ship in London after Vipa had given shipping instructions to the defendants and that payment to the
- C defendants was to be in net cash in Rotterdam against the presentation of documents to Vipa's bank in Rotterdam. The documents were to include two original bills of lading and a weight certificate issued in the name of Vipa-Rotterdam. Insurance cover was to be arranged by Vipa. Vipa later gave shipping instructions to the defendants and asked the defendants to pay the freight on their behalf. Vipa wished to have clean bills of lading, and so informed the
- D defendants. It was pursuant to these arrangements that the defendants communicated with the plaintiffs and wrote the letter of Mar. 28 to which I have referred*. Save as revealed by that letter, the arrangements between the defendants and Vipa were not known to the plaintiffs. A further fact to be mentioned is that Vipa resold the hundred barrels to Firma Julius Mertens of
- E Hamburg (to whom I will refer as "Mertens"). The sale was a sale c.i.f. Hamburg: payment was to be in cash against documents at first presentation in Hamburg.

To the claim made in the action on the contract of indemnity, the defendants advance the defence that it is unenforceable because it was founded on an illegal consideration. This plea comes with singular ill grace from those at whose

F request the procedure at the time of shipment was adopted: they are prepared to condemn their own conduct in order to save their own pocket. The legal issue which arises must, however, be determined, and it is perhaps of a nature which transcends in importance, and, in any event, cannot be affected by, any considerations as to the relative merits of the attitudes of the parties.

- It is, I think, clear that the plaintiffs did not desire that anyone should be
- G defrauded. In agreeing with the defendants, they did not have any such desire as their real purpose (compare *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (1), [1942] 1 All E.R. 142 at p. 149); but the question which here arises is whether the contract sued on was founded on an illegal consideration. An agreement is illegal and unenforceable if it has as its object the commission of a tort (compare
- H *Shackell v. Rosier* (2) (1836), 2 Bing. N.C. 634). It is said that the contract in the present case is illegal because it had as its object the making by the ship-owners of a fraudulent misrepresentation. The question arises whether this is so: if so, the further question arises whether the position is affected by the circumstance that the claims made on the shipowners were satisfied.

- The promise of the defendants was in effect this: If you will at our request
- I make no mention on the bill of lading that the barrels are "old and frail containers in leaking condition", we will indemnify you against any loss you might suffer. That is the same as requesting that a clean bill of lading should be issued when the known facts did not entitle anyone to issue such a bill.

The first question which arises is whether, when the clean bill was issued, it contained a representation. In my judgment, it clearly did. The bill of lading recorded that the hundred barrels were shipped "in apparent good order and

* See p. 846, letters G to I, ante.

condition". The barrels were manifestly in bad order and they were leaking. In *Silver v. Ocean Steamship Co., Ltd.* (3) ([1930] 1 K.B. 416), SCRUTTON, L.J., said (*ibid.*, at p. 425):

"It has been decided by CHANNELL, J., in *Compania Naviera Vasconzada v. Churchill & Sim* (4) ([1906] 1 K.B. 237), and affirmed by the Court of Appeal in *Brandt v. Liverpool, Brazil & River Plate Steam Navigation Co., Ltd.* (5) ([1924] 1 K.B. 575), that the statement as to 'apparent good order and condition' estops (as against the person taking the bill of lading for value or presenting it to get delivery of the goods) the shipowner from proving that the goods were not in apparent good order and condition when shipped and therefore from alleging that there were at shipment external defects in them which were apparent to reasonable inspection."

Later in his judgment SCRUTTON, L.J., said ([1930] 1 K.B. at p. 428):

"The last objection was that the witness did not say he relied on the bill of lading being a clean bill of lading by reason of the statement as to good order and condition. The mercantile importance of clean bills of lading is so obvious and important that I think the fact that he took the bill of lading, which is in fact clean, without objection, is quite sufficient evidence that he relied on it."

GREER, L.J., in his judgment said (*ibid.*, at p. 432):

"The bill of lading contained the words 'shipped in apparent good order and condition', and the first question to be determined is whether the defendants are estopped by these words from alleging that the goods were either in a damaged condition when shipped, or that they were insufficiently packed by reason of the fact that the tins were square and unprotected. It was decided in *Compania Naviera Vasconzada v. Churchill & Sim* (4) that those words in a bill of lading are not contractual, but that they contain a representation of fact which may create an estoppel in favour of a purchaser relying on the words in the bill of lading and acting on them to his detriment. The case was decided in 1905, and I think we ought to accept as good law the proposition that the words are not words of contract but only representations which may give rise to an estoppel."

There being a representation, it seems to me that the representation was certainly shown to be false. It was further shown that it was false to the knowledge of the shipowners through those who were acting on their behalf.

The next question which arises is whether the false representation was made by the shipowners with the intention that it should be relied on. A shipowner clearly intends that the bill of lading which he issues should be relied on. He intends that it should be relied on by those into whose hands it properly comes: consignees, bankers and indorsees must be within his contemplation. A bill of lading is issued with the purpose that it should be relied on. This could not have been more clearly illustrated than it was in the testimony of the plaintiffs' witness. He knew, for example, that banks are very often prepared to advance money if clean bills of lading are forthcoming. If a shipper knows that he will only be paid if he can present a clean bill of lading and knows that the goods which he is shipping are so defective that they could not be given a clean bill, and if in order to get his money he persuades a shipowner to issue a clean bill, and if the shipowner knows that a clean bill ought not to be issued and knows that the bill will be relied on by others, it seems to me impossible to contend that the shipowner does not make a representation with the intention that it should be acted on.

A In the present case the actual facts were as follows. The defendants knew that the barrels were leaking. They sold them to Vipa. Vipa's representative, Visser, saw them in England. He knew that they were leaking. The defendants sold to Vipa f.o.b. London. The defendants were to forward the documents to Vipa's bank in Rotterdam and were to be paid net cash against documents. Vipa's bank was the Slavenburg bank. Mr. Dalton in his evidence gave an
B account of what had happened. I read a few questions and answers from Mr. Dalton's evidence:

" Q.—Let us deal now with the first person you met in connexion with the whole of this affair. Have you a farm at Snowdown in Kent? A.—Yes. Q.—What did you keep at that farm which is relative to this action? C A.—Orange juice. Q.—Did anybody come to see you at your farm? A.—Yes, Mr. Visser of Vipa's said he would like to inspect the stuff; he would fly to London, and would I meet him? I said I would take him to the farm, and so I met him and I took him to my own farm. He inspected the juice. He saw the condition of it. He said it was old, and I said ' Yes, it belonged to the Ministry of Food and they are selling it at a low price; if you want it all right; if you do not want it, leave it '. Q.—Do not tell us quite D so much about the conversation, but more about the condition. When he went and looked at them, what was the condition of the barrels at that time? A.—They were pretty old and weather worn; they had rusty hoops and some slight leaks in them. Q.—Was there a man at the farm who had any particular job? A.—Yes; he used to go round putting water on the barrels to keep them tight, and he kept knocking the hoops down. Q.—You had E a man who put water over the barrels to swell them a bit and who pushed the hoops down with the object of preventing what? A.—Leakage. Q.—But in spite of that some were, in fact, leaking? A.—Yes. Q.—Was all that seen by Mr. Visser? A.—Yes, definitely . . . Q.—Why was it that you were interested at that stage in having a clean bill of lading to send this F stuff to Vipa? A.—Well, because Visser rang me on the phone and said to me: ' I cannot meet these bills for the cash, but my bank pays these, and in order that I get them paid I must have a clean bill. You have no need to worry, because I know the condition of the goods '. Q.—He told you he must have a clean bill, and you were not to worry because he knew the condition of the goods? A.—Yes. I told him that so long as he does not G claim anything against me, to help him I will do that . . . Q.—Will you now go to your Telexes on p. 10, which begin with a message from Visser. He has just ordered the hundred barrels, and then he sent you this Telex: ' We herewith confirm our telephone call of a few minutes ago which we H accepted one hundred barrels orange juice preserved with formic acid price '—I can leave the next bit out—' f.o.b. stowed London '. Then the words appear: ' Further conditions known to each ', and so on. To what did that refer? A.—He knows full well the stuff is poor and leaking, but he agrees with me that I would get him a clean bill of lading so that the Slavenburg bank would pay the money against the documents. [The learned judge then asked:] You were going to put forward an entirely I false document in order that Mr. Visser could bamboozle his bank? A.—No, not in a sense, because he knew the condition of the goods. Q.—Yes; but the bank did not? A.—He had to pay me on presentation of the documents. He had sold the goods to a firm in Germany and I would get his money, but he never had that money to pay me immediately, and I would not entrust him with the goods unless I got that money. Q.—So you got a clean bill of lading in order that he could bamboozle his bank? A.—Well, your Honour, yes, to a point; but he was not bamboozling his bank,

because he immediately sold the goods, got the money and paid Slavenburg. [Counsel then continued:] He may have repaid them, but, as His Honour says, in fact he was bamboozling the bank and you were, in fact, assisting him? A.—That must be the case, yes. Q.—So when you wanted those one hundred barrels shipped, you put at the bottom of cl. 4: 'We also require clean on board bills of lading'? A.—Yes; that is quite right. Q.—Again, why did you want those clean bills there? A.—So I would get the money from his bank."

In his evidence Mr. Dalton said, in effect, that Vipa's bank did not lose because the goods were resold. What had happened was that Vipa resold to Mertens of Hamburg: the resale was on c.i.f. terms. Vipa had taken out an "all risks" insurance policy. When the hundred barrels were discharged at Hamburg, the out-turn report noted as follows: "Old barrels—greater part of which leaking". Later Mertens made complaints. They held Vipa responsible and also the shipowners. They held the latter responsible "for the damage occurring on the voyage". On May 12, 1956, Mertens wrote to the Hamburg agents of the shipowners as follows:

"When receiving the above consignment I noted that the barrels leaked considerably. I immediately called coopers who secured the barrels and the weighing by Customs authorities showed a loss of weight of 2,202 kilos. I have to hold you responsible for the damage occurring on the voyage and I shall let you have a detailed list of the damage."

They received a reply, dated May 14, 1956, as follows:

"I acknowledge the receipt of your letter of [May 12, 1956] and regret to inform you that I am unable to accept your claim in respect of a loss of weight of the above consignment. According to the terms of the bill of lading the vessel is not responsible for the contents and the weight. As you know the consignment was shipped from London to Hamburg unto 'Order'. After my inquiry your firm was given to me as the receivers and I notified you of the arrival on Apr. 13, 1956, but you presented the original bill of lading only on Apr. 20, 1956. My agents in London informed me that the barrels were already in a very poor condition when delivered for shipment and some of them were leaking. During the long period of storage even more of the contents were lost. With regard to the packing I must ask you to contact the shippers in London directly."

What followed was that Mertens claimed against the insurers. A considerable quantity of the orange juice had leaked away and been lost: the claim was in respect of the quantity lost. The insurers paid Mertens and were subrogated to all Mertens' rights and remedies. The insurers claimed against the shipowners, who at first refused to pay. On Aug. 9, 1956, they wrote as follows:

"We beg to acknowledge receipt of your letter of [Aug. 7, 1956] and the result of our investigations made in the meantime are as follows: 1. The consignment was shipped in London on Apr. 4, 1956, and was discharged in Hamburg on Apr. 6, 1956. 2. The consignment was shipped 'to Order'. Only on Apr. 13, we were informed that the receivers are Messrs. Julius Mertens, Hamburg. 3. As a result of this information we notified Messrs. Mertens of the arrival on the same day, Apr. 13. 4. We received the first claim from Messrs. Mertens on May 12, 1956, more than four weeks after the discharge of the consignment. 5. On account of the facts given above . . . we cannot be held responsible for the claim for the simple reason that according to the Hague Convention a claim has to be lodged at the time of receiving the cargo within three days after discharge, in writing. 6. Not only have we to decline any claim put forward to us for the reason given

A above, we also definitely deny the amount of your claim. If there has been any loss caused by leakage it must have occurred on the quay in Hamburg."

Eventually, under threat of legal proceedings, the shipowners paid and they claimed against the defendants on the indemnity.

B On the facts as found, and, indeed, on the facts which are not in dispute, the position was, therefore, that at the request of the defendants the plaintiffs made a representation which they knew to be false and which they intended should be relied on by persons who received the bill of lading, including any banker who might be concerned. In these circumstances, all the elements of the tort of deceit were present. Someone who could prove that he suffered damage by relying on the representation could sue for damages. I feel impelled to the conclusion that a promise to indemnify the plaintiffs against any loss resulting to them from making the representation is unenforceable. The claim cannot be put forward without basing it on an unlawful transaction. The promise on which the plaintiffs rely is, in effect, this: If you will make a false representation which will deceive indorsees or bankers, we will indemnify you against any loss that may result to you. I cannot think that a court should lend its aid to enforce such a bargain.

D The conclusion thus reached is one that may seem unfortunate for the plaintiffs, for I gain the impression that they did not pause to realise the significance and the implications of what they were asked to do. There was evidence that the practice of giving indemnities on the issuing of clean bills of lading is not uncommon. That cannot in any way alter the analysis of the present transaction, but it may help to explain how the plaintiffs came to accede to the defendants' request. There may perhaps be some circumstances in which indemnities can properly be given. Thus, if a shipowner thinks that he has detected some faulty condition in regard to goods to be taken on board, he may be assured by the shipper that he is entirely mistaken: if he is so persuaded by the shipper, it may be that he could honestly issue a clean bill of lading while taking an indemnity in case it was later shown that there had, in fact, been some faulty condition. Each case must depend on its circumstances. Even, however, if it could be shown that there existed to any extent a practice of knowingly issuing clean bills when clauséd bills should have been issued, no validating effect for any particular transaction could in consequence result. It can further be said that in this case the issuing of a clean bill of lading did not mean that there was non-disclosure as to some defect in the quality of the orange juice itself but only of the barrels that contained it. This, however, cannot affect the analysis of the transaction. Nor can it be doubted that it would be of great consequence for a banker who was advancing money to know whether it was likely that the orange juice was really in the barrels or whether it was likely that some of it would have leaked away and become irretrievably lost. Such knowledge would also obviously be of great importance to a purchaser or receiver of the goods.

H It is said that a result of issuing a clean bill of lading is that a shipowner deprives himself of certain defences to claims that may be made against him. In this way advantage, in one sense, results for indorsees of the bill of lading and disadvantage for the shipowner. The shipowner deprives himself of the possibility of setting up certain defences if he is sued. He cannot assert that the goods which he has carried were in defective condition when he received them on his ship if he has stated on the bill of lading that they were in good condition. In *United Baltic Corpn., Ltd. v. Dundee, Perth & London Shipping Co., Ltd.* (6) ((1928), 32 Lloyd's Rep. 272), WRIGHT, J., expressed himself thus (ibid., at p. 275):

"The shipowner delivers the goods at the port of destination and the goods-owner points out to him that they are damaged. Then the shipowner replies that he is only liable to pay for such damage as occurred during the

voyage and that he had delivered the goods in the same condition as that in which he received them. The goods-owner replies: 'That may be so in fact, but you are estopped because you have stated on the bill of lading on the faith of which I take up the goods and pay for them—I have acted to my prejudice on this bill of lading—you have stated on that very authoritative document that you received them in apparent good order and condition and you cannot now be heard to say the contrary; therefore you are by this estoppel, by this fiction or convention, liable for the difference between their sound value and the actual damaged value which they show'."

See also *Compania Naviera Vasconzada v. Churchill & Sim* (4), *Brandt v. Liverpool, Brazil & River Plate Steam Navigation Co., Ltd.* (5), and *Silver v. Ocean Steamship Co., Ltd.* (3), to which I have already referred.

It was pointed out by counsel for the defendants that although there may be an estoppel against the shipowner, the holder of a clean bill of lading may still be in great difficulties if defective goods are shipped. He may have resold the goods and he may find that his purchaser will not accept, and he may sometimes experience great practical difficulties in suing the shipowner if, for example, the shipowner is a foreign shipowner. If he sues the shipowner, the latter may be entitled to rely on some clause in the bill of lading which protects him: furthermore, some time limit may prove fatal to a claim. In any event, however, buyers and bankers who act on the faith of clean bills of lading are not seeking law suits.

Some of the considerations to which I have referred may denote that in this particular case the plaintiffs, not being actuated by bad intentions, did not realise the viciousness of the transaction. When, at the later period, inquiries were being made on behalf of the continental underwriters, the plaintiffs acted with commendable frankness and made no attempt to suppress any disclosure. Thus on June 27, 1956, a letter was sent to them from insurance agents as follows:

"With regard to the above consignment, we send you herewith the bill of lading and the Port of London Authority's weight account . . . We have been asked by continental underwriters to ascertain whether a letter of indemnity was given to your good selves on the issue of the bill of lading."

Then there is a reference to the letter of May 14. The reply of the plaintiffs, dated June 29, 1956, was as follows:

"We are in receipt of your favour of [June 27, 1956], with inclosures, in connexion with the above consignment. In answer to your inquiry, we beg to inform you that during the loading of the orange juice it was found that a number of the barrels were leaking, and in consequence the shippers gave us an indemnity for issuing clean bills of lading, covering us for old and frail containers in leaking condition."

It must, however, be remembered that the shipping line whose claim is in these proceedings being presented by the plaintiffs as assignees of it made an effort to avoid paying and to permit the loss to be borne by others. Their attitude was shown by their letter of Aug. 9, 1956, which I have already read*. It is further to be noted that, when Mertens made complaint, the Hamburg agents of the shipowners repudiated liability on the ground that according to the terms of the bill of lading the vessel was not responsible for the contents and the weight. I have already referred to the letter† written by Mertens on May 12 and the reply, dated May 14, from the Hamburg agents of the shipowners which are also relevant in this connexion.

* See p. 852, letters H and I, ante.

† See p. 852, letters D to G, ante.

A Whatever features there are in this case which possibly enable one to approach it with a measure of sympathetic understanding how the plaintiffs came to act as they did, the undisputed facts show, however, that a short point is involved. It may be stated thus. Can A, who does what B asks him to do, enforce against B a promise made in the following terms: "If you will at my request make a statement which you know to be false and which you know will be relied on by others and which may cause them loss, then, if they hold you liable, I will indemnify you"? In my judgment, the assistance of the courts should not be given to enforce such a promise.

B The only reason why in the present case the learned judge upheld the contract was that he considered that no special damage was proved and that in the absence of damage the tort of deceit was not complete. The learned judge expressed himself as follows:

C "I do not think that it is an illegal contract, because, although admittedly a false statement was knowingly made on the document, the tort of deceit is not complete in any event until some special damage is proved, and I cannot see that any special damage can be proved in this case, because all parties have been satisfied."

D He further said:

E "The question before me now, as I see it, is whether [the plaintiffs], in agreeing to issue a bill of lading which was clean and should not have been, in return for a letter of indemnity, were entering into an illegal contract—a contract to perform a tort of deceit—and it seems to me that it is an essential element that there should be some loss to somebody, and I am not aware of any particular loss in this case."

F In my judgment, all the elements were present which made the consideration illegal and the contract unenforceable. Those elements were (a) the making of a representation of fact, (b) which was false, (c) which was known to be false, (d) with intent that it should be acted on. If the consideration for the promise was the making of such a representation, then the unlawful consideration made the contract unenforceable whether or not damage resulted to someone who acted on the representation and, therefore, had a cause of action. Apart, however, from this, there was damage in the present case. The claim which was settled was the claim of Mertens. It was a claim against the shipowners. The claim was being pressed by the continental underwriters because they had paid Mertens' claim pursuant to their liability on an all risks insurance policy. It seems to me, however, that Mertens clearly had a claim against the shipowners. When Mertens pursuant to their c.i.f. contract received the bill of lading, they became entitled to all rights of suit against the shipowners as though a contract in the terms set out in the bill of lading had been made with them. Furthermore, as is shown by the judgment of ATKINSON, J., in *Dent v. Glen Line, Ltd.* (7) ((1940), 45 Com. Cas. 244), they would have also a claim in tort. In his judgment ATKINSON, J., said (*ibid.*, at p. 259):

I "I should have liked to avoid the issue of fraud, but there it is on the pleadings, and I have to state my findings about it. The gentleman who made the statement in the witness-box, I repeat, was, in my opinion, a singularly unreliable witness, and I find that he knew the real condition of the goods; he knew that the chief officer had claused the ship's receipt, he knew that if he had claused the bills of lading in the proper way the bank would not take them up and pay, and he knew quite well that he was saying something which was untrue when he signed the clean bill of lading. It may very well be that he hoped the goods would get through with only a loss of weight, but he knew perfectly well that there was a risk of far more

serious damage than that. It seems to me that there was present every ingredient necessary to constitute legal fraud; he intended to mislead the bank and anyone to whom those documents might pass." A

It is to be observed there that ATKINSON, J., spoke of the hope that the goods would get through with only a loss of weight. In the present case, however, loss of weight was most important. No one would suppose that a bank which advanced money in regard to a hundred barrels of juice or a purchaser of them would have been uninfluenced by knowledge that the barrels were leaking. The description of the condition on arrival at Hamburg given by Vipa to the defendants in a letter dated May 1, 1956, is revealing. Vipa wrote: B

"The above mentioned lot has arrived in Hamburg as a hopeless mess only. The orange juice was streaming like water out of the barrels, and when Rotmans should not have taken immediately action to put some men to work and to fix the iron belts of the barrels firmer, the damage should have been much bigger. All the barrels have to be washed with water, to clean them, for they were laying in a bath of orange juice, which barrels have been closed by special men as we said above, and when the goods were weighed the loss in weight was about ten per cent." C D

It would appear, therefore, that loss was shown for which Mertens could have sued. It appears that the defendants took the point that, as Vipa knew of the defective condition of the barrels and as it was Vipa who took out the insurance cover, the insurers need not have paid. If, however, they had not paid, the position would merely have been that Mertens would have had to claim against the shipowners. Apart, however, from showing that there was actual loss, the illegality of the consideration is shown. E

It was submitted by counsel for the plaintiffs in his forceful argument that cases have been before the courts in which the point now raised was not taken either by the defendants or by the court. That circumstance, however, does not direct a conclusion either way in a case in which it is.

In *Holman v. Johnson* (8) ((1775), 1 Cowp. 341), LORD MANSFIELD, C.J., said (ibid., at p. 343): F

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff." G H

The conduct of the defendants does not merit that they should have relief from the claim now made; but issues are raised which are of more consequence than the result of the present action. For the reasons which I have set out, I consider that in this case the court should deny its assistance. I would allow the appeal. I

PEARCE, L.J.: I share the reluctance which any court must feel to find in favour of defendants whose behaviour and whose defence are so lacking in merit. In my view, however, that reluctance must be overcome, since the case raises a wider issue than the mere consideration of the respective merits of the parties.

- A The plaintiffs issued a clean bill of lading in respect of goods contained in barrels that were, to their knowledge, faulty. Thereby they made a representation of fact which they knew to be false. They knew that the purpose of the representation was to procure payment by the bankers who are very often not prepared to provide the money if the bill of lading is not clean. The bankers paid the money relying, no doubt, on the plaintiffs' representation. Others besides the bankers were affected by the representation, since subsequent purchasers were entitled to rely on the bills of lading.

- I find it difficult to see what answer the plaintiffs would have had if the purchasers had sued them in fraud. The fact that the damage was subsequently made good seemed to the learned judge to change the quality of their act; but it does not, in my opinion, alter the fact that the plaintiffs, by making a representation of fact which they knew to be false with intent that it should be acted on (as, in fact, it was), were committing a tort. They are now seeking to recover on the indemnity in consideration of which they committed the tort. Had they been actively intending that someone should be defrauded by their misrepresentation, their case would have been unarguable.

- The real difficulty which arises in the case is due to the fact that the plaintiffs, whatever may have been the defendants' intentions, appear from the evidence not to have contemplated that anybody would ultimately be defrauded. Theirs was a slipshod and unthinking extension of a known commercial practice to a point at which it constituted fraud in law. In the last twenty years it has become customary, in the short-sea trade in particular, for shipowners to give a clean bill of lading against an indemnity from the shippers in certain cases where there is a bona fide dispute as to the condition or packing of the goods. This avoids the necessity of rearranging any letter of credit, a matter which can create difficulty where time is short. If the goods turn out to be faulty, the purchaser will have his recourse against the shipping owner, who will in turn recover under his indemnity from the shippers. Thus no one will ultimately be wronged.

- This practice is convenient where it is used with conscience and circumspection, but it has perils if it is used with laxity and recklessness. It is not enough that the banks or the purchasers who have been misled by clean bills of lading may have recourse at law against the shipping owner. They are intending to buy goods, not law suits. Moreover, instances have been given in argument where their legal rights may be defeated or they may not recoup their loss. Trust is the foundation of trade; and bills of lading are important documents. If purchasers and banks felt that they could no longer trust bills of lading, the disadvantage to the commercial community would far outweigh any conveniences provided by the giving of clean bills of lading against indemnities.

- The evidence seemed to show that, in general, the practice is kept within reasonable limits. In trivial matters and in cases of bona fide dispute where the difficulty of ascertaining the correct state of affairs is out of proportion to its importance, no doubt the practice is useful. Here, however, the plaintiffs went outside those reasonable limits. They did so at the defendants' request without, as it seems to me, properly considering the implications of what they were doing. They thought that they could trust the defendants' agreement to indemnify them. In that they were in error.

- The general principle is not in doubt. In *Alexander v. Rayson* (9) ([1936] 1 K.B. 169), this court said (*ibid.*, at p. 182):

"It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void. But it often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject-matter for an unlawful purpose, that is to say a purpose that is illegal, immoral or contrary to public policy . . . In such a case any party to the agreement

who had the unlawful intention is precluded from suing upon it. *Ex turpi causa non oritur actio*. The action does not lie because the court will not lend its help to such a plaintiff."

I do not propose to deal with the cases to which MORRIS, L.J., has already referred. In none of the cases cited before us has a plaintiff failed where he was not fraudulently minded, but was merely reckless and unthinking in committing a tort of deceit instigated by the defendant; nor, per contra, has any case been cited where a plaintiff has succeeded in such circumstances. Recklessness, however, is sufficient to make a man liable in damages for fraud. Here the plaintiffs intended their misrepresentation to deceive, although they did not intend that the party deceived should ultimately go without any just compensation. In an action based on deceit, that state of mind would render them liable, no less than if they had been fraudulent. And I cannot avoid the conclusion that the purpose for which the clean bill of lading was given in this case was unlawful within the general principle set out above. The plaintiffs' rather haphazard belief that no one would be ultimately defrauded, although it affects their merits, does not, in my view, improve their legal position in this case. For the reasons which have already been given so clearly by MORRIS, L.J., in my opinion the appeal should be allowed.

LORD EVERSHED, M.R.: After much hesitation and with the diffidence due to the judgments of my brethren, I have reached a different conclusion: for I am not satisfied that, on the facts of this case and the findings of the judge, the court is justified in holding that the plaintiffs' action arises *ex turpi causa* and must, therefore, be dismissed.

The well-known Latin formula at least requires translation. In *Alexander v. Rayson* (9) ([1936] 1 K.B. 169), the principle was stated by this court (*ibid.*, at p. 182) in the passage already recited by PEARCE, L.J.:

"It is settled law that an agreement to do an act that is illegal or immoral or contrary to public policy, or to do any act for a consideration that is illegal, immoral or contrary to public policy, is unlawful and therefore void. But it often happens that an agreement which in itself is not unlawful is made with the intention of one or both parties to make use of the subject-matter for an unlawful purpose, that is to say a purpose that is illegal, immoral or contrary to public policy . . . In such a case any party to the agreement who had the unlawful intention is precluded from suing upon it. *Ex turpi causa non oritur actio*."

The adjective *turpis* is thus expanded to cover the three characteristics, (i) illegal (ii) immoral and (iii) contrary to public policy. The classic case of *Pearce v. Brooks* (10) ((1866), L.R. 1 Exch. 213) is the obvious instance of immorality; and when the purpose of the agreement, or the intended use of its subject-matter, is the commission of a crime or the doing of some prohibited act (for example, the infringement of the Customs law), the principle is no less obviously invoked on grounds both of illegality and public policy. The principle, no doubt, extends further. In *Alexander v. Rayson* (9) the proved purpose of the plaintiff was to use the instruments which he entered into with the defendant in order to deceive and cheat (as he did) the local rating authority: and in *Berg v. Sadler & Moore* (11) ([1937] 1 All E.R. 637), to take an example from the cases cited to us, the plaintiff was shown to have been engaged on an enterprise of deliberate deception which amounted to a false pretence. How much further does it go? Does it cover every case in which the subject-matter of the action is shown to be part of a transaction which has involved the making by the plaintiff of a statement known to be untrue in a commercial document intended to be acted on in the ordinary commercial course, even though it is not proved to have been acted on in fact by anyone, or (if it has been acted on) not to have caused loss or damage to any person: and even though the plaintiff is not shown to have

- A had at any stage in the transaction any intention that anyone should be damnified or to have been "dishonest" as that word is ordinarily understood? The defendants' argument says that an affirmative answer must be given to the question. I am not, for my part, satisfied, however, that it is so. Having considered as best I can all the cases on the subject which were cited to us in argument and which I have been able to find, there appears to me to be no authority
- B which compels this court to so rigid a conclusion.

The defendants' contention inevitably involves a pleading by him of his own wrong. I do not see, as a matter of principle, why he should be allowed so to do, unless it clearly appears that the transaction is so tainted with wrongful conduct or intention on the plaintiffs' part that the court ought not, as a matter of public policy, to lend to them its help. In *WINFIELD ON TORT* (6th Edn.) (1954) at pp. 30, 31, it is stated:

- " . . . a contract whereby A agrees that B shall commit an injury to A, which would otherwise be a tort, is often perfectly lawful: e.g., many acts which would otherwise be trespasses or nuisances are frequently permitted by a contract. Secondly, it is not always true that, even if A and B agree between themselves to commit a tort against a third party, the agreement is unlawful: e.g., if they agree to trespass on C's land in order to decide
- D a disputed right of way. Probably the law is best stated by saying that where the conduct contemplated is likely to menace public morality or safety, or (more broadly) is contrary to public policy, any contract to pursue such conduct is unlawful, and generally nothing is recoverable in contract
- E by the injured party."

- I would accept that statement as correct: see also the judgment of LORD MANSFIELD, C.J., in *Holman v. Johnson* (8) ((1775), 1 Cowp. 341), cited by MORRIS, L.J. If the statement be correct, then it seems to me to follow that the answer to the present case must depend on the true conclusion to be derived from its special facts. On those facts as they were proved or found, is the conduct of
- F the plaintiffs so tainted with "turpitude" that the court must, as a matter of public policy, refuse them any relief?

- It is not in doubt, on the findings of the learned judge and, indeed, on the admissions of the plaintiffs' witnesses in the witness-box, that the plaintiffs, in issuing a clean bill of lading, deliberately put their names to a commercial document which represented that the orange juice shipped by their principals
- G was "in good order and condition", a representation which, as regards the casks or barrels in which the orange juice was contained, they perfectly well then knew to be false in fact. *WRIGHT, J.*, a judge exceptionally experienced in commercial causes, condemned in *United Baltic Corpn., Ltd. v. Dundee, Perth & London Shipping Co., Ltd.* (6) ((1928), 32 Lloyd's Rep. 272) a somewhat similar performance in plain terms in 1928: and the passage of twenty-nine years can,
- H in the eye of any of Her Majesty's courts, lend no enchantment whatever to the continuance of a general practice on the part of any section of Her Majesty's subjects, in whose keeping in some degree must reside the good name and business reputation of Englishmen, whereby falsehood is treated as a convenient fiction for serving business interests.

- True, a witness of standing called for the plaintiffs stated that, in the circumstances of the present case as they were proved, he would not, for his part, have been prepared (as were the plaintiffs) so to prefer the wishes of his customer by making in the bill of lading a deliberately false statement. And no one of the parties in the present case who later became in any way interested in the goods shipped by the plaintiffs' principals was, in fact, in any way damnified as a result of the plaintiffs' falsehood; and that (as the learned judge impliedly but, as I think, clearly found) it was never for a moment intended by the plaintiffs that they should.
- I

It is, however, one thing to follow previous judicial authority in expressing A
disapproval of a commercial practice which appears to place business convenience
before simple truth: it is another to say that the defendants, at whose express
request and for whose own convenience the plaintiffs in the present case issued
the clean bill, should be entitled to escape the performance of their clear promise
of indemnity by invoking the rule of public policy (as I think it is) that the courts B
will not enforce contracts entered into for illegal or unlawful ends. As
LORD GODDARD, C.J., has recently observed, public mischief and public policy are
unruly horses, and not all who try to mount are found able to ride them. A
defendant who seeks to escape from his bargain on such grounds, if he is not seen
to be pleading his own wrong, commonly appears in an unattractive light, as this
court observed in *Scott v. Brown, Doering, McNab & Co., Slaughter & May v.*
Brown, Doering, McNab & Co. (12) ([1892] 2 Q.B. 724). C

The defendants in the present case now seek to show that they participated
with the plaintiffs in a deliberate and dishonest falsehood. But their first answer
to the plaintiffs' demand for implementation of the contract of indemnity was to
assert* that, as a result of their own personal inspection, the containers, though
"showing slight leakage", were, none the less, to their knowledge "compara- D
tively sound". In the circumstances, it is not surprising that the learned judge
said of Mr. Percy Dalton, the substantial proprietor of the defendant company
and the principal witness on the defendants' behalf, that he was not a satisfactory
witness and that he (the judge) could leave the credence which he put on
Mr. Dalton's evidence by saying nothing more than that. In my judgment, if
the courts should be astute to see as a matter of public policy that their processes
are not used for enforcing illegal contracts, it is also true that defences which E
seek to invoke the principle for the purpose of evading obligations clearly and
openly entered into should be closely scrutinised and that the allegations made
in invocation of the rule should be plainly proved.

The allegations in the present case are found in the defence. They are, first,
that the letter of indemnity was given by the defendants in pursuance of a con- F
spiracy between the plaintiffs and the defendants to misrepresent the condition
of the barrels to any subsequent holder of the bill of lading: and, secondly and
alternatively, that the consideration for the indemnity was the fraudulent
misrepresentation of the plaintiffs' principals of the condition of the barrels or
that its purpose was that the plaintiffs' principals should so fraudulently mis-
represent their condition. It was also (by para. 6 of the defence) alleged that the G
purchasers from the defendants, namely, Vipa, being aware of the true condition
of the barrels, requested the defendants to obtain clean bills of lading since other-
wise the purchasers could not obtain the necessary finance for the purchase;
and that such facts were known to the plaintiffs or their principals before pay-
ment of the moneys for which they are seeking indemnity in the present action.

Of these allegations the third and last clearly failed, since there was no evidence
that the plaintiffs or their principals had the knowledge alleged. The first H
defence, also, in my judgment, fails. According to the decision of the House of
Lords in *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (1) ([1942] 1 All
E.R. 142), it is essential for the establishment of a conspiracy to defraud that
the defrauding of some third party should not merely be the consequence or the
possible or likely consequence of the agreement of the alleged conspirators,
but should be its real purpose and aim. And there is, in my judgment, no ground I
for holding on the facts found and proved that it was the aim or purpose of the
plaintiffs (at any rate) in making out a clean bill of lading to cheat or defraud
anyone.

There remains the allegation that the consideration for the indemnity was that
the plaintiffs or the shipowners would make or have made the fraudulent mis-
representation of the goods. There is no doubt that the plaintiffs, when asked

* In a letter, dated July 4, 1956, addressed to the plaintiffs.

- A to make out clean bills, required the defendants' indemnity, and that the plaintiffs otherwise would not have done so. The one, or the promise of the other, was, therefore, no doubt, the consideration for the other or its promise. There is also no doubt that the description of the goods in the bill as "in apparent good order and condition" was, when the plaintiffs made it, known by them to be untrue. It was much and forcibly pressed on us by counsel for the defendants
- B that a man in such circumstances must be taken to apprehend the consequences of his acts, namely, in this case, that some third party might be deceived by the representation and alter his position for the worse in reliance on it, and counsel for the defendants demonstrated by his illustrations that circumstances, by no means extravagantly imagined, might in similar cases arise in which some person, having relied on the representation in the bill, would be liable to suffer loss in
- C consequence.

Counsel for the defendants relied on *Dent v. Glen Line, Ltd.* (7) ((1940), 45 Com. Cas. 244) to show that the plaintiffs would have been liable to such a third party for the tort of deceit—at least if they resisted a claim to compensation for the loss suffered: and counsel for the plaintiffs was, on his side, disposed to concede that the plaintiffs would in such case have been so liable. In *Dent v.*

- D *Glen Line, Ltd.* (7), however, the shipowners' denial of liability to the third party made it impossible for them, on the facts found and as ATKINSON, J., held, to assert the absence of an intention to deceive. In the present case the plaintiffs themselves (whatever may be said of their principals) made no attempt whatever to deny or dispute liability to make compensation for the loss of the orange juice attributable to the leaking condition of the casks. But does it follow that,
- E when the plaintiffs made the agreement with the defendants, they were parties together to an arrangement so involving, to the knowledge to be attributed to both of them, the commission of the tort of deceit as to bring the case within the principle of public policy which condemns such contracts as unenforceable? Have the defendants so proved? I have earlier recorded that the learned judge did not in terms find that the plaintiffs, however misguided and irresponsible,
- F were nevertheless honest, although I read his judgment as indicating that he thought them so. At least it is plain that there is no finding of dishonesty against the plaintiffs. The learned judge appears to have rejected the charge of fraud on the ground of the absence of any proved loss or damage to anyone which would be an essential element in any action on his part based on the tort of deceit. I agree, however, with counsel for the defendants in thinking that the learned
- G judge's test is not, with all respect to him, for present purposes satisfactory. If, in fact, the plaintiffs were parties to a bargain with the defendants the consideration for which on the plaintiffs' part was the making by them of a fraudulent misrepresentation, it would not, in my judgment, be a sufficient answer to the defence merely to show that in fact no one was deceived or damaged; although I observe that in the present case (unlike many other cases in which the rule was applied) there was no evidence given that anyone, banker or purchaser,
- H either in fact relied on or was deceived by the representation in the bill. The question, however, remains: Ought this court to hold that the plaintiffs fraudulently, that is dishonestly, represented the goods as being in good order and condition? That question must, I apprehend, be answered by applying to it the ordinary meaning of words and the ordinary standards observed by
- I honourable men.

In answering the question it is, in my judgment, both legitimate and necessary to bear in mind certain important facts. First, the transaction with which we are concerned followed an earlier shipment of the same general stock of orange juice. On the earlier occasion (in December, 1955) the plaintiffs had issued a clean bill of lading and, according to the evidence of their witness, Mr. Broome, no difficulty or problem had arisen. What the full facts were in regard to the earlier shipment was not investigated at the trial: but it is at least possible that,

on the earlier occasion, all parties concerned as bankers, purchasers or sub-purchasers were fully informed of the condition of the barrels and that no one was at any stage misled, and it may, therefore, be said that the court ought not, at the instance of the defendants, to assume otherwise. It is, after all, to be borne in mind that the consequences of the frailty of the barrels was, and was only, loss of some part of the orange juice. No question of the quality or characteristics of the juice itself was involved. At worst, a purchaser or sub-purchaser would get less than the full quantity which the casks should have contained, a matter for which, *prima facie* at any rate, a money payment would provide full and proper compensation—as it did in the present case on payment by the shipowners.

Then, secondly, it is not in doubt that the course adopted by the plaintiffs, if reprehensible, was recognised as a common commercial practice of long standing at least in many types of case. Counsel for the defendants observed, in the course of the trial*:

“I do not think my friend need worry about that. I am perfectly prepared to concede that these letters of indemnity, whether they be right or wrong, are commonly used in the trade. I think everybody knows that they are commonly used. The question is: Are they legal or illegal?”

I add two citations from Mr. Broome’s evidence, one given during his examination in chief and one in cross-examination, which, in my view, may be taken as typically representative of his state of mind. During his examination in chief, he said:

“Q.—How do you feel to be told that it is worthless? A.—Very upset, naturally. We took it in good faith, and when the events against which we were indemnified occurred, we felt we ought to be covered. As a matter of fact, this is the first one with which we have had any trouble at all. Q.—Do you know from your own experience whether or not other agents of shipping companies employ the same practice? A.—Yes, they do.

His Honour JUDGE BLOCK: Do you employ this practice purely on what you call the short-sea trade? A.—No, Your Honour, also in the deep-sea trade. But there are not so many in the deep-sea trade as on the short-sea trade, because there is usually time for the shipper, if necessary, to rearrange his credit. Q.—You said that this indemnity was, apparently, adopted in Germany? A.—Yes. You see, these ships leave London on the Wednesday, and they are discharged in Hamburg on Friday, and in the meantime all the documents have to be got out there, so we are rushed for time.”

In cross-examination Mr. Broome said:

“Q.—All I am trying to see is whether you agree that insurers are very largely affected if, in fact, bills of lading state goods to be in apparent good order and condition when everybody knows at the material time that the goods were such that they should have been claused. A.—Can we push that a little further? Assume that the bills are frauds, then the receiver could not claim on the insurance company. Q.—Exactly. Let us now turn our attention to a third class of person who is likely to be affected by the falsehood appearing on the bill of lading. Are you aware that many of these purchasers of goods on the Continent obtain financial assistance from their bankers? A.—Well, I know that letters of credit exist; but how they are manipulated, I do not know. Q.—We know from this correspondence that Vipa’s bank—Vipa being the purchaser—was Slavenburgs? A.—That was mentioned, yes. Q.—I am suggesting to you that the person who puts up the money (the banker) is very often only prepared to put up money if, in fact, the goods are shipped with a bill of lading which is clean, and is not prepared to put up the money if there is a claused bill of lading.

* During the examination in chief of Mr. Broome, a director of the plaintiffs.

A A.—That is the reason shippers ask us to issue clean bills of lading in exchange for an indemnity.”

B I have set out these passages at a little length because from them, in the absence of any precise finding by the learned judge, this court must reach a conclusion whether or no the plaintiffs were fraudulent in representing as they did. The cited passages seem to me at least consistent with the view that the plaintiffs were treating (at the request and for the convenience of the defendants), no doubt without closer or more careful consideration, what they regarded as established practice in a short-sea voyage as applicable to the circumstances of the present case. That the practice was common enough (whether appropriate or not to the exact and, to the plaintiffs, novel circumstances of the present case) was amply proved by the production of similar documents of indemnity from other shipowners. But I do not pause further on this aspect of the matter in view of the clear concession made by counsel for the defendants.

C As appears from the passages of Mr. Broome's evidence which I have quoted, time in these matters is short, and in the present case counsel for the plaintiffs made the point that the incidents of the present transaction almost all occurred on Apr. 4—the invoice, the shipment, the bill and the indemnity. I attach some importance—and this is the third matter of fact to which I desire to draw attention—to the last paragraph of the indemnity signed by the defendants:

D “Finally we . . . declare that we give our unqualified consent to a copy of this document being issued, if required, to receivers, underwriters and other persons who, in the opinion of the . . . shipowners or their representatives, may directly or indirectly be concerned.”

E At least the plaintiffs may fairly say that there was no secrecy or mystery about it; and, in fact, pursuant to the authority given to them, they did disclose to those who were affected the existence and terms of the indemnity.

F Lastly, it is not to be forgotten that by the issue of the clean bills the plaintiffs or their principals assumed themselves a liability from which a claused bill would have protected them; for it is not in dispute that, as against anyone who might claim in respect of the loss of the orange juice, the plaintiffs and their principals would be estopped from denying that the juice and its containers were in good order and condition when received on board their ship. In the light of these matters of fact, and in the absence of any finding of dishonesty against the plaintiffs by the learned judge who heard and saw the witnesses, this court ought not, in my judgment, to hold that the defendants established their allegation that the consideration for the indemnity was that the plaintiffs made or should make a fraudulent misrepresentation of the condition of the goods.

G Counsel for the defendants, in his reply, was, as I understood him, disposed to concede the difficulty in the way of his allegation of conspiracy, having regard to the decision in *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (1). But he contended as a further alternative that the plaintiffs knew or must be taken to have known that the defendants intended on their part to make a dishonest use of the bill of lading or of the fact that it contained a representation of the good order and condition of the orange juice. This line of defence may fairly be said to come with singularly ill grace from the defendants. It is, however, open to the objection that it was nowhere pleaded—and I refer again to the alternative plea in para. 6 of the defence* to the effect that the proposed use by Vipa (and not the defendants) was at some stage known to the plaintiffs. And it is also open to the still more serious objection that the suggestion was never from first to last put in cross-examination to the plaintiffs' witness, Mr. Broome. In my judgment, we should not hold that this defence was established by the defendants.

* See p. 860, letter G, ante.

I do not forget that, if the contract here sued on is one of the class which on grounds of public policy the court must, if necessary of its own motion, refuse to recognise or enforce, then this court must so declare and will not be deterred from so doing by the disfavour with which it may regard the defendants who seek to take advantage of the result. The court, however, must reach its conclusions on the facts proved in the case before it—that is, on the evidence given on the one side or the other: and the evidence will in large measure depend on, and must be judged in the light of, the issues raised in the action. Taking all these considerations into account, and having regard to the four matters of fact to which I have above referred, I am not satisfied that we in this court should hold that the contract of indemnity made between the plaintiffs and the defendants was a bargain involving, as the plaintiffs knew and intended or should be taken to have known and intended, a fraudulent misrepresentation on the defendants' part and, therefore, is a contract unenforceable by the plaintiffs. Thoughtless, misguided and irresponsible the plaintiffs may have been; but I am not satisfied for my part, on the evidence and what I take to have been the views of the learned judge, that it would be just for this court to condemn them as fraudulent and dishonest.

Even if we should conclude that the representation was made with such recklessness as to amount, in law, to the same thing as a representation made with the deliberate intention of deceiving, still I am not satisfied that it would be right to hold, or that any authority compels us to hold, that the proved circumstances were such that it would be contrary to public policy, *contra bonos mores*, to allow the plaintiffs to recover on the contract of indemnity from the defendants. I have, I hope, sufficiently perused all the authorities, including those cited by MORRIS, L.J. I have failed to find any case (apart from those involving immorality or public illegality) in which, on the principle *ex turpi causa non oritur actio*, a plaintiff has been cast from the seat of judgment who has not been found personally dishonest. If there was a false statement deliberately made, it was made in accordance with a practice that was common and well known in the trade and with an intention that any consequences should be covered by their or their principals' liability to make compensation—in other words, in circumstances in which the plaintiffs, by reason of the current laxity in that respect, honestly believed would not damage anybody.

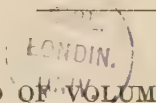
In my judgment, the result is not one which requires the court on grounds of public policy to deny to the plaintiffs their right to sue. I would, accordingly, dismiss the appeal, but, having regard to the judgment of the majority of the court, the appeal will be allowed. Subject, however, to argument, having regard to the dishonesty which the defendants not only admit but choose to allege on their own part, we make no order as to costs here or below.

[After hearing counsel for the defendants their Lordships in the exercise of their discretion awarded no costs in the Court of Appeal or below.]

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Carters* (for the defendants); *William A. Crump & Son* (for the plaintiffs).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]



[END OF VOLUME TWO.]

